

Criteria for Women and Girls to Marry: Capacity and Consent in Islamic Law

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I. Introduction

Marriage (*nikah*) is central to Islam, as demonstrated by the Prophet's statement, "Marriage is part of my sunnah, and whoever does not follow my sunnah has nothing to do with me."¹ Because of its primacy in religion and society, the regulation of marriage is of distinct consequence, particularly for women and girls. Depending on its content, marriage law has the power to either facilitate the formation of meaningful lifelong partnerships or to rob women and girls of their agency and trap them in unwanted and even abusive relationships. In this way, the legal requirements for women and girls' capacity and consent to marry are of particular importance.² In Islamic law, capacity can refer both to physical maturity, having reached puberty (*bulugh*), or mental maturity, having achieved the ability to manage one's own affairs (*rushd*).³ Both of these states of being are important in Islamic law, but traditionally only *bulugh* has been relevant to marriage.⁴ In addition, consent requirements may involve the consent of the woman or girl herself as well as the consent of her guardian (*wali*), usually her father, who is meant to protect her interests during the marriage negotiations.⁵ This paper begins with an explanation of Islamic conceptions of marriage and childhood development, then explores the issues of women and girls' capacity and consent to marry in the explicit guidance of the Qur'an and Sunnah, traditional *fiqh*, and the modern *fiqh* reform movement, before ending with a comparative analysis of the national legislation of Yemen and Malaysia in relation to these issues.

¹ Sunan Ibn Majah Vol. 3, Book 9, Hadith 1846

² While this paper focuses primarily on the requirements for women and girls to be married, it also occasionally references the standards for men and boys in order to highlight gendered differences in the law. In addition, this paper focuses specifically on heterosexual marriages as the legality of homosexual marriages is still contested as a separate issue in Islamic law. Mustafa Akyol, *What Does Islam Say About Being Gay?*, NY TIMES (July 28, 2015), <https://www.nytimes.com/2015/07/29/opinion/mustafa-akyol-what-does-islam-say-about-being-gay.html>.

³ Oğuzhan Tan, *Childhood And Child Marriage in Islamic Law*, 22 CUMHURIYET İLAHIYAT DERGİSİ-CUMHURIYET THEOLOGY J. 783, 788-95 (2008).

⁴ *Id.*

⁵ Sunan an-Nasa'i Vol. 4, Book 26, Hadith 3262; Jami' at-Tirmidhi Vol. 2, Book 6, Hadith 1102.

II. Background

In order to understand the role of women and girls' capacity and consent to marry in Islamic law, it is first necessary to explore Islamic conceptions of marriage and childhood development.

A. Marriage in Islam

Marriage in Islam is viewed as having many personal and societal religious benefits. It is a means of promoting purity as illustrated by the Prophet's words, "O young men, whoever among you can afford it, let him get married, for it is more effective in lowering the gaze and guarding one's chastity."⁶ It is also a means of increasing the Muslim population by procreation according to the Prophet's words, "Get married, for I will boast of your great numbers before the nations."⁷

Marriage under Islamic law is both a solemn covenant and a civil contract.⁸ However, classical Islamic law does not require the contract to be made through any specific form or ceremony.⁹ Individual countries applying Islamic law may establish their own requirements according to their family law code. What formal elements are required by Islamic law are the offer (*ijab*) of one party and the acceptance (*qabul*) of the other at the same meeting in front of two male witnesses.¹⁰ If two men cannot be found, one male witness may be substituted by two female witnesses, "so if one of the women forgets the other may remind her."¹¹

There are three classifications of marriage in Sunni Islamic law¹² based on the presence or absence of marriage requirements; void (*batil*), irregular (*fasid*), and valid (*sahih*).¹³ *Batil* marriages lack

⁶ Sunan Ibn Majah Vol. 3, Book 9, Hadith 1845.

⁷ Sunan Ibn Majah Vol. 3, Book 9, Hadith 1846. Elsewhere in the Sunnah, the Prophet expresses disapproval of celibacy. Sunan Ibn Majah Vol. 3, Book 9, Hadith 1848.

⁸ JOHN ESPOSITO & NATANA DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 15 (2d ed. 2001).

⁹ *Id.* at 15-16.

¹⁰ *Id.* at 16.

¹¹ Qur'an Abdul Haleem 2:282.

¹² Shia law does not recognize *fasid* marriages, but it does recognize a fourth type of marriage. *Muta* marriages are temporary marital agreements entered into in order to legalize sexual relations for a period of time. Rama Rao, *Mohammadan Law*, 11, http://msrlawbooks.in/file/MOHAMMADAN_LAW_%20F.pdf.

¹³ ESPOSITO & DELONG-BAS, *supra* note 8 at 17.

the basic foundations of a lawful marriage and are not actually considered marriages in fact.¹⁴ Legally, they grant no rights and impose no obligations.¹⁵ Any offspring of a *batil* marriage are considered illegitimate.¹⁶ Examples of *batil* marriages include a woman marrying more than one man at the same time or marriages between forbidden relations such as aunts and nephews.¹⁷ A *fasid* marriage meets the foundational requirements but either lacks some required formality, such as the appropriate number of witnesses, or it is unlawful due to an impediment which may be remedied, such as a man already having four wives.¹⁸ A *fasid* marriage does not have legal effect until it is consummated, and even then, the spouse's rights and obligations are limited.¹⁹ For example, the wife is entitled to a dowry (*mahr*) but not maintenance.²⁰ Children of *fasid* marriages are considered legitimate.²¹ A *quadi* (judge) who becomes aware of a *fasid* marriage has an obligation to either legitimize or end the marriage.²² Lastly, a *sahih* marriage is one that has met every legal requirement.²³ It initiates all legal rights and obligations and any resulting offspring are considered legitimate.²⁴

B. Concepts of Childhood Development in Islam

The concept of childhood as a legal status entitled to special protections is universally accepted today.²⁵ This is demonstrated by the fact that the major international treaty addressing the rights of children, the Convention on the Rights of the Child, has the most state parties of any major international treaty, with the support of every nation in the world save one.²⁶ Even that nation, The United States, has

¹⁴ *Id.*; Rao, *supra* note 12 at 10.

¹⁵ ESPOSITO & DELONG-BAS, *supra* note 8 at 17.

¹⁶ *Id.*

¹⁷ *Id.* at 17-18.

¹⁸ *Id.* at 18.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Status of Ratification Interactive Dashboard*, UN OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, <https://indicators.ohchr.org/> (last visited Sept. 24, 2023).

²⁶ *Id.*

their own relatively robust national legislation protecting children.²⁷ While this concept of the special status of children only gained prominence in the European legal consciousness within the last 200 years, Islamic law has addressed the issue since its early jurisprudence.²⁸

The international definition of a child, as stated in the Convention on the Rights of the Child, is a person under eighteen years of age²⁹, but in Islamic law, the definition is more complex and contested. In Islamic legal thought, a person grows through three stages of life; minority (*sighar*), puberty (*bulugh*), and mental maturity (*rushd*).³⁰ A child is a minor from birth through puberty.³¹ During this stage, the minor has reduced duties and greater protections.³² For example, while they are encouraged to practice religious rituals like prayer, they are not obligated to do so, and they have legal representatives, usually their father, to manage their property in their best interests.³³ They also are not held criminally liable for their actions, as illustrated by the Prophet's statement, "There are three (persons) whose actions are not recorded: a sleeper till he awakes, an idiot till he is restored to reason, and a boy till he reaches puberty."³⁴

The onset of puberty (*bulugh*) is marked specifically by physical, not mental, changes.³⁵ The majority of schools say these changes are the child having nocturnal emissions or in boys the ability to ejaculate or impregnate and in girl the beginning of menstruation or impregnation.³⁶ The Mālikī school also considers additional physical changes including body odor, voice change, and pubic hair growth.³⁷ Regardless of the physical changes considered, there is a set minimum age of puberty which is nine years old for girls and twelve years old for boys.³⁸ Before those ages, physical changes will not alter the legal

²⁷ *Federal Laws*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/> (last visited Sept. 24, 2023).

²⁸ Tan, *supra* note 3, at 788-89.

²⁹ "Unless under the law applicable to the child, majority is attained earlier." Convention on the Rights of the Child art. 1, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁰ Tan, *supra* note 3, at 788-95.

³¹ *Id.* at 789.

³² *Id.*

³³ *Id.*

³⁴ Sunan Abi Dawud Book 39, Hadith 4398.

³⁵ Tan, *supra* note 3, at 792.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

status of a child from minority to puberty.³⁹ In addition, if a child does not show these physical changes within the usual range of ages, they will be considered to be in puberty when they reach a certain set age.⁴⁰ That specific age is contested amongst Islamic law scholars.⁴¹ 'Abū Ḥanīfa, the founder of the Ḥanīfa school of jurisprudence⁴², stated that the onset of puberty should be no later than seventeen for girls and eighteen for boys.⁴³ However, the most widely accepted opinion is that of 'Abū Ḥanīfa's disciples, 'Abū Yūsuf and Muhammad al-Shaybānī⁴⁴, who agree that puberty may start no later than fifteen for both genders.⁴⁵ Both the Shāfi'ī and Ḥanbalī schools agree with this determination, but the Mālikī school sets the age as eighteen for both genders.⁴⁶ Once a child has entered puberty, they have increased duties, including an obligation to pray, and increased legal capacity for some acts, including sexual relations, when legitimized through marriage.⁴⁷ However, they are still protected in some ways, including not having full freedom to dispose of their property, because they have not reached full mental maturity.⁴⁸ Dr. Oğuzhan Tan, a professor in the Department of Islamic Law at Ankara University, notes that the underlying assumption, of questionable validity, seems to be that financial freedom is much more difficult than family life, thereby requiring a greater degree of mental maturity.⁴⁹

Mental maturity (*rushd*) is the stage at which a person is considered fully legally responsible.⁵⁰ *Rushd* may be determined narrowly as a person who has the ability to manage their financial affairs for themselves⁵¹, or, as al-Zamakhsharī⁵² argues, more broadly as a person who has “propriety in religion and

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Zafar Ishaq Ansari, *Abū Ḥanīfah*, BRITANNICA, <https://www.britannica.com/biography/Abu-Hanifah> (last updated June 14, 2023).

⁴³ Tan, *supra* note 3, at 792.

⁴⁴ Ansari, *supra* note 42.

⁴⁵ Tan, *supra* note 3, at 792.

⁴⁶ *Id.*

⁴⁷ *Id.* at 792-93.

⁴⁸ *Id.* at 793.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 793-94.

⁵² al-Zamakhsharī was a medieval mu'tazilite Islamic scholar and linguist most famous for his seminal Qur'anic commentary *Al-Kashshaf*. Andrew Lane, *You can't tell a book by its author: A study of Mu'tazilite theology in al-Zamakhsharī's (d. 538/1144) Kashshāf*, 75 BULL. OF THE SCH. OF ORIENTAL AND AFR. STUD. 47, 47-48 (2012).

intellect.”⁵³ The Shāfi‘ī school in particular believes that a certain level of piety is necessary to achieve *rushd*.⁵⁴

These three delineations, minority, puberty, and mental maturity, are essential to determining when a person can be married (capacity), whether consent is necessary, and if so, from whom.

III. Explicit Guidance in Divine Sources

Sources of Islamic law are divided between divinely revealed sources and sources derived from human reasoning.⁵⁵ The divinely revealed sources are the Qur’an, the verbatim words of God as revealed to the Prophet, and the Sunnah, the words, practices, and tacit endorsements of the Prophet.⁵⁶ These sources are the most authoritative in Islamic law and when their guidance is stated definitively, it is believed to be above interpretation.⁵⁷

A. *Qur’an*

The Qur’an provides guidance on various marriage related issues such as prohibitions on marrying certain relations⁵⁸, limits on the number of wives a man may take⁵⁹, waiting periods for women to remarry⁶⁰, and a prohibition on marrying women from polytheistic faiths.⁶¹ However, the Qur’an does not explicitly address the physical or mental maturity that a woman or girl must achieve in order to marry or any consent requirements on the part of the prospective bride or her guardian (*wali*). Nevertheless, some Qur’anic verses may be relevant to the topics of capacity and consent in that guidance can be drawn from the Qur’an on these issues through the process of *ijtihad*, striving to derive rules of *Shari’ah* through

⁵³ CAROLYN BAUGH, MINOR MARRIAGE IN EARLY ISLAMIC LAW 45 (Bernard Weiss et al. eds. 2017) (ebook).

⁵⁴ Tan, *supra* note 3, at 794.

⁵⁵ MOHAMMAD HASHIM KAMALI, SHARI’AH LAW 19 (2008).

⁵⁶ Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15:33 Cardozo J. of L. & Gender 33, 36-37 (2008).

⁵⁷ KAMALI, *supra* note 55, at 19-23.

⁵⁸ Qur’an Abdul Haleem 4:22; Qur’an Yusuf Ali 4:23.

⁵⁹ Qur’an Yusuf Ali 4:3.

⁶⁰ Qur’an Yusuf Ali 2:228.

⁶¹ Qur’an Saheeh International 2:221.

interpretation of the divine sources, as will be discussed hereinafter in Sections IV and V on *fiqh*.⁶² As the scholar al-Shatibi⁶³ wrote, “Experience shows that every learned scholar who has resorted to the Qur’an in search of solution to a problem has found in the Qur’an some guidance to assist him on the subject.”⁶⁴

B. *Sunnah*

Whereas the Qur’an is mostly silent, the *Sunnah* provides explicit guidance on both the issue of capacity and consent.

i. Capacity

One source of guidance on capacity to marry in the *Sunnah* comes from the Prophet’s own actions in his marriage to the ‘Aishah. A hadith provides that ‘Aishah said, “The Messenger of Allah married me when I was six, and consummated the marriage with me when I was nine, and I used to play with dolls.”⁶⁵ As the Prophet’s actions are in themselves a source of religious guidance, this hadith suggests that, at least during the life of the Prophet, it was acceptable within Islamic law to marry a girl of six and consummate that marriage when she reached nine years of age. In addition, the Prophet is reported as having said, “He who has a son born to him should give him a good name and a good education and marry him when he reaches puberty.”⁶⁶ This hadith explicitly sets the proper age to marry, at least for boys, at the time of puberty. The hadith continues to state that if a son is not married at puberty and thereafter commits sin, likely referring to intercourse as that is an act which would be considered sin without marriage but not within, then the “guilt rests only on the father.”⁶⁷ This communicates that it is

⁶² KAMALI, *supra* note 55, at 25.

⁶³ Al-Shatibi was a 1300s Andalusian Islamic law scholar of the Maliki school. His magnum opus, *Al-Muwafaqat* continues to be highly influential in Islamic law generally and specifically on the issue of *Maslahah* (public interest). *Brief Biography of Imam Abu Ishaq al-Shatibi*, KITAABUN (July 12, 2016) <https://kitaabun.com/shopping3/brief-biography-imam-ishaq-shatibi-a-755.html>.

⁶⁴ KAMALI, *supra* note 55, at 20-21 (quoting al-Shatibi, *Al-Muwafaqat fi Usul al-Shari’ah*, III, 219).

⁶⁵ Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3378.

⁶⁶ Mishkat al-Masabih Book 13, Hadith 3138.

⁶⁷ *Id.*

not only proper to marry a boy when he reaches puberty, but it may be a religious imperative. The Sunnah does not explicitly recognize mental capacity as a requirement for marriage.

ii. Consent

The Sunnah also provides explicit guidance on the requirement of a woman or girl's consent and the consent of her guardian. Notably, the Sunnah distinguishes between the level of deferment due to women who have not yet been married, referred to as "virgins", and women who have been previously married. Ibn 'Abbas narrated that the Messenger of Allah said, "A previously married woman has more right to decide about herself (with regard to marriage) than her guardian, and a virgin should be asked for permission with regard to marriage, and her permission is her silence."⁶⁸ This hadith grants previously married women greater control over the decision to be married than a woman who has not been married, but clearly requires some form of consent from all potential brides. However, the consent of a woman who has not previously been married does not need to be explicit, it may be implied by her silence. This requirement of consent is reemphasized in a hadith narrated by Khansa' bint Khidham, who related a situation in which a woman who had previously been married was remarried by her father against her will.⁶⁹ The woman sought out the Prophet, who annulled the marriage.⁷⁰ Through his actions, the Prophet upheld the importance of women's right to consent to marriage, particularly for women who have previously been married.

In regard to the consent of the woman or girl's guardian, Abu Musa narrated that the Prophet said, "There is no marriage except with a *wali*."⁷¹ This confirms that a *wali* must be involved in the process of contracting for marriage, but does not specify their role. This hadith is elaborated on by Aishah who narrated that the Prophet said, "Whichever woman married without the permission of her *wali* her

⁶⁸ Sunan an-Nasa'i Vol. 4, Book 26, Hadith 3262.

⁶⁹ Sunan an-Nasa'i Vol. 4, Book 26, Hadith 3268.

⁷⁰ *Id.*

⁷¹ Jami' at-Tirmidhi Vol. 2, Book 6, Hadith 1101.

marriage is invalid, her marriage is invalid, her marriage is invalid.”⁷² This hadith indicates that the consent of the *wali* is compulsory and the legal effect of its absence is to make the marriage invalid.⁷³

Repetition of words or phrases is a frequent educational device utilized by the Prophet in his teachings in order to add emphasis and promote listener understanding.⁷⁴

IV. Traditional *Fiqh*

Fiqh is the positive Islamic law that results from human reasoning.⁷⁵ There is extensive and often conflicting *fiqh* on the subjects of women’s capacity and consent to marry which are reasoned not only on the explicit guidance of the divine sources but also on Islamic law principles such as public interest (*maslahah*).⁷⁶

A. Capacity

Seeing as there is no minimum marriage age specified in the Qur’an or Sunnah, the majority of early Islamic scholars, including all the companions, agreed that women could be married as a minor, that is before puberty, if she was not delivered to the house of her husband to begin sexual relations until she reached puberty.⁷⁷ They base this rule in part on their interpretation of a Qur’anic verse which discusses the waiting period for remarriage.⁷⁸ This verse states, “As for your women past the age of menstruation, in case you do not know, their waiting period is three months, and those who have not menstruated as well.”⁷⁹ The majority of scholars believe that “those who have not menstruated” refers to pre-pubescent

⁷² Jami` at-Tirmidhi Vol. 2, Book 6, Hadith 1102.

⁷³ While the word “invalid” at first seems to suggest the marriage is void (*batil*) it actually appears to be an example of an irregular (*fasid*) marriage in that the hadith continues on to say that if the marriage is consummated, the woman is owed a *mahr*, which is the legal consequence of *fasid* but not *batil* marriages. Esposito & DeLong-Bas, *supra* note 8, at 17-18.

⁷⁴ See, Jami` at-Tirmidhi Vol. 1, Book 46, Hadith 3640 (“Narrated Anas bin Malik: that the Messenger of Allah (SAW) would repeat a statement three times so that it could be understood.”)

⁷⁵ KAMALI, *supra* note 55, at 40-41.

⁷⁶ *Id.* at 32-36.

⁷⁷ Tan, *supra* note 3, at 791-92.

⁷⁸ *Id.* at 800.

⁷⁹ Qur’an Dr. Mustafa Khattab 65:4.

girls who have not yet begun menstruation and the fact that they are mentioned remarrying suggests that it is permissible to marry pre-pubescent girls.⁸⁰ This interpretation seems to preclude the possibility that “those who have not menstruated” refers to physically mature women with amenorrhea, meaning they do not menstruate for any number of medical reasons.⁸¹ A minority of early scholars disagreed with the permissibility of marrying minor girls.⁸² Ibn Shubruma⁸³, ‘Abū Bakr al-Asamm⁸⁴, and ‘Uthmān al-Battī⁸⁵ argued that minors, those who have not achieved puberty, should not be confined to marriage because the purpose of the institution is sexual satisfaction and reproduction, neither of which may take place before puberty.⁸⁶ Al-Sarakhsī⁸⁷ ridiculed this minority view when he wrote, “‘Abū Bakr al-’Asamm must have been deaf⁸⁸, for he seems not to have heard the hadiths’ about the prophet’s marriage to ‘Āisha when she was six years old and his bedding her when she reached the age of nine.”⁸⁹

This majority opinion was followed until the Islamic law codification movement, which began in the mid-1800s, caused a shift in some traditional rules of Islamic law.⁹⁰ The 1917 Ottoman Decree of Family Law established the minimum marriage age as eighteen for men, absent judicial approval, and

⁸⁰ Tan, *supra* note 3, at 800.

⁸¹ *Amenorrhea: Absence of Periods*, AMERICAN COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Oct. 2020) [https://www.acog.org/womens-health/faqs/amenorrhea-absence-of-periods#:~:text=How%20common%20is%20amenorrhea%3F,some%20point%20in%20their%20lives_\(last updated July 2022\)](https://www.acog.org/womens-health/faqs/amenorrhea-absence-of-periods#:~:text=How%20common%20is%20amenorrhea%3F,some%20point%20in%20their%20lives_(last%20updated%20July%202022).).

⁸² Tan, *supra* note 3, at 791.

⁸³ Ibn Shubruma was a qadi of Kūfa, a city in what is modern day Iraq. His father was a companion of the Prophet. He died in 144/761. J. Vadet, *Ibn Shubruma*, BRILL (2012),

https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ibn-shubruma-SIM_3378?lang=fr.

⁸⁴ ‘Abū Bakr al-Asamm was a theologian and *mufasssir*, a person who meets certain requirements allowing him to interpret the Qur’an for his community. He died in either 200/816 or 201/817. Josef Van Ess, *al-Aṣamm*, BRILL (2012), https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-asamm-SIM_8354.

⁸⁵ Little is written in English about the background of ‘Uthmān al-Battī. He was a Basran contemporary of Ibn Shubruma and ‘Abū Bakr al-Asamm. He died in 143/760. RAMON HARVEY, TRANSCENDENT GOD, RATIONAL WORLD: A MATURIDI THEOLOGY, 31 (Ulrika Mårtensson et al. eds., 2021).

⁸⁶ Tan, *supra* note 3, at 791.

⁸⁷ Al-Sarakhsī was a prominent Hanafī scholar. One of his major contributions to Islamic legal scholarship was his book *Sharhu’l-Cāmīi’s-sagīr*. He died in 483/1090. *Sharhu’l-Cāmīi’s-sagīr Shams al-’Aimma al-Sarakhsī (d. 483/1090)*, TURKIYE DIYANET FOUNDATION CENTER FOR ISLAMIC STUDIES (Jan. 27, 2022), http://english.isam.org.tr/index.cfm?fuseaction=objects2.detail_content&cid=1664&cat_id=20&chid=48.

⁸⁸ al-’Asamm literally means ‘deaf’. Tan, *supra* note 3, at 791.

⁸⁹ *Id.*

⁹⁰ *Id.* at 794.

seventeen from women, absent judicial approval and parental consent.⁹¹ The decree also set an absolute minimum marriage age of twelve for boys and nine for girls.⁹² The authors of the decree recognized the long legal precedent they were upending, but they strongly defended their decision as necessary in the modern era.⁹³ The authors justified their decision when they wrote:

*[I]n our country parents often neglect the education and instruction of their children, betrothing them in the cradle in order to see them married and with rights to an inheritance, so these poor children who know nothing about the world are married and thrown to catastrophe. Families created in this manner, composed of children who have not seen school, who do not know how to read and write, nor the commands of the faith, are like a dead-born faetus, condemned to decomposition in the very first months of their existence. This is one of the causes of the instability of families in our country.*⁹⁴

In addition, the authors point to the injustice of little boys playing in the street while “girls of the same age are burdened with the greatest obligation in human society.”⁹⁵ They also note the poor health outcomes for child brides which are passed on to their children.⁹⁶ All these factors, the authors’ claim, lead to the “degradation of the Islamic element.”⁹⁷ While it is not explicitly stated, by referencing the harm that child marriage does to young girls specifically and society generally, the authors seem to root their arguments in the Islamic principles of the removal of hardship (*raf‘al-haraj*) and prevention of harm (*daf‘al-darar*), both of which are encompassed in the concept of public interest (*maslahah*).⁹⁸ These principles are central to Islam as demonstrated by the Qur’an’s words, “[Allah] has chosen you and

⁹¹ *Id.* at 794.

⁹² Darina Martykánová, *Matching Sharia and ‘Governmentality’: Muslim Marriage Legislation in the Late Ottoman Empire*, IDEOLOGY, SOC’Y AND VALUES 153, 169 (2009).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 170.

⁹⁶ Martykánová, *supra* 92, at 170.

⁹⁷ *Id.*

⁹⁸ KAMALI, *supra* note 55, at 35.

placed no hardship in your religion.”⁹⁹ In addition to these Islamic principles, the authors also reference the authority of the minority of early Islamic scholars who repudiated marriage before puberty.¹⁰⁰ Despite the authors’ claims of Islamic foundations, some historians view this decree and other similar reforms as motivated by external political pressures and western influence rather than internal Islamic reinterpretations.¹⁰¹

Today, minimum marriage ages in Muslim majority countries are generally determined by state legislation.¹⁰² Due to influences like custom, politics, and differing interpretations of Islamic law, these minimums vary considerably nation to nation, as demonstrated hereinafter in Section VI’s comparative analysis.¹⁰³

B. Consent

i. Consent of the Woman or Girl

Despite the seemingly definitive words of the Prophet requiring the consent of all prospective brides¹⁰⁴, all major Islamic schools except Hanafi agree that a *wali* may force a previously unmarried virgin girl to marry.¹⁰⁵ In contrast, a previously married adult woman must always grant her consent.¹⁰⁶ The position of the Hanafi school is that a *wali* may initiate a marriage contract on behalf of his previously unmarried ward, but the minor girl ultimately has the right to accept or reject the marriage when she reaches puberty.¹⁰⁷

⁹⁹ Qur’an Abdul Haleem 22:78; KAMALI, *supra* note 55, at 35.

¹⁰⁰ Martykánová, *supra* 92, at 170.

¹⁰¹ Tan, *supra* note 3, at 794.

¹⁰² See, *Marriage Laws around the World*, PEW RESEARCH CENTER, https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf (last visited Sept. 24, 2023).

¹⁰³ *Id.*

¹⁰⁴ Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3262.

¹⁰⁵ Leila P. Sayeh & Adriaen M. Morse, *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT’L L. J. 311, 326 (1995); A. Mohd et al., *Protecting Women’s Interest (Maslahah) in Marriage Through Appointment of a Guardian (Wali) Under Islamic Law* 23 PERTANIKAJ. SOC. SCI. & HUM. 75,76 (2015).

¹⁰⁶ Mohd, *supra* note 105, at 77.

¹⁰⁷ Aisha K. Gill. & Taher Hamed, *Muslim Women and Forced Marriage in the United Kingdom*, J. OF MUSLIM MINORITY AFF., Nov. 2006 at 5.

In general, coercion is anathema to Islam.¹⁰⁸ This is particularly true in relation to the negotiation of contracts, as the Qur'an established consent to be their foundation when it declared, "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent."¹⁰⁹ However, one type of coercion is acceptable in Islamic law.¹¹⁰ "Coercion with right" refers to the exercise of compulsion by a legitimate authority; for example, a judge may force a person to sell some of their property in order to pay back the person's debts.¹¹¹ The majority of Islamic jurists apply this concept to argue that a *wali* has legitimate authority to compel their ward to marry, just as a judge has a right to enforce their decisions on litigants.¹¹² This is called *wilāyat al-ijbār*, or compulsion guardianship.¹¹³

Despite the established majority opinion of the Shafi, Maliki, and Hanbali schools that a *wali* may compel a girl to marry, this near consensus has not gone without opposition.¹¹⁴ Throughout history, prominent scholars from within these schools have voiced dissent including Ibn al-Qayyim¹¹⁵ and Ibn Taymiyyah¹¹⁶. The latter of whom wrote,

As for marrying off a woman who is averse to the marriage, it is contrary to both the principles of Shari'ah and the sound intellect. Allah, Exalted is He, does not allow her guardian to compel her to sell or lease contracts except with her permission; neither does

¹⁰⁸ *Id.* at 4.

¹⁰⁹ Qur'an Saheeh International 4:29.

¹¹⁰ Gill & Hamed, *supra* note 107, at 4.

¹¹¹ *Id.*

¹¹² *Id.* at 4-5; Tan, *supra* note 3, at 790-91.

¹¹³ Gill & Hamed, *supra* note 107, at 5.

¹¹⁴ *Id.* at 11.

¹¹⁵ Ibn al-Qayyim was a 13th century Hanbali legal scholar and the most famous student of Ibn Taymiyyah. Henri Laoust, *Ibn Taymiyyah*, BRITANNICA, <https://www.britannica.com/biography/Ibn-Taymiyyah> (last updated Sept. 22, 2023).

¹¹⁶ Ibn Taymiyyah was an influential Hanbali theologian who lived in the 1200s. He is most well-known for his emphasis on returning Islam to the sources of the Qur'an and the Sunnah. *Id.*; Gill & Hamed, *supra* note 107, at 11.

*He allow the guardian to compel her to food, drink or dress; so how can He [Allah] compel her to have a relationship with someone she hates.*¹¹⁷

Ibn Taymiyyah rested his position on the fact that there is nothing in the Qur'an or Sunnah which explicitly gives *walis* the right to compel their wards to marry and *Shari'ah* specifically prohibits other lesser forms of compulsion.¹¹⁸

ii. Consent of the *Wali*

While a man or boy may contract a marriage unsupervised, traditional *fiqh* requires a woman or girl to have a guardian (*wali*) to help her through the process.¹¹⁹ This is based in the Prophet's explicit statement requiring a guardian's consent to a girl's marriage.¹²⁰ The *wali*, usually the prospective bride's father, is meant to protect the interests of the woman or girl and ensure that she is not taken advantage of by any unsuitable suitors.¹²¹ In this way, the role of the *wali* is seen as protecting women's *maslahah*.¹²² *Maslahah*, public interest, is a principle objective of Islamic law, potentially even the most important and encompassing as argued by al-Shatibi¹²³ in his work *Al-Muwafaqat*.¹²⁴

Traditionally, all Islamic jurists consider the consent of a woman or girl's guardian to be important, but the necessity of their consent to the establishment of a valid marriage is contested.¹²⁵ The majority of jurists, including Mālik bin Anas, Al-Shafi'i, and Ahmad ibn Hanbal, believe that the *wali*'s consent is obligatory (*wajib*)¹²⁶ regardless of whether the woman or girl has been previously married or

¹¹⁷ Gill & Hamed, *supra* note 107, at 4. (quoting Aḥmad b. c Abd al-Ḥalīm, Ibn Taymiyyah, *Majmūc al-Fatāwā*, ed.c Ḥamīd al-Jazzār and Anwar al-Bāz, Cairo: Egypt, Dar al-Wafa, 1997).

¹¹⁸ *Id.*

¹¹⁹ Zaynab Ansari, *The Islamic Marriage Contract*, 4 AZIZAH 44 (2006).

¹²⁰ *Jami` at-Tirmidhi* Vol. 2, Book 6, Hadith 1101.

¹²¹ Ansari, *supra* note 119.

¹²² Mohd, *supra* note 105, at 81.

¹²³ *See*, KITAABUN *supra* note 63.

¹²⁴ KAMALI, *supra* note 55, at 32-33.

¹²⁵ Mohd, *supra* note 105, at 77.

¹²⁶ Islamic law recognizes five categories of behavior; obligatory (*wajib*), praiseworthy or recommended (*mandub*), permissible (*mubah*), reprehensible (*makruh*), and forbidden (*haram*). KAMALI, *supra* note 55, at 33.

not.¹²⁷ However, Abu Hanifa and his accomplished disciple Zufar argue that the *wali*'s consent is only recommended (*mandub*) for girls who have already achieved puberty.¹²⁸ This opinion is in line with Abu-Hanifa's overall juristic emphasis on personal liberty.¹²⁹ However, even in the Hanifi school, if a *wali* specifically takes action to intervene in a marriage he did not consent to, the marriage may be deemed invalid.¹³⁰ Other scholars draw a distinction based on previous marriages.¹³¹ Dawud al-Zahiri¹³² maintains that a *wali*'s consent is obligatory for women who have not been married, but not for previously married women, based on the hadith, "A previously married woman has more right to decide about herself (with regard to marriage) than her guardian."¹³³

V. Movement for Reform of *Fiqh*¹³⁴

In recent years, there has been a call from some modern Islamic scholars to reform aspects of Islamic marriage law in regards to capacity and consent, among other issues, to better align *fiqh* with

¹²⁷ Mohd, *supra* note 105, at 77.

¹²⁸ *Id.*

¹²⁹ KAMALI, *supra* note 55, at 71.

¹³⁰ Mohd, *supra* note 105, at 78.

¹³¹ *Id.* at 77.

¹³² Dawud al-Zahiri was a famous Islamic jurist who founded the Zahiri school of thought, which emphasized literal interpretations of the divine sources and rejection of imitation (*taqlid*), analogy (*qiyas*), and juristic preference (*istihsan*). The Zahiri school later merged with the Hanbali school. *Zahiri*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803133342854;jsessionid=CAA72DD3BB2D47AC3E2F0F9649D74B9> (last visited Sept. 24, 2023); *Zāhirīyah*, BRITANNIA, <https://www.britannica.com/topic/Zahiriyah> (last updated Mar. 10, 2005),

¹³³ Mohd, *supra* note 105, at 77; Sunan an-Nasa'i Vol. 4, Book 26, Hadith 3262.

¹³⁴ In part because of the patriarchal power structure that was reasserted after the death of the Prophet, women's voices in Islamic law have often been overlooked. This is particularly true because women were traditionally ineligible to be *mujtahids*, scholars who practice *ijtihad*. Since women are often barred from formally practicing *ijtihad*, their reinterpretations of the divine sources on the topics of capacity and consent in marriage are not considered legitimate by some scholars of classical Islamic law. In general, there are strong reasons to only cite Islamic law arguments made by *mujtahids*, seeing as they are the best trained to interpret the complexity of the divine sources, and that rule is followed in this paper's discussion of traditional *fiqh*. However, this section cites the opinions of female Islamic law scholars and woman-run Islamic institutions because Muslim women are at the forefront of the movement for progressive reform of marriage law and their lack of legitimization by some members of the wider *ummah* (Muslim community), is a result of their gender, not necessarily their qualifications. Additionally, the idea of modern *mujtahids* is disputed in any case. Warren, *supra* note 56, at 38.

Islamic principles and protect the interests of women and girls.¹³⁵ This can be accomplished through *ijtihad*, the process of striving to derive the rules of *Shari'ah* from the Qur'an and Sunnah.¹³⁶ Just as traditional *fiqh* was established through the thoughtful reasoning of prior Islamic scholars, so too can that *fiqh* be revised by the efforts of current scholars.¹³⁷ *Ijtihad* has three capabilities; in regards to the rulings of the Qur'an and Sunnah, scholars can endeavor to discover the correct interpretation according to the letter and objective of the law.¹³⁸ In regards to matters on which there is no clear guidance in the original sources or *ijma* (consensus of scholars), scholars can be guided by the objectives of *Shari'ah*, discussed in detail hereinafter.¹³⁹ Lastly, when existing *fiqh* no longer serves *Shari'ah's* objectives due to changes in society, new *ijtihad* is justified.¹⁴⁰

Some Islamic scholars disagree with the proposition of using *ijtihad* to reform established *fiqh*.¹⁴¹ They argue that the "Gate of Ijtihad" closed in the 10th century and further endeavors are not permitted.¹⁴² However, *ijtihad* has never truly ceased completely, even if it lost some of its formality, and it is a legitimate *Shari'ah* approved method.¹⁴³ The prophet himself validated *ijtihad* when he questioned a judge he was sending to Yemen about how he would make decisions on Islamic law.¹⁴⁴ If he could not find guidance in the Qur'an or the Sunnah, the man stated, "I shall do my best to form an opinion and I shall spare no effort" and of this the Prophet approved.¹⁴⁵ In addition, *ijtihad* remains the main method for

¹³⁵ See e.g., Sayeh & Morse, *supra* note 105, at 321; *Move to End Child Marriage in Malaysia*, SISTERS IN ISLAM (July 4, 2019), <https://sistersinislam.org/move-to-end-child-marriage-in-malaysia/>.

¹³⁶ KAMALI, *supra* note 55, at 25.

¹³⁷ *Id.*

¹³⁸ *Id.* at 26.

¹³⁹ *Id.* at 27.

¹⁴⁰ *Id.*

¹⁴¹ Rachel Anne Codd, *A Critical Analysis of the role of Ijtihad in Legal Reforms in the Muslim World*, 14 ARAB L. Q. 112, 113 (1999).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Sunan Abi Dawud Book 24, Hadith 3592.

¹⁴⁵ *Id.*

keeping Islamic law dynamic and flexible to the changing conditions of the *umamah* (Muslim community).¹⁴⁶ Without *ijtihad*, there is a risk of religious and juristic stagnation.¹⁴⁷

In addition, it is important to note that respect for women and sensitivity to their often vulnerable status in society is not a modern invention in Islamic law nor is its codification always the result of western influence.¹⁴⁸ In many ways, the proliferation of Islam beginning in the 600s strengthened women's rights compared to their status in Pre-Islam Arabia.¹⁴⁹ The Prophet himself often advocated for the rights of women in Islam.¹⁵⁰ Unfortunately, after the Prophet's death, his guidance on this issue was not heeded and in the subsequent centuries the vast majority of male jurists often chose to interpret divine sources through their own patriarchal lens, making religious and legal determinations that upheld man's power over women.¹⁵¹ However, even in those intervening years, a minority of male scholars argued for the equality of women, such as Sayyid Mumtaz Ali who in the late 1800s published, 'Huquq un-Niswan', a defense of women's rights, including marriage rights.¹⁵² This history demonstrates that the modern movement for progressive reform of marriage related *fiqh* is not *bidah*, an unprecedented and unislamic modern innovation,¹⁵³ but a movement deeply rooted in the origins of Islamic jurisprudence. It also serves as the basis for the argument made by some Islamic law scholars that Islam has "drifted from its guiding principles as they apply to Muslim women."¹⁵⁴ The goals of the movement for the reform of marriage related *fiqh* is to redress this drift of principles and improve the situation of Muslim women and girls around the world.

¹⁴⁶ KAMALI, *supra* note 55, at 25; Codd, *supra* note 141, at 113.

¹⁴⁷ Codd, *supra* note 141, at 113.

¹⁴⁸ Warren, *supra* note 56, at 41-43.

¹⁴⁹ *Id.* at 42-43.

¹⁵⁰ *Id.* at 46.

¹⁵¹ *Id.* at 45-46.

¹⁵² Sayyid Mumtaz Ali was an Islamic scholar working in the late 1800s. He was Deobandi, a member of a conservative school of thought, but his assertions on women's rights were progressive for his time. Gail Minault, *Sayyid Mumtaz Ali and 'Huquq un-Niswan: An Advocate of Women's Rights in Islam in the Late Nineteenth Century*, 24 MOD. ASIAN STUD. 147, 147-49 (1990).

¹⁵³ Warren, *supra* note 56, at 36-37.

¹⁵⁴ Sayeh & Morse, *supra* note 105, at 321.

A. Capacity

Many modern Islamic scholars have argued for raising the standards for minimum marriage ages under Islamic law.¹⁵⁵ Some argue for setting the minimum marriage age at eighteen, while others argue for more flexible standards such as the achievement of *rushd* (mental maturity).¹⁵⁶ In 2019, Saleh Abbas, the deputy grand imam of al-Azhar, considered by many Muslims to be the highest authority in Sunni jurisprudence, issued a *fatwa*, a juristic opinion, against child marriage.¹⁵⁷ While *fatwas* are nonbinding, the opinion of such a prominent institution carries weight in the Muslim world.¹⁵⁸ In this *fatwa*¹⁵⁹, The deputy grand imam recognizes the interconnectedness of capacity and consent by stating that consent of both prospective spouses is a requirement for marriage, and a person does not have the maturity to consent until they reach eighteen years of age.¹⁶⁰ In addition, the *fatwa* argues that girls before eighteen are not able to assume the responsibility of marriage and, as the Qur'an states, "God does not place a burden on a soul greater than it can bear."¹⁶¹

The deputy grand imam's focus on maturity echoes the arguments of other Islamic scholars who argue that the minimum requirement for marriage should be both *bulugh* (puberty) and *rushd* (mental maturity).¹⁶² These scholars root their argument in the Qur'anic verse, "Test the competence of the orphans until they reach a marriageable age. Then if you feel they are capable of sound judgment, return their wealth to them."¹⁶³ Some scholars argue this verse supports the idea that marriage is only

¹⁵⁵ See e.g., Susie Neilson, *How A Former Child Bride Got A Fatwa Against Child Marriage*, NPR (June 26, 2019), <https://www.npr.org/sections/goatsandsoda/2019/06/26/734535629/how-a-former-child-bride-got-a-fatwa-against-child-marriage>; Sisters in Islam, *supra* note 135.

¹⁵⁶ Ruth Maclean, *Senior Islamic cleric issues fatwa against child marriage*, GUARDIAN (June 21, 2019), <https://www.theguardian.com/global-development/2019/jun/21/senior-islamic-cleric-issues-fatwa-against-child-marriage>; Islamic Relief Worldwide, *An Islamic Human Rights Perspective on Early and Forced Marriages* at 7 (2018), <https://jlfic.com/wp-content/uploads/2018/03/EFM-HUMAN-RIGHTS-CSW62.pdf>.

¹⁵⁷ Maclean, *supra* note 156; Neilson, *supra* note 155.

¹⁵⁸ Neilson, *supra* note 155.

¹⁵⁹ Saleh Abbas, *Fatwa Child Marriage*,

<https://docs.google.com/document/d/14iySUD7jvDe3JeM5AWqbmMHBOZNWdGmE0PaZVVD3JLs/edit>.

¹⁶⁰ Maclean, *supra* note 156.

¹⁶¹ Abbas, *supra* note 159 (quoting Qur'an 2:286).

¹⁶² Islamic Relief Worldwide, *supra* 156, at 7.

¹⁶³ Qur'an Dr. Mustafa Khattab 4:6.

permissible to those who have reached both *bulugh*, “a marriageable age”, and *rushd*, “sound judgment”, because that is the standard set therein for entering into a legal agreement, and marriage is a kind of legal agreement.¹⁶⁴

Modern Islamic law scholars advocating against child marriage take different approaches in addressing the issue of Aishah’s age at the time of her marriage to the Prophet. Some argue against the validity of the hadith¹⁶⁵ stating her age at marriage as six.¹⁶⁶ They point to historical inconsistencies that emerge when comparing the narration to other hadiths as well as the reported “senility” of the originator of the hadith, Ibn Urwa.¹⁶⁷ Further supporting this view is the fact that Aishah’s age at marriage was completely absent from the earliest sources and was only added over a century after the death of the Prophet.¹⁶⁸ Other scholars argue that regardless of Aishah’s age, Muslim men today have a religious obligation to avoid harmful practices.¹⁶⁹ As one hadith states, “There should be neither harming nor reciprocating harm.”¹⁷⁰ While the marriage of a young child may have been normal in 7th century Arabia, child marriage in the modern context is clearly injurious to the girl.¹⁷¹

B. Consent

i. Consent of the Woman or Girl

Perhaps nowhere in the discussion of marriage *fiqh* is the drift of Islamic principles more evident than in the lack of consent requirements in traditional *fiqh*. Many modern Islamic scholars emphasize the Sunnah’s insistence on the necessity of a woman or girl’s consent to marriage: “If she refuses then she is

¹⁶⁴ Islamic Relief Worldwide, *supra* 156, at 7.

¹⁶⁵ Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3378.

¹⁶⁶ Javad T. Hashmi, *Oxford Study Sheds Light on Muhammad’s ‘Underage’ Wife Aisha*, NEW LINES MAGAZINE (Oct. 28, 2022), <https://newlinesmag.com/essays/oxford-study-sheds-light-on-muhammads-underage-wife-aisha/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Islamic Relief Worldwide, *supra* 156, at 8.

¹⁷⁰ Sunan Ibn Majah Vol. 3, Book 13, Hadith 2340.

¹⁷¹ Islamic Relief Worldwide, *supra* 156, at 8.

not to be forced.”¹⁷² In addition, some scholars argue for increased standards due to changes in social norms.¹⁷³ Specifically, some scholars argue that the hadith which states that a previously unmarried woman could give her consent to marry through her silence¹⁷⁴ should be read in the context in which it was stated, when silence was a normal form of agreement in many cultures.¹⁷⁵ They argue that today, explicit consent is the social norm in most cultures and therefore more closely reflects the intent of the *Shari’ah* requirement of establishing clear consent.¹⁷⁶

ii. Consent of the *Wali*

The primary reason for requiring women and girls to have a *wali* consent to their marriage is to protect their interests.¹⁷⁷ Some more conservative Islamic scholars believe that women are inherently less capable than men of making decisions for themselves in their best interests or too shy to advocate for themselves in marriage contract negotiations.¹⁷⁸ This belief may have been well founded at the time the requirement of a *wali’s* consent was established, when women’s role in society precluded them from developing the same experience and education as men.¹⁷⁹ However, other Islamic scholars emphasize that in many places around the world, through increases in education and changes in socioeconomic conditions, Muslim women have achieved equal capabilities to men in society and therefore should have full authority to choose their spouses, unincumbered by their *wali*.¹⁸⁰ Still other modern Islamic scholars argue that the role of the *wali* should be retained, but that *walis* should act in accordance to their religious obligation, as outlined in the hadith, “A man is the shepherd of the people of his house and he is

¹⁷² Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3270; Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3262. *See e.g.*, Islamic Relief Worldwide, *supra* 156, at 5; Abbas, *supra* note, 159.

¹⁷³ Islamic Relief Worldwide, *supra* 156, at 5.

¹⁷⁴ Sunan an-Nasa’i Vol. 4, Book 26, Hadith 3262.

¹⁷⁵ Islamic Relief Worldwide, *supra* 156, at 5.

¹⁷⁶ *Id.*

¹⁷⁷ Mohd, *supra* note 105, at 81.

¹⁷⁸ *Id.* at 80-81 (stating that women are “bestowed with feminine nature which embodies softness and shyness . . . and cannot be easily erased” which prevents them from effectively negotiating on their own behalf).

¹⁷⁹ Sayeh & Morse, *supra* note 105, at 326.

¹⁸⁰ *Id.*

responsible for his flock.”¹⁸¹ The Prophet placed a particular importance on fathers’ good treatment and protection of their daughters when he stated, “There is no Muslim who has two daughters and takes good care of them but that he will enter the Garden.”¹⁸² Therefore, from the perspective of some scholars, *walis* are still beneficial for women, but they must refocus themselves on their original purpose of protecting their wards from rights violations including the rights to education, psychological and physical health, and equity.¹⁸³

C. The Objectives of *Shari’ah*

In discussing potential reforms of marriage related *fiqh*, it is helpful to recall the principal objectives of *Shari’ah* and consider how the proposed reforms align with these goals. The Qur’an describes the objectives of *Shari’ah* when it states, “O mankind! there hath come to you a direction from your Lord and a healing for the (diseases) in your hearts, and for those who believe, a guidance and a Mercy.”¹⁸⁴ The *Shari’ah* enumerates three elements of this objective of mercy; to educate the individual (*tahdhib al-fard*), to establish justice (*‘adl*), and to realize benefit (*maslahah*) for the people.¹⁸⁵

Education is a key goal of Islam.¹⁸⁶ This education is firstly a social and moral education, in that *Shari’ah* trains individuals to be contributing members of society who do not harm others.¹⁸⁷ However, the goal of education also involves the pursuit of learning, as evidenced by the hadith, "Seeking knowledge is a duty upon every Muslim"¹⁸⁸ This imperative to seek out education is also present in the Qur’an where it commands, “Read! in the name of thy Lord who created: He created man from a clinging form. Read! Your Lord is the Most Bountiful One who taught by [means of] the pen, who taught man what he did not know.”¹⁸⁹ The *Shari’ah* objective of education is essential to the conversation about child

¹⁸¹ Al-Adab Al-Mufrad Book 9, Hadith 206.

¹⁸² Al-Adab Al-Mufrad Book 4, Hadith 77.

¹⁸³ Islamic Relief Worldwide, *supra* 156, at 6.

¹⁸⁴ Qur’an Yusuf Ali 10:57.

¹⁸⁵ KAMALI, *supra* note 55, at 27-28.

¹⁸⁶ *Id.* at 28-29.

¹⁸⁷ *Id.*

¹⁸⁸ Sunan Ibn Majah Vol. 1, Book 1, Hadith 224.

¹⁸⁹ Qur’an Abdul Haleem 96: 1-5.

and forced marriages because often when a girl's marriage begins, their education ends.¹⁹⁰ Young girls who marry are often unable to continue their education because of their increased domestic responsibilities, pregnancies, social stigma, or even legal barriers.¹⁹¹ This can lead to high rates of illiteracy among other poor educational outcomes.¹⁹² Therefore, progressive reform *fiqh* which seeks to delay marriage until adulthood clearly contributes to the achievement of the *Shari'ah* objective of education.

The second objective of Islam is justice (*'adl*) as established in multiple Qur'anic verses including, "Oh believers! Stand out firmly for justice as witnesses to God, even if it be against yourself, your parents and relatives and whether it be against rich or poor."¹⁹³ Justice has a particular definition in the Islamic context in that *'adl* means literally to "plac[e] things in their right places where they belong."¹⁹⁴ This indicates an imperative to strive for equilibrium in society in which rights and obligations are balanced.¹⁹⁵ Justice also includes considerations of equity and fairness.¹⁹⁶ Because justice is so foundational to *Shari'ah*, if *fiqh* which was established in certain historical conditions has become unjust in modern society, some Islamic law scholars such as Mohammad Hashim Kamali believe this justifies using *ijtihad* to reform the *fiqh*.¹⁹⁷ This applies to *fiqh* related to capacity to marry because in modern society child marriage is largely considered unjust to the children it affects, but traditional *fiqh* reflects historical tolerance for the practice.¹⁹⁸ In addition, child marriage and forced marriage are issues that

¹⁹⁰ Islamic Relief Worldwide, *supra* 156, at 7.

¹⁹¹ The Child Marriage Research to Action Network (CRANK), *Evidence Review: Child marriage interventions and research from 2020 to 2022* 6 (Jan. 2023), <https://www.unicef.org/media/136646/file/CRANK-Evidence-Review-Child-Marriage-2023.pdf>.

¹⁹² Islamic Relief Worldwide, *supra* 156, at 7.

¹⁹³ Qur'an Dr. Mustafa Khattab 4:135.

¹⁹⁴ KAMALI, *supra* note 55, at 30.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 31.

¹⁹⁷ *Id.* at 32.

¹⁹⁸ Tan, *supra* note 3, at 790-91.

negatively affect women and girls disproportionately¹⁹⁹, making it an issue of gendered inequity and unfairness which can be remedied through the revision of traditional marriage *fiqh*.

Lastly, public interest (*maslahah*) is a core objective of *Shari'ah*.²⁰⁰ There is a consensus among the *ulama* that there is no ruling in *Shari'ah* that does not bestow genuine benefit.²⁰¹ Public interest includes the dual goals of removing hardship and preventing harm.²⁰² While child marriage was normalized across the globe for most of history²⁰³, today, child marriage is recognized as having devastating effects, particularly on girls.²⁰⁴ In addition to suffering negative impacts on education as already mentioned, girls who are married as children are subjected to higher rates of domestic and sexual abuse.²⁰⁵ The harms of forced and child marriage are also felt across generations, as child marriage often throws women and their children into intergenerational cycles of poverty and both child brides and their children suffer from poor short- and long-term health outcomes.²⁰⁶ In regard to health outcomes, child marriage is key driver of adolescent pregnancy and the leading cause of death for fifteen- to nineteen-year-olds globally is complications relating to pregnancy and childbirth.²⁰⁷ Taking these personal and inter-generational effects into account, it is clearly vital for the *maslahah* of both girls specifically and society generally to revise *fiqh* to prevent the harms of forced and child marriage and remove from girls the potential hardships of a marriage which they are either not mature enough to endure or do not consent to.

¹⁹⁹ See, CRANK, *supra* note 191, at 3.

²⁰⁰ KAMALI, *supra* note 55, at 32-36.

²⁰¹ *Id.* at 33.

²⁰² *Id.* at 35.

²⁰³ BAUGH, *supra* note 53, at 25.

²⁰⁴ CRANK, *supra* note 191, at 3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 12.

VI. Comparative Analysis

A. Yemen

On paper, Yemen is a multi-party representative democracy.²⁰⁸ However, due to the ongoing civil war, which began in 2015, currently there is no central government with full control over the nation.²⁰⁹ Yemen is over 99% Muslim and this overwhelming majority is reflected in the nation's legal frameworks.²¹⁰ Yemen's constitution establishes it as an Islamic nation²¹¹ in which Islam is the state religion²¹² and *Shari'ah* is the source of all legislation.²¹³ Yemeni marriage law is governed by Personal Status Law 20/1992 which was significantly amended in 1998, 1999, and 2003.²¹⁴ In many ways, it closely follows traditional marriage *fiqh*.

i. Capacity

Yemen's Personal Status Law 20/1992 originally set a minimum marriage age of fifteen, but a 1999 amendment to Article 15 abolished any minimum marriage age; making it possible for a child of any age to be married.²¹⁵ Article 15 states that while marriage may occur at any age, sexual relations are not permitted until the girl reaches puberty.²¹⁶ However, this prohibition is without legal consequence and is flagrantly violated in practice, as evidenced by Human Rights Watch's findings of incidences of the

²⁰⁸ Manfred W. Wenner & Robert Burrowes, *Yemen*, BRITANNICA (Apr. 20, 2022), <https://www.britannica.com/place/Yemen>.

²⁰⁹ *Freedom in the World 2021: Yemen*, FREEDOM HOUSE, <https://freedomhouse.org/country/yemen/freedom-world/2021> (last visited Oct. 1, 2023).

²¹⁰ SCOTT WEINER, US COMM'N ON INT'L RELIGIOUS FREEDOM, RELIGIOUS FREEDOM CONDITIONS IN YEMEN 1 (2021), <https://www.uscirf.gov/sites/default/files/2021-09/2021%20Yemen%20Country%20Update.pdf>.

²¹¹ YEMENI CONSTITUTION art. 1.

²¹² *Id.* at art. 2.

²¹³ *Id.* at art. 3.

²¹⁴ English translated versions of Yemeni family law are not accessible. This paper's author was able to locate an Arabic version and use Google translate to translate it into English. However, this technology was inexpert, sometimes resulting in difficult to parse translations. In addition, the document was not fully updated with the most recent amendments. Therefore, in order to ensure proper understanding and accuracy, each citation to the original legislation is paired with a citation to a secondary source that confirms this author's interpretation of the content. Where the Arabic document has not been updated, secondary sources are cited exclusively. Anna Würth, *Stalled Reform: Family Law in Post-Unification Yemen*, 10 ISLAMIC L. & SOC. 12, 18-21,25-26 (2003).

²¹⁵ *Id.* at page 26.

²¹⁶ *Id.*

martial rape of pre-pubescent Yemeni girls.²¹⁷ Numerous attempts to establish a minimum marriage age have been attempted but none have succeeded, due to the power of a conservative minority who view the establishment of a minimum marriage age to be against *Shari'ah*.²¹⁸ That view was legitimized by Parliament's Sharia Legislative Committee in 2010, when they published an opinion stating that a pending proposal to set a minimum marriage age was against the Qur'an, Sunnah, Yemen's constitution, and children's interests.²¹⁹ However, amongst Islamic countries, Yemen is an outlier in its choice to not establish a minimum marriage age.²²⁰

The lack of a minimum marriage age, combined with factors such as poverty, instability, and conservative social attitudes, have led to staggering rates of child marriage in Yemen.²²¹ Approximately 52% of girls are married before the age of eighteen and 14% are married before age fifteen.²²²

ii. Consent

Article 10 of the Personal Status Law states that a marriage is invalid if either party is coerced to enter it.²²³ However, Article 23 provides that while women who have been previously married must give their consent to marry, a previously unmarried girl need only remain silent for her consent to be implied.²²⁴ This lack of an explicit consent requirement in all cases makes previously unmarried women and girls vulnerable to the risk of forced marriage, particularly because the presence of the bride at the closing of the marriage contract is not required.²²⁵ In regards to the consent of the *wali*, the guardian's

²¹⁷ *Id.*; HUMAN RIGHTS WATCH [HRW], "HOW COME YOU ALLOW LITTLE GIRLS TO GET MARRIED?" (Dec. 8, 2011), <https://www.hrw.org/report/2011/12/07/how-come-you-allow-little-girls-get-married/child-marriage-yemen>.

²¹⁸ HRW, *supra* note 217.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ REPUBLICAN DECREE LAW NO. (20) OF 1992 AD REGARDING PERSONAL STATUS [PERSONAL STATUS LAW] art. 10 (accessed in Arabic at https://yemen-nic.info/db/laws_je/detail.php?ID=11351); HUMAN RIGHTS WATCH [HRW], OBLIGATING OBEDIENCE: VIOLATIONS OF WOMEN'S RIGHTS IN YEMEN 10 (Jan. 2015), https://www.hrw.org/reports/yemen0115_web.pdf.

²²⁴ PERSONAL STATUS LAW art. 23; HRW *supra* note 223, at 10.

²²⁵ HRW *supra* note 223, at 10-11.

consent is required under Article 18, however in certain cases, a woman whose *wali* will not consent may petition the court for an exception.²²⁶

B. Malaysia

Due to its federal and multicultural nature, Malaysia is a decidedly more complicated yet moderate case study compared to Yemen. Malaysia is a federal constitutional monarchy with a parliamentary democracy comprised of thirteen states and three federal territories.²²⁷ Malaysia's federal constitution names Islam as the "religion of the federation" but the federal government produces secular law.²²⁸ Malaysia's religious composition is approximately 63% Muslim, with a shafi'i majority, which necessitates the institutionalization of Islamic legal authority.²²⁹ Therefore, the state legislature has jurisdiction over Islamic law and the personal and family law, including marriage law, of citizens "professing the religion of Islam."²³⁰ Islamic family law in the federal territories of Kuala Lumpur and Labuan are separately governed by the Islamic Family Law (Federal Territory) Act of 1984 (IFLA).²³¹ While the states are not within the jurisdiction of IFLA, they often use the act as a model for their own legislation.²³²

In addition, in a multicultural compromise characteristic of Malaysia, a dual court structure exists in which secular federal civil courts and religious state Syariah courts co-exist.²³³ A 1988 amendment to

²²⁶ PERSONAL STATUS LAW art. 18; HRW *supra* note 223, at 11.

²²⁷ *Country Reports on Human Rights Practices: Malaysia*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 1 (2011), <https://2009-2017.state.gov/documents/organization/186496.pdf>.

²²⁸ MALAYSIAN CONSTITUTION art. 3(1); Yvonne Tew, *The Malaysian Legal System: A Tale of Two Courts*, GEO UNIV. LAW CENTER 3 (2011)

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2944&context=facpub>.

²²⁹ *Share of Malaysian population in 2020 by religion*, STATISTICA (Feb. 2020), <https://www.statista.com/statistics/594657/religious-affiliation-in-malaysia/>.

²³⁰ MALAYSIAN CONSTITUTION art. 74(2) and Ninth Schedule List 2.

²³¹ ISLAMIC FAMILY LAW (FEDERAL TERRITORY) ACT [IFLA] sect. 1(1), 4.

²³² *Untitled Memorandum*, SISTER'S IN ISLAM, 1,

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5694&file=EnglishTranslation>.

²³³ Tew, *supra* note 228, at 4.

Malaysia's constitution established that the civil courts "have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."²³⁴

i. Capacity

Between 2010 and 2015, nearly 9,000 children were married in Malaysia.²³⁵ Of these children, approximately 6,268 were Muslim.²³⁶ This discrepancy is owed to the fact that the minimum marriage age for non-Muslim girls, as established by Article 10 of the Law Reform (Marriage & Divorce) Act 1976, is eighteen, or sixteen if authorized by the Chief Minister²³⁷, while the minimum marriage age for Muslim girls, legislated by each state, is sixteen.²³⁸ In addition, Syariah court judges can grant permission for girls younger than sixteen to marry.²³⁹ In 2015, a staggering 81% of all such requests were accepted.²⁴⁰ In the federal territories of Kuala Lumpur and Labuan, IFLA governs the capacity required to marry.²⁴¹ Section 8 of IFLA similarly sets the minimum marriage age for men at eighteen and girls at sixteen but states that younger children may marry with the written approval of the Syariah judge.²⁴² The act gives no guidance for what circumstances should justify judicial approval.

Instead of going through the lengthy and uncertain process of Syariah court approval, prospective groom(er)s wishing to make brides of even younger girls have discovered the loophole of cross-border weddings.²⁴³ The Guardian reported in 2018 on the case of forty-one-year-old Che Abdul Karim Che Hamid, who traveled from Malaysia to Southern Thailand to marry an eleven-year-old girl.²⁴⁴ This is just

²³⁴ MALAYSIAN CONSTITUTION art. 121(1a).

²³⁵ Ooi Kok Hin, *Child Marriages in Malaysia: Reality, Resistance and Recourse*, PENANG INSTITUTE, 1 (July 11, 2017), https://penanginstitute.org/wp-content/uploads/jml/files/issues/july_11_2017_OKH_download.pdf.

²³⁶ *Id.*

²³⁷ LAW REFORM (MARRIAGE & DIVORCE) ACT 1976 art. 10 (Malaysia).

²³⁸ *See e.g.*, ISLAMIC FAMILY LAW ENACTMENT 2003 [SELANGOR FAMILY LAW], sect. 8 (State of Selangor); Islamic Family Law Enactment 1983 [Negeri Family Law] art. 8 (Negeri Sembilan); Hin, *supra* note 235, at 2.

²³⁹ Hin, *supra* note 235, at 2.

²⁴⁰ *Id.* at 3.

²⁴¹ IFLA sect. 8.

²⁴² *Id.*

²⁴³ Hannah Ellis-Petersen, *The dark secret of Thailand's child brides*, GUARDIAN (Sept. 1, 2018), <https://www.theguardian.com/world/2018/sep/01/thailand-malaysia-muslim-child-forced-marriage>.

²⁴⁴ *Id.*

one example of what has become a booming business, with Thai imams charging sometimes four times as much to perform a wedding for Malaysian men seeking to skirt Malaysian legal processes.²⁴⁵ The minimum marriage age in the majority of Thailand is seventeen with parental permission, but in the southern majority Muslim provinces of Narathiwat, Pattani and Yalla, Islamic law is applied to family law matters.²⁴⁶ Therefore the classical Islamic minimum marriage age of nine, if the girl has reached puberty, applies.²⁴⁷

Lastly, it is worthwhile to point out a related issue of capacity; capacity for sexual relations. Section 375(g) of Malaysia's penal code states that regardless of whether consent is provided, sexual intercourse with a girl under sixteen years of age is rape.²⁴⁸ However, the same section also provides a nonsensical exception; if you marry the child first, the sex is no longer criminal.²⁴⁹ This is a secular statutory rape provision, not to be confused with the Islamic law crime of *zina*, illicit sexual relations, which is based on the propriety of sex before marriage not the girl's ability to consent.²⁵⁰ Malaysia's criminal law clearly reflects a recognition that a girl under sixteen is unable to consent to sexual relations, yet it unjustifiably dismisses that principle if she is married. It also begs consideration how lawmakers justify the fact that the intersection of federal criminal law and state Islamic family law creates the absurd proposition that Muslim girls under sixteen are not old enough to be able to consent to sexual relations but they are old enough to consent to marriage, a considerably weightier commitment which also naturally includes intercourse. The marital exception to Malaysia's statutory rape law, combined with the lack of minimum marriage age in Malaysian Islamic law, actively incentivizes child marriage by providing a legal loophole for what would otherwise be criminal sexual activity. In 2013, a forty-year-old

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ The president of the Islamic Council of Narathiwat, Safei Cheklah, stated that it is not advisable for children under eighteen to be married but said, "I have to speak based on Islamic principle, and according to Islam, the father can give permission for the girl to get married as long as she has achieved physical maturity." Ellis-Petersen, *supra* note 243.

²⁴⁸ PENAL CODE sect. 375 (Malaysia).

²⁴⁹ *Id.*

²⁵⁰ KAMALI, *supra* note 55, at 192.

Malaysian man was charged with the rape of a thirteen-year-old girl, but the prosecution dropped the case after he married her.²⁵¹ Mary Lee, a representative from Malaysian women's advocacy organization Sabah's Action Resource Group, identified this situation as just one example of a "worrying trend" in Malaysia.²⁵² Because the absolute minimum marriage age is already sixteen for non-Muslim girls, only Muslim girls will be vulnerable to this exception's consequences, which can be a lifetime of sexual abuse, particularly because Malaysia's penal code does not recognize marital rape.²⁵³

ii. Consent

Section 13 of IFLA states that a marriage shall not be recognized unless both parties to the marriage consent.²⁵⁴ This indicates the consent of the prospective bride is mandatory and precludes any legal basis for forced marriages.²⁵⁵ Section 13 also addresses the consent of the *wali* by stating that a marriage may not be recognized without the consent of either a woman's *wali* by *nasab*, her male relative, or the Syar'iah Judge acting as *wali Raja*, person given consent by the Sultan to act as *wali*.²⁵⁶ The consent of a *wali Raja* is only permissible when a *wali* by *nasab* does not exist, cannot be found, or refuses to give permission without sufficient reason.²⁵⁷ The various state Islamic family law codes replicate IFLA's provisions on these issues.²⁵⁸ While forced marriage is illegal in Malaysia, it is important to note that child marriages can often be forced marriages hiding in plain sight because parents' high level of

²⁵¹ Kate Hodal, *Malaysian rape accused marries 13-year-old alleged victim*, GUARDIAN (May 22, 2013), <https://www.theguardian.com/world/2013/may/22/malaysian-rapist-marries-victim-girl>.

²⁵² *Id.* See also, Beh Lih Yi, *Malaysian man charged with rape escapes jail after marrying 14-year-old victim*, REUTERS (Aug. 3, 2016), <https://www.reuters.com/article/uk-malaysia-women-crime-idUKKCN10F06H> (a similar case from 2016 in which a twenty-two-year-old man evaded a whipping and a thirty-year jail sentence by marrying the fourteen-year-old girl he was charged with raping. Subsequent marriage is not a legal defense to rape because the man was not married to the girl at the time of the crime. However, prosecutors often choose to use their discretion to drop rape cases when the man marries his minor victim).

²⁵³ Yi, *supra* note 252; Kasthuri Patto, *Malaysian Government's decision to keep to keep Section 375 of the Penal Code is a threat to women*, ASEAN PARLIAMENTARIANS FOR HUMAN RIGHTS (Nov. 9, 2020), <https://aseanmp.org/2020/11/09/malaysian-governments-decision-to-keep-section-375-of-the-penal-code-which-does-not-criminalize-marital-rape-shows-it-is-regressive-patriarchal-and-a-threat-to-women-from-all-walks-of-lif/>.

²⁵⁴ IFLA sect. 13.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See e.g., SELANGOR FAMILY LAW sect. 13; NEGERI FAMILY LAW sect. 13.

financial, legal, and psychological power over their children give them a particularly strong coercive influence to force children to marry. This is usually not done with malicious intent, as many parents believe marriage is the best option for their child for a number of financial, social, and safety-related reasons, but regardless of intent, the negative impacts on girls remain the same.²⁵⁹

VII. Conclusion

The importance of marriage in Islam is enshrined in the divine sources of the Qur'an and Sunnah, which jointly provide guidance on the issues of women and girls' capacity and consent to marry. Both historic and current Islamic scholars have applied their own reasoning to further uncover the legal requirements of marriage as embodied in traditional *fiqh* and the movement for marriage *fiqh* reform. The comparative analysis of Yemen and Malaysia's national marriage laws demonstrate that Islamic marriage law is extremely influential in some nations' legislation, but its content also varies considerably between countries. Islamic marriage law, particularly the issues of capacity and consent, is a complex area of jurisprudence which has significant consequence to the lives of all Muslims, but particularly women and girls. Existing *fiqh* on prospective brides' capacity and consent to marry has drifted somewhat from the guiding principles of Islam, resulting in negative effects for women and girls. However, the rich ongoing discussions about marriage law within the Islamic community demonstrates a continuing effort to align marriage practices with the guidance of the divine sources and the just principles of Islamic law.

²⁵⁹ *Why it Happens*, GIRLS NOT BRIDES <https://www.girlsnotbrides.org/about-child-marriage/why-child-marriage-happens/> (last visited Oct. 3, 2023).