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İslam Hukukunda Çocukluk ve Çocuk Evliliği

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Childhood and Child Marriage in Islamic Law

Abstract: Though the child marriage has been a social phenomenon known and practiced in different societies throughout history, it has recently been all the more offensive to modern sensibilities. Until the last two centuries, children did not enjoy an exceptional status entitling them to differential treatment before the judiciary in the European legal thought. On the other hand, Islamic law took pioneering steps in according children a special legal status. One can see that even the early books of Islamic jurisprudence were full of highly technical details on different stages of physical and mental development of human being along with legal provisions resulted from each stage. Despite this early awareness of child rights, the child marriage phenomenon was seen in both Islamic societies and Islamic law. Because Islamic child law has remained deeply influenced by the cultural aspects of the period in which it first emerged, and these aspects have continued to serve as the basis of child law in Islamic jurisprudence across the Muslim world. This study attempts to demonstrate some excessive interpretations through which jurists traditionally argued for child marriage and read the relevant verses more coherently with their textual context.

Summary: Developing a one-size-fits-all definition of the term "child" is more difficult than one might think. That is why there might be seen a palpable dissatisfaction among the scholars of childhood studies with a child definition made by any social discipline. On the other hand, Islamic law has from the very beginning had a detailed theory of child law. According to Islamic legal thought, humans pass through three stages of development between birth and adulthood: minority, puberty, and mental maturity. All the schools of Islamic law agree that children are minors [*saghīr*] from birth to puberty. Minors must have legal representatives to manage their possessions in their best interest. Jurists had a large consensus on a guardian's, and especially a father's and paternal grandfather's, authority to compel the minor children in his care (*al-wilāya al-mujbira*), such that he can even give them in marriage to whomever he sees fit. However, such a betrothal is perceived to be a preliminary contract that does not directly result in a joint marital life. In premodern Islamic history, only a few early scholars such as Ibn Shubruma (d. 144/761), ʾAbū Bakr al-Asamm (d. 200/816), and ʿUthmān al-Battī (d. 143/760) were categorically against the marriage of minor children.

In Ḥanafī opinion, girls and boys who have reached puberty with a sound mind (as being *āqil* and *āqila*), are then free of guardianship in terms of marriage, which means that they are able to conclude their marriage contract themselves. But the guardian still holds the right to proceed legally against marriage if he finds it inappropriate. The other three Sunnī madhhabs differentiate between male and female: while a male can make a marriage contract by himself after puberty a female remains perpetually under guardianship. Shāfiʿī school believes that the legal cause requiring guardianship (virginity) still exists, so, the guardian keeps holding his compulsory authority to marry girls off, and that obtaining her consent is just complimentary rather than necessary for the validity of her contract. It is not a requirement of marriage to acquire *rushd* or to complete the process of physiological maturation.

Traditional Islamic law has not exhibited any divergence from its pro-early marriage position until modern times. The 1917 Ottoman Decree of Family Law, issued a set of unprecedented rulings: First, in order to be capable of marriage, a male had to have reached the age of eighteen,

and that a female had to have reached the age of seventeen. A boy under the age of eighteen had to obtain a judge's permission to marry, and a girl under the age of seventeen was required to have both the consent of her guardian and the permission of a judge. It further added that a boy under the age of twelve and a girl under the age of nine could never be married off.

Although neither of logical context and syntactical structure serves them, jurists have used some Qur'anic verses (al-Nisā 4/3-6, al-Nisā 4/127, al-Talāq 65/4) in support of child marriage. However, this article tries to bring a more coherent interpretation to these verses. It also asserts that the Qur'an does not overtly facilitate the child marriage but, in fact, the scholars premise their pro-child marriage stance on some strained interpretations which are pretty acceptable to the cultural setting of their time.

The narrative about ʿĀisha's early marriage to the Prophet is another argument. This narrative is strongly believed to be authentic, however, very few jurists have referred to it arguably because they didn't want to talk about the privacy of prophet or they were critical about the authoritativeness of narration. Taking a closer look at the narrative one can notice a significant negativity at the turn of phrase. Because ʿĀisha talks about physiologically and psychologically adverse conditions surrounded her in a fashion pleading for mercy and empathy of the audience. According the details came up in the narrative, while she was innocently playing with her friends, ʿĀisha was suddenly taken out of the swing knowing nothing about what would happen next. Narrative seems to impose not only permissibility of child marriage but also overstates that children must be obedient and resilient for marriage even in inappropriate conditions. The narrative is technically a kind of *khabar al-wāhid* (one transmitter's report). So, even though it has a historiographical significance, it lacks the quality of being evidence for the religious provisions. Because she is not transmitting in this narrative an official statement of the prophet, so to say, on the issue; but she is talking about an event that she was exposed.

Keywords: Islamic Law, Child Marriage, Early Marriage, Betrothal, Child Law, Wilāya Mujbira, Guardianship, Child, Marriage, Qur'ān, Tafsīr.

İslam Hukukunda Çocukluk ve Çocuk Evliliği

Öz: Çocuk evliliği, tarih boyunca farklı toplumlarda bilinen ve uygulanan sosyal bir olgu olsa da son zamanlarda, modern duyarlılıkları giderek daha fazla rahatsız eden bir hal almıştır. Son iki asır öncesine kadar, Avrupa hukuki düşüncesinde çocuklar yargı önünde farklı bir muamele görmelerine imkan veren istisnai bir statüye sahip değildi. Diğer taraftan, İslam hukukunun çocuklara, özel bir hukuki statü kazandırma konusunda bazı öncü adımlar attığını söyleyebiliriz. Nitekim, en eski İslam hukuku kitaplarının bile, insanın fiziksel ve zihinsel gelişim aşamalarına ve her bir aşamada ortaya çıkan hukuki hükümlere dair son derece teknik ayrıntılarla dolu olduğunu görebiliriz. Ancak çocuk hakları konusundaki bu erken farkındalığa rağmen, çocuk evliliği olgusu hem İslam toplumlarında hem de İslam hukukunda kendini gösterebilmiştir. Çünkü, İslam çocuk hukuku, ilk ortaya çıktığı dönemin kültürel şartlarından ciddi şekilde etkilenmiştir. Üstelik bu kültürel şartlar, İslam dünyası boyunca İslam çocuk hukukunun temel zemini olma işlevini sürdüre gelmiştir. Bu çalışma, alimlerin çocuk evliliğini delillendirmek üzere yapageldikleri bazı

aşırı yorumları ortaya koymaya ve konuyla ilgili âyetleri metinsel bağlamıyla daha uyumlu bir şekilde okumaya çalışmaktadır.

Özet: Her bağlam için geçerli olabilecek, standart bir çocuk tanımı yapmak göründüğünden daha güçtür. Bu nedenle çocuk araştırmaları sahasında çalışan akademisyenlerin, muhtelif sosyal disiplinler tarafından yapılacak herhangi bir çocuk tarifi konusunda memnuniyetsizlik içinde olması doğaldır. Diğer yandan, İslam hukukunda baştan beri ayrıntılı bir çocuk hukuku teorisi mevcuttur. İslam hukuk düşüncesinde, insanlar doğum ile yetişkinlik arasındaki gelişim döneminde üç aşamadan geçerler: Çocukluk (küçüklük), buluğ ve rüşt. Bütün fıkıh mezhepleri, insanın doğumu ile ergenliği arasındaki dönemde küçük çocuk sayılacağı kanaatindedirler. Bu çocukların mallarının en iyi şekilde idare edilebilmesi için yasal temsilcileri bulunmak zorundadır. Fakîhler çocuğun velisinin, özellikle de baba veya baba tarafından dedenin, velâyeti altındaki küçük çocuklar üzerinde mücbir bir yetkisi olduğu (velâyet-i mücbire) konusunda geniş bir fikir birliğine sahiptirler. Buna göre veliler, velâyetleri altında bulunan çocukları uygun gördükleri kişilerle evlendirme yetkisine de sahiptirler. Fakat zaman zaman beşik kertmesi olarak da anılan bu uygulama bir ön sözleşmeden ibarettir. Yani bu sözleşme doğrudan doğruya fiziksel boyutları da olan müşterek bir evlilik hayatını meşru kılmamaktadır. Çünkü cinsel hayatın ancak buluğdan sonra gerçekleşmesi ön görülmektedir. Modernite öncesi İslam tarihi boyunca, İbn Şubrume (ö. 144/761), Ebû Bekr el-Esamm (ö. 200/816) ve Osman el-Bettî (ö. 143/760) gibi bir kaç fakih dışında küçük çocukların evlenmesine kategorik olarak karşı çıkan kimselere pek rast gelinmemektedir.

Hanefi mezhebinde, herhangi bir zihinsel özrü olmaksızın buluğa eren erkek ve kız çocuklar evlilik konusunda mücbir velâyetin kapsamı dışına çıkarlar. Bu, evlilik sözleşmelerini bizzat gerçekleştirebilecekleri anlamına gelmektedir. Fakat veli, uygunsuz bulduğu evliliğe karşı dava açarak bunu yargı yoluyla geçersiz kılma yoluna gidebilir. Diğer üç Sunnî mezhep ise erkek ve kız çocuklar arasında bir ayrım yapar: Buluğa eren erkek kendi evlilik akdini yapabilme hakkını elde ederken aynı durumdaki kız çocuklar velâyet altında kalmaya devam ederler. Şâfi'î mezhebine göre, velâyeti gerekli kılan illet (bekaret) hâlâ geçerliliğini korumaktadır. Dolayısıyla veli, kızları evlendirme konusundaki icbâri yetkisini elinde tutmaya devam etmektedir. Bu durumda kızın rızasının alınması, akdin geçerliliği için şart olmaktan ziyade sadece nezaket gereğidir. Rüşte ulaşmak veya fizyolojik olgunlaşma sürecini tamamlamak ise İslam hukukunda evlilik için şart görülmemiştir.

Modern zamanlara kadar geleneksel İslam hukukunun erken evlilik lehinde gösterdiği bu yaklaşımda herhangi bir değişiklik olmamıştır. 1917 yılında çıkan Hukuk-ı Aile Kararnamesi daha önce benzeri görülmemiş bir dizi düzenleme getirmiştir: İlk olarak, evlilik yaşı erkek için on sekiz kız için ise on yedi olarak belirlenmiştir. On sekiz yaşın altındaki erkeklerin hakimden evlenme izni alması; on yedi yaşından küçük kızların ise hem veli onayı hem de hakim iznine sahip olması zorunlu hale getirilmiştir. On iki yaşın altındaki erkekler ile dokuz yaşından küçük kızların ise asla evlendirilemeyeceği kararlaştırılmıştır.

Mantıkî bağlam ve sentaktik yapı elverişli olmamasına rağmen fakihler çocuk evliliğini desteklemek üzere bazı Kur'ân âyetlerine (Nisâ 4/3-6, Nisâ 4/127, Talâk 65/4) referansta bulunmuşlardır. Makale içeriğinde detaylı şekilde açıklandığı üzere zorlama yorumlamalarda bulunmuşlardır. Bu makale, söz konusu âyetlere daha tutarlı bir yorum getirmeye çalışmaktadır. Aynı şekilde, Kur'an'ın çocuk evliliğini kolaylaştırıcı bir tavır içerisinde olmadığını, çocukların

evlendirilebilmesi yönündeki yaklaşımların tarihsel ve kültürel şartlara bağlı olarak yapılan bazı zorlama yorumlara dayandığını ileri sürmektedir.

Hz. ʿÂişe'nin Hz. Peygamber ile oldukça erken bir yaşta evlendiğine dair nakledilen rivâyet de konuyla ilgili olarak ileri sürülen başka bir argümandır. Bu rivâyetin sahih olduğuna inanılmaktadır. Buna rağmen ilginç bir şekilde bu rivâyet çok az fakih tarafından kullanılmıştır. Bunun sebebi, fakîhlerin Hz. Peygamberin mahremiyetinden bahsetmek istememeleri olabilir. Rivâyetin hücciyeti konusuna kuşkuya kapılmış olmaları da mümkündür. Söz konusu rivâyete daha yakından bakıldığında, ifadedeki menfi üslup hemen dikkat çekmektedir. Çünkü rivâyette Hz. ʿÂişe, Hz. Peygamberle evlendiği günü anlatırken sürekli olarak fizyolojik ve psikolojik açıdan olumsuz koşullardan bahsetmektedir. Nitekim Hz. ʿÂişe birden bire oynamakta olduğu salıncaktan alınmakta ve kendisinin de bilmediği bir yere doğru götürülmektedir. Rivâyet, sadece çocuk evliliğinin cevazını ortaya koymakla yetinmemekte, sanki aynı zamanda çocukların uygunsuz koşullardaki evlilik taleplerine bile itaatkar olmaları gerektiğini salık vermektedir. İçerik yanında teknik olarak bakıldığında bu rivâyet, haber-i vâhiddir. Çünkü rivâyet, sadece Hz. ʿÂişe tarafından bilinebilecek detayları içermektedir. Tarihî açıdan bir öneme sahip olmasına rağmen dinî hükümlere kanıt olma niteliğinden yoksundur. Çünkü bu rivâyette, râvi konuyla ilgili Hz. Peygamber'e ait resmi bir açıklamayı nakletmemekte; sadece kendi zaviyesinden maruz kaldığı bir durumdan bahsetmektedir.

Anahtar Kelimeler: İslam Hukuku, Çocuk Evliliği, Erken Evlilik, Beşik Kertmesi, Çocuk Hukuku, Velâyet-i Mücbire, Velâyet, Çocuk, Evlilik, Kur'an, Tefsir.

1. INTRODUCTION: THE COMPLEXITY OF CONCEPTIONS OF CHILD AND CHILDHOOD

"All people, when they see a toddler about to fall into a well, feel compassion for the child,"[1] wrote Mencius (371–289 BC), the famous Confucian philosopher. However, conceptualizing the child as an academic subject seems much more complex and confusing than having one's heart go out to a toddler in peril.

In his seminal work, P. Ariès propounds that the idea of childhood did not exist in medieval societies, simply because, to him, there was no place for childhood in the medieval world.[2] This is not to say that children were neglected and deprived of their parents' affection,[3] but to suggest that an awareness of the particular nature of childhood was lacking. Ariès's thesis draws on French materials e.g. paintings, diaries and, school curricula; but was widely interpreted as common to most European[4] or Western[5] societies. English reformer T. Becon's question "what is a child or to be a child?" in 1550 might be considered an early mark of such a curiosity about child

1 Mencius, Trans. D. C Lau (New York: Penguin Books, 1970), 2A6.

2 Philippe Ariès, *Centuries of Childhood,* Trans. Robert Baldick (New York: Alfred A. Knopf. 1962), 33.

3 P. Ariès, *Centuries of Childhood,* 128.

4 Alan Prout, *The Future of Childhood* (London: RoutledgeFalmer, 2005), 9.

5 Linda A. Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900* (Cambridge: Cambridge University Press. 1983), 2.

as a study subject in the Western scholarship.[6] Ariès describes the realization that children are not merely miniature adults as discovery of childhood[7] while Cunningham chooses a bolder description in the title of his book *The Invention of Childhood.* On the other hand, some recent studies have challenged Ariès's thesis[8] and criticized him for drawing on limited sources.[9]

Even though the invention of childhood as a cultural category has triggered the contemporary progress,[10] there is still a palpable dissatisfaction among the scholars of the field with the way in which the social disciplines dealt with childhood.[11] The perpetual 'nature-culture dichotomy' is a primary difficulty one would inevitably find in making up an idea of child: On one hand, child has a physiological disposition that would undergo a process of development, what brings about a theory of "phases" or "stages".[12] On the other hand the childhood might be seen as a cultural construct visible in shifting attitudes toward and about child within a particular cultural environment.[13] In this regard, Cunningham said that if children themselves have in some ways changed over time, much more subject to change have been ideas about childhood.[14]

Perhaps it is because of the elusiveness of the term that, out of the three international reference texts adopted by United Nations that are particularly concerned with children's rights, neither the Geneva Declaration (1924) nor the Declaration of the Rights of the Child (1959) offer a definition of what a child actually is. Attempting to address this deficiency, the third and last text, the Convention on the Rights of the Child (1989), came up with the following definition: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." This age-based definition, in fact, is more circumspect than might appear. The Convention presumably added this proviso to allow countries that already had some other firmly established concepts of the child in their national legal codes, which are hard to change, to sign the Convention as a starting point for a true adaptation to come later.

2. THREE STAGES OF PHYSICAL AND MENTAL DEVELOPMENT OF HUMAN BEING AND CHILD MARRIAGE IN ISLAMIC LEGAL THOUGHT

Islamic law has from the very beginning had a detailed theory of child law drawn from the Qur'an, prophetic tradition, and common custom. It was pioneering in according children a

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6 Hugh Cunningham, *The Invention of The Childhood* (London: BBC Books, 2006), 12.

7 Ariès, *Centuries of Childhood,* 33.

8 Albrecht Classen, "Philippe Ariès and the Consequences: History of Childhood, Family Relations, and Personal Emotions: Where do we stand today?", *Childhood in the Middle Ages and Renaissance* (Berlin: Walter de Gruyter, 2017), 4-7.

9 Pollock, *Forgotten Children* 2-12; Also see; S. Shahar, *Childhood in the Middle Ages* (London: Routledge, Chapman & Hall, 1990).

10 Bruce Bellingham, "The History of Childhood Since the 'Invention of Childhood' Some Issues in the Eighties", *Journal of Family History* 13/3 (1988): 348.

11 Prout, *The Future of Childhood*, 1.

12 John Demos, "Developmental Perspectives on the History of Childhood." *The Journal of Interdisciplinary History* 2/2 (Autumn 1971): 318.

13 Sandra Smidt, *The Developing Child in The 21st Century* (London: Routledge, 2006), 4.

14 Cunningham, *The Invention of The Childhood,* 13.

special legal status; however, this theory of child law has remained deeply influenced by the cultural aspects of the period in which it first emerged. According to this classical perspective, humans pass through three well-marked stages of development between birth and adulthood: minority, puberty, and mental maturity. Scholars talked about marriage issues with relation to each of these stages.

2.1 Minority [*Sighar*] and Marriage

All the schools of Islamic law agree that children are minors (*saghīr*) from birth to puberty[15] and that during this period, they enjoy an exceptional status. First, the Islamic judicial system does not treat them like adults regarding corporal punishment.[16] Yet, any restitution for material damages or injuries resulting from a minor's offenses is deducted from his wealth and paid by their legal representatives.[17] Minors can inherit property, because getting inheritance is certain to be in their pure favor.[18] In fact, the heirs do not have right to disclaim their inheritance in Islamic law.[19] In addition, though they are encouraged to develop the habit of performing prayers and other religious rituals, they are not obliged to do so.[20]

Minors must have legal representatives to manage their possessions in their best interest and provide them with care, shelter, maintenance, and education. Because of the natural affection (*ghayra ṭabīʿīyya*][21] towards his children the father is the natural guardian of them. In case of the father's death, the duty of guardianship devolves upon other surviving male members of the family in a regular order, starting with male ascendants like paternal grandfather and great-grandfather, continuing with brothers, sons of brothers, paternal uncles, and extending to paternal cousins.[22] This order might vary from one madhhab to another.[23] As a rule, mothers and other female members of the family do not have a natural right of guardianship in terms of

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15 Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-Durr al-mukhtār* (Beirut: Dār al-Fikr, 2000), 5:153; Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-bārī sharḥ Saḥīḥ al-Bukhārī* (Beirut: Dār al-Maʿrifa. 1379h.), 13:9.

16 ʿAbdulazīz b. ʾAḥmad b. Muḥammad al-Bukhārī, *Kashf al-ʾasrār*, ed. ʿAbdullāh Mahmūd Muḥammad ʿUmar, 1. ed (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 4:339; ʾAḥmad Fatḥī Bahnasī, *al-Masʾūliyya al-jināīyya fī al-fiqh al-Islāmī* (Cairo: Dār al-Shūrūq, 1988), 270-271.

17 ʿAlī b. Muḥammad al-Pazdawī, *Kanz al-wusūl ilā maʿrifa al-ʾusūl* (Karachi: Matbaa Jaweed Press, nd.), 324.

18 Saʿduddīn al-Taftāzānī, *Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ*, ed. Dhakariā ʿUmeirāt, 1. ed (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), 2:339.

19 Ibn ʿĀbidīn, *Radd al-muḥtār*, 6:758; ʿAlī Ḥaydar, *Durar al Ḥukkām sharḥ Majalla al-ʾaḥkām*, ed. and Trans. Fahmī al-Ḥusaynī (Beirut: Dār al-Jīl, 1411/1991), 4:96.

20 ʾAbū al-Muẓaffar Manṣūr al-Samʿānī, *Qawāṭiʿ al-ʾadilla*, ed. Muḥammad Ḥasan Muḥammad Hasan, 1. ed (Beirut: Dār al-Kutub al-ʿIlmiyya, 1999), 2:376.

21 Shihābuddīn al-Qarāfī, *al-Dhakhīra*, ed. Muḥammad Hajjī (Beirut: Dār al-Gharb, 1994), 4:223.

22 ʿAbdulmalik b. ʿAbdullāh b. Yūsuf al-Juwainī, *Nihāya al-maṭlab fī dirāya al-madhhab*, ed. ʿAbdulaẓīm Mahmūd al-Dīb (Dār al-Minhāj, 2007), 12:45-46; ʾAbū al-Ḥasan al-Māwardī, *al-Ḥāwī fī fiqh al-Shāfiʿī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 4:208; Zayn al-ʿĀbidīn Ibn Nujaym, *al-Baḥr al-rāiq sharḥ Kanz al-daqāiq* (s.l., Dār al-Kitāb, nd.), 3:127; Muḥammad b. ʿAbdullāh al-Khurashī, *Sharḥ Muḥtasar al-Khalīl* (Beirut: Dār al-Fikr, nd.), 3:180.

23 For a compared account of the jurists' disagreement about the order of guardians, see; ʿAbdurrahmān al-Jazarī, *al-Fiqh ʿalā al-madhāhib al-ʾarbaʿa* (Beirut: Dār al-Turāth al-ʿArabī, 1969), 4:26-27.

marriage[24] except that a woman holds the right to keep her minor children upon divorce or her husband's death.[25] Nevertheless, this kind of custody (*ḥaḍāna*) is limited to the child's care and maintenance only, and does not give her the ability to enter into contracts on behalf of her child.[26]

A guardian may assign custodianship of the child to a trustworthy unrelated third party (*wasī*/custodian) in his lifetime or in the event of his death.[27] If a child's legal guardian dies without leaving behind another legal guardian or appointing a custodian, the competent court entrusts the custodianship to somebody else whom it views as eligible.[28] However whether their authority is restricted to providing the wards with care and control or extends making the decision of marriage on behalf them is disputed among the jurists.[29]

The practice widely known today as "betrothal in the cradle" might be seen by many ordinary Muslims as repugnant to human values. However, schools of Islamic law have had a strikingly large consensus on a guardian's, and especially a father's and paternal grandfather's,[30] authority to compel the minor children in his care (*al-wilāya al-mujbira*),[31] such that he can even give them in marriage to whomever he sees fit.[32] In their theory of *al-wilāya al-mujbira*, scholars refer to *ijbār* (compulsion) a lawful use of authority or influence to force a person to act as required.[33] Interestingly, the word *jabīra*, derived from the same root as *ijbār*, refers to a piece of wood or other material used to immobilize a broken bone, forcing it to stay in its proper place for healing.[34] This etymological background implies that *ijbār* is a necessary or, at least, permissible use of force to set things right. Accordingly, a guardian's authority to compel a minor in his care is

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24 ʿAbū al-Walīd Muḥammad b. ʾAḥmad Ibn Rushd, *al-Bayān wa al-taḥsīl*, ed. Muḥammad Hajjī (Beirut: Dār al-Gharb al-Islāmī, 1988), 4:311; Muḥammad al-Khatīb al-Shirbīnī, *al-ʾIqnāʿ fī ḥall elfāẓ ʾAbī shūjāʿ* (Beirut: Dār al-Fikr, 1415h.), 2:409.

25 Ibn Nujaym, *al-Baḥr al-rāiq*, 3:127.

26 ʾAḥmad b. Muḥammad al-Ṣāwī, *Bulgha al-sālik li ʾaqrab al-masālik*, ed. Muḥammad ʿAbdussalām Shahin (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 2:230.

27 ʿAlī Ḥaydar, *Durar al-ḥukkām*, 1:52.

28 Ibn Nujaym, *al-Baḥr al-rāiq*, 8:529.

29 Muḥammad b. ʾAbī Sahl al-Sarakhsī, *al-Mabsūt* (Beirut: Dār al-Maʿrifa, nd.), 4:405; ʿAlāuʿddīn al-Kāsānī, *Badāiʿ al-ṣanāiʿ fī tartīb al-shārāiʿ* (Beirut: Dār al-Kitāb al-ʿArabī, 1982), 2:252.

30 The scope and limits of compulsory authority of other guardians e.g. uncles and brothers are controversial among the juristconsults. See for an detailed account: ʿAbdulazīz al-Bukhārī, *Kashf al-ʾasrār*, 4:89; Muḥammad b. ʾAḥmad Ibn Juzay, *al-Qawānīn al-fiqhiyya* (s.l., s.n., nd.), 133-134; ʾAbū ʿUmar Yūsuf b. ʿAbdilllāḥ Ibn ʿAbdilbar al-Nemrī, *al-Kāfī fī fiqh ʾahl al-Madīna*, ed. Muḥammad M. ʾUḥayd (Riyad: Maktaba al-Riyād al-Hadītha, 1980), 2:523; Māwardī, *al-Ḥāwī*, 9:53.

31 As Ibn Nujaym puts, "guardians have an proper authority of marrying both male and female minors off", Zayn al-ʿĀbidīn Ibn Nujaym, *al-ʾAshbāh wa al-naẓāir* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 176: Ghazzālī also states that "father and grandfather enjoy a compulsory authority", Abū Ḥāmid al-Ghazzālī, *al-Wasīṭ fī al-madhhab*, ed. ʾAḥmad M. Ibrāhīm, Muḥammad M. Tāmer, 1. ed (Cairo: Dār al-Salām, 1417h.), 5:68.

32 Muḥammad Shaybānī, *al-Ḥujja*, 3:123; Ibn ʿAbdilbar, *al-Kāfī*, 2:521; Dhakariā al-ʾAnsārī, *ʾAsnā al-maṭālib fī sharḥ rawḍ al-ṭālib* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 4:164.

33 For comparability of the power of guardians to that of judges, see; Kāsānī, *Badāiʿ*, 2:316.

34 ʾAbū Bakr Muḥammad b. el-Ḥasan Ibn Duraid, "Jabr", *Jamhara al-lugha*, ed. Ramzī Munīr Baʿalbakī, 1. ed (Beirut: Dār al-ʿIlm li al-Malāyīn, 1987), 1:265.

considered very similar to the sanction power of judges. Incidentally, juristconsults use the term *mulzima* (legally-binding) too instead of *mujbira* (compulsory).[35]

The child's consent to such a marriage is not required, for he or she is not at a proper age to evaluate benefits or harms of such a deal[36], whereas the father, having both life experience and an 'unquestionable compassion' (*shafaqa jaliyya*)[37] for his child, is eligible to make decisions about many aspects of his child's life, including marriage. However, such a betrothal is perceived to be a preliminary contract that does not directly result in a joint marital life. That is why the guardian cannot hand over (*taslīm*) the child to the other party before she reaches puberty, for only after she reaches puberty can they have an intimate relationship.[38] But it is important to note that the children who have reached puberty do not have the right to rescind (*khiyār al-bulūgh*) the contract made by their fathers.[39]

Though they never acquired a considerable following at any point in premodern Islamic history, a few early scholars such as Ibn Shubruma (d. 144/761), ʾAbū Bakr al-Asamm (d. 200/816), and ʿUthmān al-Battī (d. 143/760) are reported to have been categorically against the marriage of minor children.[40] Ibn Ḥazm agrees with them on males but not females.[41] Al-Sarakhsī (d. 483/1090), in a chapter he composed clarifying the Ḥanafī perspective on child marriage, sums up the arguments of Ibn Shubruma and al-'Asamm as follows:

> "The natural purpose of marriage is obtaining sexual satisfaction. Also, its religio-legal [*sharʿī*] purpose is reproduction. Being a child, however, negates both purposes. ... A marriage contract made for perpetuity is intended to require its legal consequences only after puberty. Thus, nobody has right to confine children (to marriage) before their time (of majority), for there will be no guardianship authority over them after the puberty."[42]

For al-Sarakhsī, these arguments are so foolhardy that he adds: "'Abū Bakr al-'Asamm must have been deaf [*al-'Asamm* literally means 'deaf'], for he seems not to have heard the hadiths" about the prophet's marriage to ʿĀisha when she was six years old and his bedding her when she reached the age of nine, not to mention other narrations about the early marriage practices of the prophet's companions.[43]

Ḥanafī scholar al-Zaylaʿī (d. 743/1342) writes that the permissibility of child marriage was reportedly accepted by ʿUmar, ʿAlī, the ʿAbādila (four highly respected jurists named ʿAbdullāh who were all companions of the prophet), and ʾAbū Hurayra, whose conviction alone is sufficient.

35 al-Kāsānī, *Badāiʿ Badāiʿi*, 2:316.

36 Ibn NujaymNujaim, *al-Baḥr al-rāiq*, 3:118.

37 al-Qarāfī, *al-Dhakhīra*, 4:223.

38 Ibn ʿĀbidīn, *Radd al-muḥtār*, 3:66.

39 al-Shaybānī, *al-Ḥujja*, 3:141.

40 Muḥammad ʾAbū Zahra, *al-ʾAḥwāl al-shakhsiyya* (s.l.:Dār al-Fikr al-ʿArabī, 1956), 109.

41 ʾAbū Muḥammad Ibn Ḥazm, *al-Muḥallā bi al-āthār* (Beirut: Dār al-Fikr, nd.), 9:44-45.

42 al-Sarakhsī, *al-Mabsūt*, 4:212.

43 al-Sarakhsī, *al-Mabsūt,* 4:212.

He also mentions al-Karkhī's claim that all the companions were agreed on the permissibility of minors' marriage.[44]

2.2. Puberty [*Bulūgh*] and Marriage

Historically, puberty in nearly all societies has been one of the markers of the end of childhood.[45] In Islamic Law, puberty (*bulūgh*), relates to physical changes rather than psychological maturation. Pubescent boys and girls (*bāligh* and *bāligha*), if they are mentally healthy (*āqil-āqila*), are considered majors (*kabīr-kabīra*) in Islamic Law.

Children are recognized as having reached puberty in one of two ways: The first involves signs of physiological changes to their bodies, such as having wet dream and gaining a capacity of ejaculation (*al-inzāl*) or actual impregnation (*al-iḥbāl*) for a boy as well as starting to menstruate, having wet dream and being pregnant for a girl.[46] Having wet dream and menstruation are recognized as true and valid markers of puberty only after the age of nine years for girls and the age of twelve years for boys. Earlier signs are not taken into consideration.[47] The second is reserved for those children who are considerably late in displaying these signs; in such cases, a child is deemed to have reached puberty when he or she turns a certain age. According to ʾAbū Ḥanīfa, the onset of puberty may take until the age of eighteen for boys and seventeen for girls, but not no longer.[48] However, in the most commonly accepted opinion among the Ḥanafī jurist-consults, ʾAbū Yūsuf and Muhammad al-Shaybānī[49] deem the age of fifteen as the maximum age of puberty for both genders in an agreement with Shāfiʿīs[50] and Ḥanbalīs.[51] The juristconsults of the Imāmiya mostly tend to set the ages of fifteen and nine as the maximum limits for boys and girls, respectively.[52] Mālikī scholars differ in that they offer a longer list of signs of physiological changes to the body that includes such things as the growth of pubic hair, body odor, and voice changes.[53] In cases where none of these signs develop, the Mālikī juristconsults consider the age of eighteen as the age of majority for both males and females.[54]

The International Islamic Fiqh Academy,[55] sets the maximum age for the onset of puberty at fifteen years. They state that pubescent boys and girls are religiously responsible for performing prayers and rituals; however, in terms of criminal or fiscal acts, administrative powers or public authorities are entitled to make decisions on the age of puberty (that brings responsibility

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44 al-Zaylaʿī, Tabyīn, 2:121.

45 Cunningham, *The Invention of The Childhood*, 13.

46 Ibn Nujaym, *al-Baḥr al-rāiq*, 8:96

47 ʿAlī Ḥaydar, *Durar al-ḥukkām*, 2:633.

48 Ibn Nujaym, *al-Baḥr al-rāiq*, 8:96: Fakhruddīn ʿUthmān b. al-Zaylaʿī, *Tabyīn al-ḥaqāiq sharḥ Kanz al-daqāiq* (Cairo: Dār al-Kitāb al-Islāmī, 1313h.), 4:33.

49 al-Zaylaʿī, *Tabyīn*, 4:33.

50 Muḥammad b. ʾIdrīs al-Shāfiʿī, *al-ʾUmm* (Beirut: Dār al-Maʿrifa, nd.), 1:87.

51 ʿAbdurraḥmān Ibn Qudāma, *al-Sharḥ al-kabīr* (Beirut: Dār al-Kitāb al-Arabī), 4:512.

52 Ḥusayn b. Yūsuf b. ʿAlī al-Ḥillī, *Mukhtalaf al-Shīʿa*, 2. ed (Qom: s.n., 1423h.), 5:451.

53 al-Khurashī, *Sharḥ Muḥtasar al-Khalīl*, 5:291.

54 al-Khurashī, *Sharḥ Muhtasar al-Khalīl*, 5:291.

55 A modern fatwa institution working as a subsidiary organ of Organization of Islamic Cooperation.

to the subjects).[56] Intriguingly, this fatwa does not reveal anything about marriage and its relation to the age of puberty.

To the Ḥanafi school, the legal cause (ʿilla) of imposition of guardianship over the minor children under the age of seven is the absence of their mental capacity (*adam al-aql*) and after the age of seven the legal cause becomes not absence but inadequacy of it (*aw nuqsānuh*),[57] while the Shāfiʿī scholars tend to see the virginity (*bikāra*) for girls as the cause requiring guardianship.[58] Therefore, in Ḥanafī opinion, girls and boys who have reached puberty with a sound mind (as being *āqil* and *āqila*), are then free of guardianship in terms of marriage, which means that they are able to conclude their marriage contract themselves.[59] But the guardian still holds the right to proceed legally against marriage if he finds it inappropriate.[60]

The other three Sunnī madhhabs differentiate between male and female: while a male can make a marriage contract by himself after puberty a female remains perpetually under guardianship.[61] Shāfiʿī school believes that the legal cause (virginity) still exists, so, the guardian keeps holding his compulsory authority to marry girls off, and that obtaining her consent is just complimentary rather than necessary for the validity of her contract.[62]

As a conclusion to the views above, it is not a requirement of marriage to acquire *rushd* or to complete the process of physiological maturation that starts with the first signs of puberty and usually finishes toward the age of twenty. A male child who has only just reached puberty is considered to be able both to make his own decision on the issue of marriage and to competently handle family issues by himself, even if he remains ineligible to dispose of his own property because he has not yet reached mental maturity (*rushd*). While mental maturity is regarded as necessary for the validity of his financial decisions, it is not a prerequisite for any marriage decision. On the other hand, a female child who is not yet eligible to make the decision to marry on her own or to watch over her own property may nevertheless be placed into a marriage by her guardian. This picture seems to assume that the responsibilities of marriage and family are much easier to bear than those of wealth.

2.3. Mental Maturity [Rushd] and Marriage

Referred to as *rushd* in Islamic law, acquiring mental maturity is the last stage of the human being's developmental process and serves as the marker that one is able to manage his or her affairs and be considered fully responsible before the law. In Arabic, *rushd* means to have a quality by which one can find the right path and act reasonably.[63] As a legal term, it denotes being

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56 Academy's decision dated July 9-14, 2007 and numbered 168 (18/6).

57 al-Sarakhsī, *al-Mabsūt*, 24:156: Ibn Nujaym, *al-Baḥr al-rāiq,* 3:127.

58 al-Māwardī, *al-Ḥāwī*, 9:38.

59 Ibn Nujaym, *al-Baḥr al-rāiq*, 3:117.

60 al-Sarakhsī, *al-Mabsūt*, 5:13.

61 al-Māwardī, *al-Ḥāwī*, 9:38.

62 al-Māwardī, *al-Ḥāwī*, 9:52; Ibn Nujaym, *al-Baḥr al-rāiq*, 3:127; Ibn Qudāma *al-Sharḥ al-kabīr*, 7:426; ʿAlī al-Ṣaʿīdī al-ʿAdawī, *Ḥāshiya al-ʿAdawī ʿalā Kifāya al-ṭālib*, Ed. Yūsuf M. al-Biqāī, (Beirut: Dār al-Fikr, 1412), 2:96. Māwardī, *al-Ḥāwī*, 9:52.

63 Muḥammad b. Mukram Ibn Manẓūr, "Rushd", *Lisān al-ʿArab* (Beirut: Dār Sādir, 1414), 3:175-176.

mentally mature as sufficiently as to manage one's property.[64] However the Shāfiʿī juristconsults insist that one must also be pious in order to be seen as having *rushd*.[65]

Rushd brings the subjects in an independence of decision-making about their commercial activities only. This is for a simple reason that puberty, as outlined above, is already treated as a sufficient condition for marriage. Thus, the definition of *rushd* has been given here just to complete the overall picture of developmental process in Islamic law and question why the concept of *rushd* has been neglected as a criteria for establishing eligibility or capability to marry.

Traditional Islamic law has not exhibited any divergence from its pro-early marriage position until modern times. Even a considerably late draft of the Personal Status Code (*al-ʾAḥkām al-Sharʿiyya fī Aḥwāli's-Sakhsiyya*) prepared during the years 1869–1876 by Qadrī Pasha in Egypt—though this code never achieved legal validity—espoused the permissibility of the minors' marriage. *al-ʾAḥkām al-Sharʿiyya* unequivocally stated that the father, the grandfather, and other guardians have authority to place minor males and females in a marriage that is compulsory within a specific set of conditions.[66]

A dramatic shift of perspective on child marriage occurred only after some external influences began to be felt in the Muslim world: A declaration laying out the reasons why the Ottoman Empire had declined against contemporary Western civilization and offering a remedy to the setback, the *Gülhane Hatt-ı Şerifi* (The Supreme Edict of the Rose Garden) of 1839, inaugurated a reform period (*Tanzimat*, 1839-1856) in the empire. Among the many reforms it called for was the codification of law. Because of political rivalry among the governmental elite, the codification movement alternated between the adaptation of Western codes and the transformation of Islamic law from customary to written law. The first Islamic legal code, the *Majalla* (1877), was based on Ḥanafī jurisprudence only. The 1917 Ottoman Decree of Family Law, however, benefited from multiple schools of law and issued a set of unprecedented rulings: First, in order to be capable of marriage, a male had to have reached the age of eighteen, and that a female had to have reached the age of seventeen.[67] A boy under the age of eighteen had to obtain a judge's permission to marry,[68] and a girl under the age of seventeen was required to have both the consent of her guardian and the permission of a judge.[69] It further added that a boy under the age of twelve and a girl under the age of nine could never be married off.[70]

Issued during the demanding political and social circumstances of World War I, the Decree of Family Law was a more result of external challenges than it was of the internal dynamics of traditional Islamic law. These factors included the feminist movement; Westernization; the new, mixed (religio-secular) character of the legal system; and a multitude of insoluble social

64 Ibn ʿĀbidīn, *Radd al-muḥtār*, 6:150; ʿAlī Ḥaydar, *Durar al-ḥukkām*, 2:274.

65 Ismāʿīl b. Yaḥyā al-Muzanī, *al-Mukhtasar*, in Shāfiʿī's *al-ʾUmm*, 8:92-443 (Beirut: Dār al-Maʿrifa, 1990), 8:209; al-Māwardī, *al-Ḥāwī*, 6:349.

66 Article 44, p. 13.

67 Article 4.

68 Article 5.

69 Article 6.

70 Article 7.

problems. Strictly speaking, family law was the field of law that was best entrenched in the recesses of society, the most conservative, and the last to be codified.

Most of the Muslim-majority countries subsequently adopted a considerable number of secular laws in addition to the traditional Islamic laws to set a minimum age for full competence in marriage. That was an innovation since the jurists had never discussed the imposition of a minimum age for post-puberty marriage.[71] Yet, the common people continued to turn to the traditional religious law of former periods. Interestingly, 'Abū Zahra credited issuance of a law, in Egypt in 1933, ordering judges to dismiss with prejudice the claims for underage marriages to the impact of prior familiarity with the above-mentioned anti-child marriage scholars[72] rather than secular effect coming along in the country.

3. INTERPRETATIVE OPERATIONS LEGITIMIZING CHILD MARRIAGE

3.1. Overinterpretation of al-Nisā 4/3

One Qur'anic verse jurists use in support of child marriage al-Nisā 4/3 is generally understood and translated as follows:

> "And if you fear that you will not deal justly with the *orphan girls (yatāmā),* then marry *those that please you of [other] women (mā tāba lakum min al-nisā),* two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. *That is more suitable that you will not do injustice (zālika adnā ʾallā taʿūlū).*"

In doing so, jurists bring the following explanation to the verse: [One normally can marry *an orphan minor girl* who is still under guardianship; however, it is very difficult to do that in a just fashion. After all, - according to what reported from ʿĀisha as the reason this verse was revealed, - some people had married girls who were under their own guardianship by taking a decision of marriage on behalf of parties, themselves and minor girls.[73] This caused an injustice the verse mainly talked about. That is why men were ordered to take an alternative way by marrying other women that would *please them*. This is a better behavior for a *man to not be unjust*. However, it means that if the requirement of justice is met by the man he can marry a minor girl.]

Though the both logical context and syntactical structure of the verse refute this explanation, all the jurisprudential schools have kept holding it. We will be dealing with each of these three expressions:

3.1.1. *"Yatāmā"*

The word *yetāmā* is a plural form of the masculine word (mudhakkar) *yatīm* (male orphan). As a rule in Arabic, the plural form of a masculine word may also include female ones if the context requires it. But a masculine plural word does not mean the females only keeping the males out, unless there is an exceptional literary purpose to do that. Accordingly, a reader is not

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71 Judith E. Tucker, *Women Familiy and Gender in Islamic Law* (Cambridge: Cambridge Univ Press, 2008), 72.

72 ʾAbū Zahra, *al-ʾAḥwāl al-shakhsiyya*, 109.

73 Muḥammad b. al-Jarīr al-Ṭabarī, *Jāmiʿ al-bayān ʿan taʾvīl āy al-Qurʾān,* ed. ʾAḥmad Muḥammad Shākir, 1. ed (Beirut: al-Risāla, 2000), 7:531.

expected in his understanding to restrict the meaning of *yetāmā* to the female orphans alone as far as the word works for meaning both genders.

The word *yatāmā* is mentioned three times in the first six verses of al-Nisā in the same context in which one is ordered to avoid doing any kind of injustice towards the orphans, males or females. In the first place al-Nisā 4/2 ordered the guardians to "give to the orphans their properties", then al-Nisā 4/6, just a few lines below, said: "And test the orphans [in their abilities] until they reach [the age of] marriage." It is obvious that the context has not changed and that both male and female orphans are included in the word *yetāmā*. However, overwhelming majority of jurists are taking al-Nisā 4/3, which is found in the middle of those verses, out of the above mentioned context in three steps: First, they are restricting *yatāmā* in this verse to "the orphan girls" believing that the word *yatāmā* in al-Nisā 4/3 cannot include male ones; because it recommends the men to marry [other] women if they get concerned that they might do injustice to the orphans (*yatāmā*). Though the Qur'an does not specify the kind of injustice, scholars tend to see it as linked with marrying them, relying on the second part of the ʿĀisha's report: "People asked the Prophet for an explanation to this verse [al-Nisā 4/3]. So Allah sent down the verse [127 of al-Nisā] starting with "they request from you, [O Muhammad], a ruling concerning *women*."[74] So, in those scholars' understanding, Allah responded to the question about the orphans of al-Nisā 4/3 by talking about "orphan women" in al-Nisā 4/127. Accordingly, the context of al-Nisā 4/3 is being determined by the al-Nisā 4/127[75] which follows up:

> "Allah gives you a ruling about them and [about] what has been recited to you in the Book concerning the orphan women (*yetāmā al-nisā*) to whom you do not give what is decreed for them - and [yet] you desire to marry them - and concerning the oppressed among children and that you maintain for orphans [their rights] in justice."

As explained above, guardians had been given a license to force the minors into the marriage and, by this interpretation, the ones who want to marry minor orphan girls, are obtaining a permit to do that.[76] At this point, it wouldn't be so difficult to take the second step by using the jurisprudential analogy (*Qiyās*) and say that if the orphan girls might be given in a marriage despite their vulnerability to injustice, the non-orphan girls having a better chance of protection would be even more fit for an early marriage. Al-Jassās commented on this approach primarily depending on ʿĀisha's report and Ibn Abbas' interpretation to al-Nisā 4/3 as follows: "We don't know anybody disapproving of this opinion among the first generations [salaf]."[77] In short, it

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74 Muḥammad b. ʿUmar Fakhruddīn al-Rāzī, *Mafātīḥ al-ghayb* (Beirut: Dār ʾIḥyā al-Turāth al-Arabī, 1420h.),

75 Muḥammad ʾAbū Mansūr al-Māturīdī, *Taʾwīlāt al-Qurʾān*, ed. Majdī Bāsalūm, 1. ed (Beirut: Dār al-Kutub al-ʿIlmiyya, 2005), 3:7: Muḥammad Rashīd b. ʿAlī Ridā, *al-Manār* (Egypt: al-Hayʾah al-Misriyya al-ʿĀmma, 1990), 4:282.

76 Ibrahīm b. al-Sirrī al-Zajjāj, *Maʿānī al-Qurʾān*, ed. ʿAbduljalīl ʿAbduh Shalabī, 1. ed (Beirut: Alam al-Kutub, 1988), 2:11; Muḥammad al-ʾAmīn al-Shanqītī, *ʾAdwāuʾl-bayān fī īdāh al-Qurʾān bi al-Qurʾān* (Beirut: Dār al-Fikr, 1995), 1:222.

77 ʾAḥmad b. ʾAbū Bakr al-Jassās, *Aḥkām al-Qurʾān*, ed. Muḥammad ʿAbdussalām Shāhīn, 1. ed (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 2:65.

becomes a rule that when Qur'an speaks of women in a context of marriage it means the both major and minor females.[78]

As the third step, they are claiming that even the orphan women (*yatāmā al-nisā*), al-Nisā 4/127 talks about in a context of marriage, are no more than 'minor girls',[79] because one cannot be described as an orphan after puberty according to a narrative from prophet.[80] By doing so, they are changing the meaning of a very well-known word *Nisā* (women) in Arabic[81] to support their perspective. Al-Harrāsī says that the word *Nisā*, normally referring to the women only, has happened to contain the minor children as well due to a consensus (ijmāᶜ) established among the Muslim scholars.[82]

In short, out of these interpretations, the word *yatāmā* (both male and female orphans) has come to take the form "orphan girls" in the first step; then in the second step, the word "orphan" has been taken away while the word "girls" preserved. Although Qur'an explicitly spoke of "orphan women", in the third step, the scholars tend to understand that expression as "orphan minor girls".

In fact, the verse 3 of al-Nisā normally urges the Muslim community to keep away from all forms of injustice to the orphans, males or females, majors or minors, during marriage or outside marriage. Hence, even they are sided with child marriage, many of early scholars, like Mujahid, Muqātil, Saīd b. Jubair, Daḥḥāk and others reportedly espoused the view that the word *yetāmā* in this verse covers both genders.[83]

3.1.2. *"Mā tāba lakum min al-nisā"*

The literal translation of this expression is "the women whom you consider good and nice" what is paraphrased by the translators of Qur'an as "women of your choice", "women who are pleasing you" and "those that please you of [other] women". Feeling that advising men to marry *good and nice* women who can please the men does not bring any normative consequence, some scholars entertained the possibility that the description *good and nice* should be replaced with a more technical one, which is "permissible [women] for marriage"[84], due to fact that the verb *tāba* is coming from the same root with *tayyibāt* which literally means "nice and good things" and refers in Qur'an to "the permissible foods and drinks". (al-Baqara, 2/57) *Tayyibāt* is also used in Qur'an as a description of "women with chastity, who has not involved in fornication". (al-Nūr

78 al-Jassās, Aḥkām al-Qurʾān, 2:66.

79 ʾAbū Dāwūd Suleymān b. al-ʾAshᶜath, *al-Sunan*, "Wasāyā", 9.

80 al-Jassās, ʾAḥkām al-Qurʾān, 2:66; ʾAbū ᶜAbdullāh Muḥammad b. ʾAḥmad al-Qurṭobī, *al-Jāmiᶜ li Aḥkām al-Qurʾān*, ed. ʾAḥmad al-Bardūnī, Ibrahm ʾUṭfayyesh, 2. ed (Cairo: Dār al-Kutub al-Misriyya, 1964), 5:8.

81 ʾAbū Muḥammad ᶜAbdullāh b. Muslim b. Qutayba al-Dīnawarī, *al-Jarāthīm* (Damascus: Vazâra al-Thaqāfa, nd.), 1:277-287.

82 al-Harrāsī, *Aḥkām al-Qurʾān*, 2:313.

83 ʾAbū al-Ḥajjāj Mujāhid, *Tafsīr al-Mujāhid*, ed. Muḥammad ᶜAbdussalam ʾAbū al-Neil. 1. ed (Egypt: Dār al-Fikr, 1989), 266; ʾAbū al-Ḥasan Muqātil b. Suleymān, *Tafsīru Muqātil*, ed. ᶜAbdullāh Maḥmūd Shahhāta, 1. ed (Beirut: Dār ʾIḥyāal-Turāth, 1423h.), 357; Ṭabarī, *Jāmiᶜ al-bayān*, 7:540.

84 ʾAbū Muḥammad al-Ḥusayn al-Baghawī, *Maālim al-tanzīl*, ed. ᶜAbdurrazzaq al-Mahdi, 1. ed (Beirut: Dār al-ʾIḥyā al-Turath al-ᶜArabī, 1420h.), 1:564.

24/26) However, in general, the jurists did not make any reference to chaste women in their dealing with al-Nisā 4/3, because, in the opinion of overwhelming majority of scholars, a woman's prior indecent relationship does not render her religiously or legally ineligible for marriage.[85] Thus, *mā tāba lakum min al-nisā* must not mean the chaste women.

I think that we have a good cause to seek the meaning of the expression "*tāba lakum"* in its idiomatic structure rather than far implications of a single verb, *tāba,* since the same phrase is coming up right in the next verse as well with a slight difference of conjugation but without any difference of context: "And give women their dowries as a gift, but if they of themselves *be pleased to give up to you a portion of it* [*fa in tibna lakum an shay*], then eat it with enjoyment and with wholesome result." (al-Nisā, 4/4.)

For any phrase used at two consecutive places within the same context in the whole Qur'an must be initially expected to refer to the same thing, the meaning of *mā tāba lakum min al-nisā* comprises "the women who would be pleased to *give up willingly".* This could be paraphrased as "women who would do you favor". Thereby, what is *good and nice* here is their conduct (generosity), but not themselves. This meaning would be more compatible with the third expression in the verse.

3.1.3. *"Zālika adnā ʾallā taʿūlū"*

Actually, the expression *ʾallā taʿūlū* has two meanings in Arabic; being one "to not be unjust" and another "to not be dependent and needy". Ibn Manzūr expresses that most of the commentators of Qur'an adopted the first one, while al-Shāfiʿī takes a stand for the second meaning of the expression. Ibn Manzūr also mentions how al-Kisāī and al-ʾAzharī ambitiously agreed with al-Shāfiʿī.[86] Here is a point that as far as the expression lent itself linguistically to two plausible interpretations, the context is what would fix the meaning. So, the majority of the scholars has been more likely to take the first meaning due in no small part to that they did not see any significance for the second meaning within this context. However, when it comes together with the interpretations that I propose for the first two expressions they will constitute a more meaningful and coherent whole picture. Accordingly, the total message of the first five verses of al-Nisā will be as follows:

1. "O mankind, fear your Lord, who created you from one soul and created from that its mate and dispersed from both of them many men and women, and fear Allah through whom you demand your mutual [rights], and [do not cut the relations of] the wombs (kinship). Surely, Allah is Ever and All-Watcher over you."

The surah starts with an emphasis on the fact that human reproduction involves wedlock of man and woman. This natural phenomenon is to be realized through marriage and family, however *the mutual rights* must be respected in the marriage process. This preliminary consideration determines the context that the upcoming coverage would go around.

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[85] al-Qurṭubī, *al-Jāmiʿ*, 12:167-170.

[86] Ibn Manẓūr, *Lisān al-ʿArab*, "*ʿAwl"*, 11:482; Shāfiʿī, *al-ʾUmm*, 5:44.

2. "And give to the *orphans* their properties and do not substitute the defective [of your own] for the good [of theirs]. And do not consume their properties into your own. Indeed, that is ever a great sin."

Orphans, male or female, are such a vulnerable section of society to financially abusive behaviors of the elders including parents, husbands and other relatives. This verse orders legal representatives to not see orphans' property as a source of enrichment even in a desperate situation.

3. "And if you fear that you will not deal justly with the *orphans* [in terms of governing their property, by marrying marriageable ones, which are not minors, or other ways], then marry those *whoever willingly endows you*, as second or third or fourth [to support your life]. But if you fear that you will not be just [with them as to spousal relations], then [don't marry those women for their money merely, but marry only] one [free] woman or those your right hand possesses. That is more *suitable that you will not be needy and dependent* [or that you will not do injustice to them]."

Thus, the overall message becomes that: if you are in such poverty that you cannot sustain yourself individually or along with your current family do not covet the riches of orphans under your protection, rather you may avoid increasing expenditures by marrying one woman or relatively low-profiled a slave woman. However, if you are not economically self-sufficient, you can get married with more women who might be generous with you and support you with livelihood.

4. "And [normally,] give women their dowries as a gift, but if they of themselves be *pleased to endow you with a portion of it* [in such situation of poverty, for instance], then eat it with enjoyment and with wholesome result."

The men who are supposedly responsible for financial support of the family also have to please the women by giving a gift specified during the marriage contract, however if the case is that the man is not rich enough to do that, they can take what spouses have given up willingly.

5. "And do not give the weak-minded your [their] property, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness."

To make a case for child marriage, jurists took charge of another excessive interpretation at the upcoming verse, al-Nisā 4/6, by deviating from their methodological principles they adopted in their discussion about whether a word instanced in Qur'an and hadiths should be primarily understood through its lexical meaning or technical meaning. The word *nikāḥ* in the Arabic language normally refers to a sexual intercourse,[87] but as a legal term, it stands for the marriage contract. In the Ḥanafī opinion, the word *nikāḥ* must be understood based on its lexical meaning, unless a noteworthy presumption requires taking for the technical meaning.[88] Majority

[87] ʾAbū ʿAbdurraḥmān al-Khalīl b. ʾAḥmad, "Nikāḥ", *al-ʿAyn* (s.l.: Dār al-Hilāl, nd.), 3:63.

[88] al-Jassās, *Aḥkām al-Qurʾān*, 2:142.

of non-Ḥanafī jurists, on the other hand, prioritize the legal meaning of *nikāh*, particularly in absence of findings making another way necessary or possible.[89]

Conspicuously, at their handling with the following verse, they left both lexical and legal meanings of *nikāḥ* by providing for it a figurative meaning which is not expected in such a legal context. So, they interpreted the word *nikāḥ* here *as puberty*.

> 6. "And test *the orphans* [male or female, in their abilities] until they reach [the age of] *nikāḥ*. Then if you perceive in them sound judgment, release their property to them."

Obviously, the word *nikāḥ* here must be initially intended to mean the most-known, technical sense of it which is marriage, leaving out the lexical one, which is having sexual intercourse, bearing in mind that there is no such a premarital sexual intimacy allowed in Islam. Also, the word "until" in the expression "and test the orphans [in their abilities] until they reach the age of *nikāḥ (marriage)*" puts the marriage as deadline for developing a mental maturity. In other words, there is an implication that only a marriage of somebody who has already gained a sound judgement is imaginable and permissible. However, scholars appear to think that the meaning of *nikāḥ* must be other than the marriage contract for an undercurrent of conviction that children's marriage contract is fairly possible.

3.2. Preconceived Reading of al-Talāq 65/4

Another Qur'anic verse mistreated in favor of child marriage is al-Talāq 65/4 which is dealing with the minimum period (*iddah*) that a woman must wait between two marriages:

> "And as for those of your women who have despaired of menstruation, in case you have any suspicion, then their prescribed time shall be three months, (along) with those who have not menstruated. And for those who are pregnant, their term is until they give birth..."

Jurists have come to an agreement on a view that *those who have not menstruated* cannot be other than the girls married before their puberty; consequently, as their marriage ends off they must wait three lunar months. However, when this view considered together with verse 49 of al-Ahzāb which explicitly states that waiting period is necessary because of having sex during the marriage, an ominous conclusion becomes that minor girls might get well involved in a sexual intercourse during their early marriage. Actually, scholars do not seem to be eager to conclude this, however, in their interpretation to the above mentioned verses, they have adopted premises resulting this conclusion.

In fact, from the first verse onwards, surah of al-Talāq handles the issue of *iddah* by referring to the women, not children:

> "When you divorce women, divorce them at their prescribed periods (*iddah*) and count (accurately) their prescribed periods"..... "as for those of your women who have despaired of menstruation." (al-Talāq 65/1)

Giving pages, in his *al-Jarāthīm*, to variety of words describing women in the Arabic language, an early linguist al-Dīnawarī (d. 276/889), mentions mature women's physical features

[89] ʿAlī b. Muḥammad al-Kiyā al-Harrāsī, *ʿAḥkāmal-Qurʾān*, ed. Mūsa Muḥammad ʿAlī, ʿIzza ʿAbd Atiya (Beirut: Dār al-Kutub al-ʿIlmiyya, 1405h.), 2:383.

only but not the female children's.[90] It means that literal meaning of the word *nisā* (women) in Arabic does not refer to the female minors at all. Thus, the minor girls are not mature woman, both naturally and lingually.

3.3. Reliability of the Narrative from ʿĀisha on Her Early Marriage to Prophet

It is very interesting that even though the narrative about ʿĀisha's early marriage to the Prophet is very well-known to the Muslims and strongly believed to be authentic, out of the jurists who dealt with minor marriage, very few such as Shāfiʿī[91] and al-Sarakshī, have referred to it in their argumentation arguably because they didn't want to talk about privacy of prophet or they were critical about the authoritativeness of narration. Taking a closer look at the narrative one can figure out why the jurists stood away from it: Reportedly, ʿĀisha said: "the Messenger of Allah married to me in the aftermath of Khadija's death, when I was six years old. And he had a carnal connection with me while I was nine years old."The alleged story reveals some details about what she was like that day before entering the nuptial chamber. As ʿĀisha's account continues in Bukhari's report, the encounter took place shortly after ʿĀisha arrived in Medina along with her mother and elder daughter and stopped over in the neighborhood of Banī al-Ḥārith b. al-Khazraj. She had just recovered from sickness and hair loss that occurred because of the hardships of journey. One day, while she was in swing playing with her female peers, her mother ʾUm Rūmān called her, she went to her having no idea about what she wanted her to do. ʾUm Rūmān caught her by the hand and walked her away. Since she became out of breath, they stopped at the door of the house. ʾUm Rūmān took some water and wiped her face and head, then, when she returned to normal breathtaking, she took ʿĀisha into the house. The women of *Ansār* who had already gathered greeted her and gave best wishes. ʾUm Rūmān entrusted them with her preparation. In the forenoon, she was startled by an unexpected coming of the Messenger of Allah who had come to Medina a few weeks earlier with ʾAbū Bakr. Her mother handed her over to the Prophet. The story ends with the following sentence of ʿĀisha: "I was a girl of nine years of age at that time." We should add to the story that the Prophet was more than fifty years of age at the time.

In the narrative, unlike what she was expected to do, ʿĀisha talks about physiologically and psychologically adverse conditions surrounded her in a fashion that sounds to be pleading for mercy and empathy of the audience. While she was innocently playing with her friends, she was suddenly taken out of the swing knowing nothing about what would happen next. She was also surprised with what she saw later.

Narrative, as it stands, imposes not only permissibility of child marriage but also overstates that children must be obedient and resilient for marriage even in inappropriate conditions. Thus, the significant negativity at the turn of phrase might be separately questioned in terms of its consequences reflected on the marriage customs in Muslim societies through history.

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90 ʾAbū Muḥammad ʿAbdullāh b. Muslim b. Qutayba al-Dīnawarī, *al-Jarāthīm*, (Damascus: Vazāra al-Thaqāfa, nd.), 1:277-287.

91 al-Shāfiʿī, *al-ʾUmm*, 7:163.

The narrative is technically *a* kind of *khabar al-wāhid* (one transmitter's report). Because, ʿĀisha is the only narrator conveyed all these details about her very personal situation. However, even though this narrative has a historiographical significance, it lacks the quality of being evidence for the religious provisions. Because she is not transmitting in this hadith an official statement of the prophet, so to say, on the issue; but she is talking about an event that she was exposed.

CONCLUSION

In the light of what I covered above it becomes clearer that the Qur'anic verses do not overtly facilitate the child marriage but, in fact, the scholars premise their pro-child marriage stance on some strained jurisprudential interpretations which are pretty acceptable to the cultural setting of their time. Although the first six verses of al-Nisā have the same context, scholars imported a context to a verse (al-Nisā 4/3) in the heart of whole scene from al-Nisā 4/127 which is, in turn, not about child marriage at all. Beside shifting the context, when they have a few plausible interpretation options they don't prefer but the one which supporting child marriage even if the other options are more powerful in many ways. The examples of that are explicitly seen in their interpretations to al-Nisā 4/3). Also, they assigned the expression "those who have not menstruated" in al-Talāq 65/4 to the minor girls married off by their legal representatives while they could take some other ways.

According to the classical view, a father enjoys compulsory authority to force his children into marriage with regard to his unimpeachable affection towards them as well as the other guardians may be given the same authority by an analogy to the father. Actually, this is an inherently customary aspect as the consent of marrying parties is a prerequisite to the marriage contract.

Even the religious authoritativeness of the hallmark narrative about ʿĀisha's early marriage to the Prophet must be called into question due to fact that it lacks technical conditions that must be found at a religio-legally binding evidence.

Marriage is more than a joint intimate life of a couple. That is why socio-economic justifications have played an essential role in marriage practices. In traditional societies, the marriage of girls has been often seen as a security, economy, honor, and even a political issue to be wisely handled by the head of the family. So, he had to expedite matters of the girls' marriage as far as possible lest the things would not go beyond his control later. One historically examines the societies across Arabian Peninsula in that time, may fairly find such a practice quite expectable and understandable within a traditional context; after all, Qur'an does not provide such a powerful justification to this tradition. On contrary, the practice itself was decisively powerful that it led the scholars to seek for a religious rationale even if feeble.

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