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Rachel Sumption

Washington University in St. Louis, rachel.sumption@wustl.edu

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DOMINATION OR KINSHIP? INTERPRETING FEMINIST CONCERNS ABOUT ISLAMIC MARRIAGE LAW

RACHEL SUMPTION

If marriage is “the cornerstone of civilization” in Islamic thought, then the laws of marriage and divorce also define fundamental sexual and gender relations between men and women.¹ *Nikah* is the Arabic term for both marriage and sexual intercourse, and many classical definitions conflate the two meanings to refer to both a physical and contractual union. This has two important implications in Islamic legal thought: First, the *nikah* is a public signifier of sexual relations that are allowed by God, since sexual relations outside of the *nikah* (*zina*) are forbidden by the Qur’an as a criminal offense. Second, if we accept the feminist argument that a *nikah* is the husband’s purchase of sexual access to his wife, then

¹ Zainab Alwani, ‘Marriage: The Cornerstone of Civilization,’ [2011] *Islamic Horizons* 40.3, 50

allowable relations between men and women in the Qur'an are, by definition, relations in which men make all legal decisions.

Islamic feminists like Ziba Mir-Hosseini criticize the classical *fiqh* concept of marriage as a sexual exchange based on their belief that Islam should promote sexual equality. "The classical *fiqh* notion of women's rights is nowhere more evident than in the definition of the marriage contract, which treats women as semi-slaves. One can say that the disparity between men's and women's rights in Muslim societies was—and still is—sustained largely through the rules that classical jurists devised for regulating the formation and termination of the marriage contract."² She claims that other rights and duties related to *nikah* are merely "moral injunctions that are overshadowed by those elements of the contract that concern the exchange."³ For Hosseini and other

² Ziba Mir-Hosseini, ['The Construction of Gender in Islamic Legal Thought and Strategies for Reform'](#) [2003] 1/1 HAWWA, 5

³ *Ibid*, 6

reformists, Qur'anic exhortations about treating wives kindly or seeking their consent do not change or diminish the importance of sexual access in a marriage contract.

Western agendas of “liberal reform” seek to correct relations between the sexes by enacting dramatic changes to Islamic legal procedure such as abolishing polygamy, increasing access to divorce, and inserting special protective stipulations in to better protect Muslim wives.⁴ Less attention is paid to how dimensions of the marriage contract itself seek to elevate marriage as a sacred union between the *sexes* (man and woman), not just a *sexual* union (intercourse.)

In this study, I want to address the legitimate objections of feminists like Mir-Hosseini by suggesting that the “sexual domination” presumed by the *nikah* is a limited interpretation of the *nikah* contract. My essay seeks to answer the following question: How do the classical

⁴ Majid Khadurri, ‘Marriage in Islamic Law: The modernist viewpoints’ [1977] 26 Am. J. Comp. L. 213, 215

schools of Islamic law view the *nikah* as more than a sexual exchange? I intend to discuss how definitions of the *nikah* contract and its major legal parties expand the intercourse/exchange relationship of the *nikah* into a broader familial relationship between a man and woman (and their respective families.) I will reexamine the legal definition of *nikah*, aspects of the threefold marriage classification system, and laws regarding guardianship to support my case. Although intercourse is used to make certain marriage stipulations legally binding, the *nikah* serves a larger purpose than just the regulation of sexuality. The word *nikah* may imply the concepts of both marriage and intercourse, but the *nikah*'s evolution as a legal concept has created separation between the two.⁵

⁵ This essay does not seek to identify terms of equality in divorce, childrearing, or other aspects of family life, but merely in the process of formulating a marriage contract.

THE MARRIAGE CONTRACT: A GENERAL OUTLINE AND LEGAL EFFECTS

A basic definition of the *nikah* would seem to align with the interpretation of the marriage contract given by Hosseini above. Colonial author Sir Wilson defined Islamic marriage as “a contract for the purpose of legalizing sexual intercourse and the procreation of children.”⁶ However, as with all of the major concepts within Islamic family law, there exists a plurality of views throughout classical jurisprudence. The biggest question surrounding the debate of the *nikah* definition is: Does the *nikah* encompass all of the rights, duties, and obligations that follow consummation, or does a *nikah* exist merely as an isolated sexual act?

Classical manual *Kitab-un-Nikah* establishes the primary disagreements between schools about the *nikah*'s definition. “Nikah, however, as an Islamic legal concept has been variously defined by Islamic scholars with the

⁶ Wilson in Tanzeem Fatima, *Marriage Contract in Islam* (Deep and Deep Publications 2007) 32

variation dependent upon whether the emphasis is placed upon the matrimonial contract itself or the sexual act which consummates that matrimonial contract.”⁷ Hanafi jurists interpret *nikah* variously as the marriage contract or as sexual consummation depending upon the Qur’anic context, while the other three schools of thought maintain that the word refers to the contract negotiated between spouses and a woman’s Wali. All rights and duties of the marital contract then become a part of the *nikah* definition. These same rights and duties come into effect upon consummation, but the *nikah* contract exists independent of sexual intercourse.⁸ All marriage contracts across schools guarantee men unlimited sexual access except in certain sacred periods of fasting. Nonetheless, the *Kitab-un-Nikah* notes that some Shafi’i jurists hold that this right of sexual access should actually be interpreted as a mutual duty of both husband and wife to have

⁷ Sheikh Abdurraghiem Sallie, *Kitab-un-nikah* (Islamic Book Service 2001) 7

⁸ *Ibid*, 9

intercourse with one another. “The wife can therefore compel the husband to submit to sexual intercourse and vice versa.”⁹

Classical authors’ definitions of *nikah* also generally contain reference to the procreation of children, which Hosseini neglects to include in her definition. Sexual access by the husband cannot be analyzed without considering that a family results from sexual access; immediately, the *nikah* is not just the legalization of sexuality but also the legitimization of children, which keeps the family unit stable.¹⁰ In the rest of my study, I will focus on two other elements of the *nikah* to determine how their existence serves to expand the marriage contract: the restrictions on marriage validity and the role of the Wali. My arguments will be drawn from across the classical schools, following the tradition of judges who

⁹ Ibid, 12

¹⁰ Tanzeem Fatima, *Marriage Contract in Islam* (Deep and Deep Publications 2007)33

have cited support from various schools of law to support their decisions.

MARRIAGE CLASSIFICATIONS: VALIDITY AND CONSUMMATION

The classification system of Muslim marriages challenges the *nikah*'s double connotation by claiming that marriages can be invalid even after consummation. In *Muslim Family Law*, Menski and Pearl define three types of marriages classified under Islamic law: valid or *sahih* marriages, irregular or *fasid* marriages, and void or *batil* marriages.¹¹ Non-Hanafi jurists do not make a sharp distinction between *fasid* and *batil* marriages; *fasid* marriages are generally considered equally void. It is agreed among schools that a marriage is *batil* if there is a prohibited degree of familial affinity between the spouses, if the man has already irrevocably divorced the woman, if there is a possibility of polyandry, or if there is a prohibited difference of religion between the woman and

¹¹ Werner Menski and David Pearl, *Muslim Family Law* (3rd edn, Sweet and Maxwell 1998) 143

the man.¹² Apart from this consensus, disagreement arises in situations where illicit sexual intercourse has already taken place between two parties. “The Hanafi and Hanbali jurists, therefore, treat the sexual act, or an actual period of privacy, as equivalent to a *nikah* to create a *musahara* impediment. This view of illicit sexual contact being equated to a *nikah* was rejected by the Shafi’i and Maliki jurists.”¹³ In their view, sexual intercourse actually initiates a void marriage, although the man and woman may marry under an official *nikah* after the fact.

Marriages are considered *fasid* if they fail to meet some procedural requirements of the *nikah*, such as a certain number of witnesses, but the intercourse that exists throughout a *fasid* union also fails to make the union a valid *nikah*. Pearl and Menski clarify that “If the union is

¹² Ibid, 146.

¹³ Ibid, 146. In this quotation, the “*musahara* impediment” refers to the familial affinity impediment mentioned previously: after having intercourse with the woman, he is prevented from marrying anyone within a specific degree of affinity to her. For a complete list of prohibited familial affinities, see Menski 145.

consummated in a situation where the parties were acting in good faith, then any children of such a union are legitimate and there is no *zina*.”¹⁴ Once a marriage has been identified as *fasid*, then the parties must separate until they are remarried in a proper, *sahih* nikah.¹⁵ However, it is the sexual intercourse already occurring in these invalid or irregular marriages that challenges Hosseini’s idea that *nikah* is only a sexual exchange. In these two types of marriages, the “sexual exchange” has occurred, but the *nikah* marriage contract is not put into effect. If *batil* and *fasid* marriages are clearly meant to be avoided in favor of *sahih*, then it may still be argued that the *nikah* seeks to regulate sexuality, but *nikah* and intercourse cannot be inimitably linked. The presence of *batil* and *fasid* marriages limits the legal boundaries of marriage to a narrower span than the legal boundaries of

¹⁴ Ibid, 144. A consummated marriage can also be classified as *fasid* if a Wali does not believe that the spouses and families are equally matched; a topic that is discussed further below.

¹⁵ Ibid, 144

sexual intercourse. The regulations that determine a valid marriage challenge the concept of marriage as intercourse, but how does the *nikah* contract otherwise take into account the personhood of potential spouses? This process is demonstrated best through the role of a Wali in classical marriage.

GUARDIANSHIP IN MARRIAGE: THE WALI AS A SOCIETAL LINK

Islamic law requires the presence of a Wali in a *nikah* to ensure that the marriage is more than just a reckless union based upon sexual impulses. The age of capacity for marriage in Islam is, generally, the age of puberty for both men and women. One of the primary reasons early marriage is encouraged is to prevent *zina*, or sexual intercourse outside of marriage.¹⁶ It is *wajib*¹⁷ for men to choose beautiful wives so that they can remain chaste. “Young men, those of you who can support a wife

¹⁶ Ibid, 141

¹⁷ In Islamic law, a *wajib* act is considered compulsory for the parties it refers to. The act should not be avoided without a valid excuse.

should marry, for it keeps you from looking at nonpermissible females and protects you from immorality...”¹⁸ If the goal of the *nikah* contract was merely to arrange a situation for legal sexuality, then a Wali figure such as the one outlined in *fiqh* would not be essential to the contracting of a marriage.

Feminists criticize the classical role of a Wali because of the Wali’s ability to contract a minor woman into marriage without her consent, but among different schools, a Wali has a varying amount of agency depending upon the age and sexual status of his charge. A Wali is needed to arrange a marriage for minor men and women because they are not legal adults¹⁹. A Wali can be differentiated into two types: the *wali mujbir* and the *wali ghayr mujbir*. A *wali mujbir* has enforcing power and must voice unequivocal consent to the marriage of his charge,

¹⁸ Hadith narrated by Bukhari and Muslim

¹⁹ One issue to be noted in classical doctrine is the disagreement over the ability of female guardians to be Walis themselves, which Siddiqi claims would have been improbable in the societies that Abu Hanifa’s *fiqh* developed in.

while the *wali ghayr mujbir* cooperates with his charge and must gain her consent before proceeding with the marriage. In the Shafi'i and Maliki schools, a Wali is always a *mujbir*, and his consent is needed for a marriage to be completed. Mona Siddiqi's review of the Hanafi development of *wilaya* effectively explains how the Wali system serves to create a right of consent that is juxtaposed to a man's right of access in the marriage contract. "In marrying, the woman has acted with regard to a right that concerns her exclusivity. For this, she is fully competent, being sane and capable of distinction. These very reasons which allow her to act for herself in the matters of property, permit her to choose a husband. She simply requires a wali to marry her off so as not to be associated with shamelessness/immodesty."²⁰ Also

²⁰ Mona Siddiqi, 'The concept of Wilaya in Hanafi Law: authority versus Consent in al- Fatawa al-Alamgiri' [1995] *Islamic Law and Society* 2.3, 174

The interesting term in this quote is the term exclusivity, which seems to imply that a woman has an equal right shared with her husband. He has the right to sexual access, and her complementary right is her husband's sexual loyalty to her. The

integral to the Hanafi law on the subject of Wali is the *khiyar-al-bulugh*, in which a minor woman contracted in marriage can choose to stay within the marriage when she reaches puberty. She can choose to legitimize her marriage either by allowing sexual intercourse, voicing her consent (if a *thayyib*), or remaining silent (if a *bikr*.)²¹ In this case, sexual relations indicates an adult woman's consent to her marriage, If females are fully empowered legal agents able to contract themselves into sexual exclusivity, then why do they still seek the consent of a Wali?

After a cursory analysis of the Wali role among the schools, it appears as if a woman is given the most agency in choosing her husband in the Hanafi school, but the question of agency is not the sole factor in determining how a Wali considers personhood. The criteria that a Wali must follow expand the negotiations of a marriage contract to include a variety of considerations about the

quote also recalls Hosseini's comparison of marriage to a commercial contract.

²¹ Mona Siddiqui (n 20) 180

parties' personalities, social standing, and family relationships.²² A Wali's place is to connect the marriage with the people surrounding it. He legitimizes the marriage as a contract that is acceptable to his family and to society.²³ He is responsible for informing the wife of the name of her prospective husband and the amount of the dowry; if he does not do so, she has the right to reject the marriage.²⁴ The joint cooperation of the potential wife and Wali (or potential husband and Wali, if the husband is also a minor) to create a beneficial marriage contract *increases* the number of parties directly involved in the marriage contract, at least on the side of one spouse. The *Kitab-un-Nikah* lays out seven responsibilities of a Wali in marriage negotiations. The first four are concerned with personal and familial relationships, while the last three concern proper procedure for dower payment. In the former

²² Ibid, 177

²³For a more in-depth study of the various considerations a Wali makes when negotiating a marriage, see Fatima (n10) 112.

²⁴ Ibid, 183

considerations, a Wali must not have any clear animosity between himself and the biker, there should not be clear or concealed animosity between the Biker and her husband, the husband should conform to the doctrine of *kafa'ah*²⁵, and the husband should be able to afford her dowry and full provision.²⁶

Although the Hanafi are unique in their requirements of a virgin's consent, all schools define the Wali role closely so that the Wali's acceptance of a proposal implies that the marriage meets a comprehensive set of conditions for his charge's future well-being.

CONCLUSIONS: TOWARDS AN EXPANDED *NIKAH*

My paper argues that *nikah* and intercourse are separate by both definition and practice. A marriage is defined by all of the duties and rights stipulated in its contract (not just the access/maintenance exchange,) and

²⁵ Kafa'ah is a doctrine that considers equality between the spouses with numerous factors. Various modern state codes contain loopholes for a Wali to reject a marriage based upon its failure to meet one or more of the kafa'ah standards.

²⁶ Sheikh Abdurraghiem Sallie (n 8) 58

sexual exchanges can occur without a recognized marriage.

With the approval of a Wali, many things other than sexuality are considered to ensure that marriage is a solid foundation for family life. The act of sexual intercourse is used as a binding force for some marriage stipulations, but it doesn't constitute all of marriage. Reexamining what traditional authorities have to say about the marriage contract provides a more solid justification for the marriage contract than criticisms that rely solely on reformist views or Western ideals of equality within marriage. Although the legal procedure surrounding marriage is conducted by men, legal considerations for the female spouse's personhood should not be overlooked when voicing arguments for sexual equality in Islam.

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