

## *Age of Consent in Classical Islamic Law*

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The age of consent to sexual relations is not firmly established in classical Islamic law like it is in many Muslim and non-Muslim countries today. The appropriate age of sexual relations was set in traditional pre-modern societies by either individual families or local custom, often linked to signs of physical puberty like menarche and pubic hair.[1] The lack of consistency in this area of law is because societies throughout time and place widely vary in their circumstances, resources, concerns, and priorities.

There are many instances in history for which the age of consent and marriage is in apparent disagreement with modern norms and laws. The 12th century *Decretum Gratiani*, for instance, mandates consent at an undefined “age of discretion”[2] and acknowledges that sexual relations and marriage might occur as early as seven years.[3] Some Christian sources state that Mary was to be given in marriage to the ninety year-old St. Joseph when she was only twelve or fourteen.[4] As late as the mid-19th century, the United Kingdom’s *Offences against the Person Act* legally allowed sexual relations with twelve year-olds.[5] Around the same time in the United States, each state determined its own criminal law with age of consent ranging from ten to twelve years of age. It is only at the beginning of the late 19th century, spurred on by the Industrial Revolution’s rapid economic growth and technological development, that attitudes shifted toward setting the age higher and higher.[6]

Therefore, it should not be surprising that the development of classical Islamic law into centralized state systems followed a similar trajectory as other societies.

### **Why is this issue important today?**

Sexual relations are religiously unlawful in Islam in the absence of a contract of marriage or concubinage. Concubinage disappeared when the Muslim world martialled Islamic legal

arguments to abolish slavery,[7] so consent is now only relevant to marriage. The question of consent to marriage is important to the modern context from at least two perspectives:

First, there is an ongoing controversy in regards to the practice of child marriage in some places in the Muslim world.[8] Classical Islamic jurists generally allowed a marriage to be contracted with a child, but not consummated through sexual intercourse until the child gained puberty or was physically ready to do so.[9] While the classical law theoretically upheld the right of children to consent to their marriage upon reaching adulthood, external factors such as cultural and familial pressure can easily violate the spirit of these protections, if not the letter of the law itself. The Prophet decreed that such a child must consent to the marriage before it can be consummated.[10] Therefore, forced marriages are out of the question altogether, but the question still remains of what norms related to younger marriages that Muslims are most appropriate for them to adopt locally at the state-level in each country.

Second, the age of consent is brought up in anti-Islam polemics to allegedly demonstrate the backwards and ‘evil’ nature of Islam. Modern norms, at least in the West, have placed a stigma on sexual relations between “adults” (usually 18 years and above) and “adolescents” (usually 17 years and below). Voluntary sexual intercourse with a post-pubescent minor who is younger than the legal age of consent is legally punished as “statutory rape.” Such boundaries are appropriate for highly developed modern societies, but the rule in most of the world throughout time was based on local customs for good reason. As such, polemicists will cite the rulings of some classical Islamic jurists who allowed, or appeared to allow, sexual relations with girls as young as nine, which they claim is evidence that Islam promotes child abuse or ‘grooming gangs.’ Attacks of this nature permeate the internet, anti-Islam literature, and some political discourse, despite being based entirely on misinformed historical anachronisms.

## **No consensus age in Islamic law**

There is no consensus in Islamic law around the age of consent to marriage or sexual relations, for the same reasons there was no consensus in the West or elsewhere. The Hanafi jurist Zayn al-Dīn ibn Nujaym (d. 1563) writes:

[The scholars] differed as to the time when one could consummate with a young girl. It is said that it is not permissible to consummate with her as long as she has not reached puberty, it is said he may consummate with her when she reaches nine years, and it is said he may consummate with her if her body is large enough to handle intercourse, otherwise he may not.[11]

Islamic laws related to human-human interaction (as opposed to human-divine interaction) tend to be governed by social custom rather than explicit statutes from divine revelation.[12]

Juristic and moral reasoning on the basis of general principles are often the determining factor in judging social customs to be right or wrong, appropriate or inappropriate. This flexible legal device was derived from the statement of the Prophet's well-known companion 'Abd Allāh ibn Mas'ūd (d. 653), "Whatever the Muslims view as good is good to Allah, and whatever they view as evil is evil to Allah."<sup>[13]</sup> That is, a society of Muslims has been delegated some authority to regulate their own social customs. For this reason, it is a valid opinion in Islamic law for a fixed age of consent to be set, or for it to be set by natural signs like puberty or physical development. Today, the majority of Muslim countries have opted to set the age of consent between fourteen and eighteen, although Bahrain is an outlier with a minimum age of twenty-one.<sup>[14]</sup>

## **Operative principle: no harm or returning harm**

Regardless of one's opinion on the age of consent, all classical jurists accepted in principle the illegality of causing harm to another person without a legitimate reason.<sup>[15]</sup> The Prophet had issued a decree, "Do not cause harm or return harm."<sup>[16]</sup> The jurists explicitly applied this principle to sexual relationships. Yahyá ibn Sharaf al-Nawawī (d. 1277), representing the Shafi'i school, states this as a necessary condition when discussing the rights of wives to living and maintenance, "If it is possible to have intercourse with her without harming her, he may do that. If it is not possible for him to have intercourse with her except by harming her, he does not have permission to have intercourse with her."<sup>[17]</sup> There is no valid interpretation of Islamic law, in any school of thought, that allows children to be abused in any way, sexually or otherwise. The Prophet said, "He is not one of us who is not merciful to our young."<sup>[18]</sup>

## **Looking ahead**

Islam was revealed to be relevant to all peoples in every time and place. The twin legal principles of permitting social customs in general, restricted by the imperative not to cause harm, allow some flexibility for Muslim societies to place appropriate boundaries to sexual relations as they continue to develop. It is not a coherent Islamic legal argument to claim that because the Prophet married his youngest wife Aisha at age nine, that it is permissible or beneficial for Muslims to do so while they live in greatly different social circumstances. There are other considerations in the divine law that cannot be ignored. The issue of child marriage leading to abuse is of dire importance for Muslims to address and through consultation achieve some stable legal parameters appropriate to each region's context.

At the same time, it is ignorant or disingenuous for anti-Islam polemicists to cite historical facts and classical juristic rulings out of context to vilify Islam and Muslims today. Many of these polemicists attempt to draw a straight line between these facts and the criminal behavior of some Muslims today, though no such direct connection exists in reality. The gross stereotypes born of this misinformation contribute to the ‘othering’ of Islam and Muslims, as well as unfair demands for collective responsibility or even hate crimes.<sup>[19]</sup> A wider contextual analysis of classical texts, as attempted in this article, in tandem with appreciating modern realities should demonstrate that any proposed connection between classical Islam and contemporary criminality is simply tenuous at best.

## References

- [1] Paula S Fass, *Encyclopedia of Children and Childhood: In History and Society* (New York, N.Y: Macmillan Reference USA, 2004), 45. Available from *Gale eBooks*.
- [2] John T. Noonan and Augustine Thompson, *Marriage Canons from the Decretum of Gratian and the Decretals, Sext, Clementines and Extravagantes* (n.p., 1993), C. 30 q. 2. <http://legalhistorysources.com/Canon%20Law/MARRIAGELAW.htm>
- [3] *Ibid.*, Decretals of Gregory IX, book four, C. 3.
- [4] Charles G. Herbermann, “St. Joseph,” in *The Catholic Encyclopedia: an International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church* (Knights of Columbus Catholic Truth Committee, 1913). <https://www.newadvent.org/cathen/08504a.htm>
- [5] Matthew Waites, *The Age of Consent: Young People, Sexuality, and Citizenship* (Hampshire: Palgrave Macmillan, 2005), 63.
- [6] Stephen Robertson, “Age of Consent Laws,” in *Children and Youth in History*, Item #230. <https://chnm.gmu.edu/cyh/items/show/230>
- [7] William G. Clarence-Smith, *Islam and the Abolition of Slavery* (New York: Oxford University Press, 2006), 19.
- [8] See for example: Kasjim Salenda, “Abuse of Islamic Law and Child Marriage in South-Sulawesi Indonesia,” *Al-Jami’ah: Journal of Islamic Studies*. 54.1 (2016): 95-121.
- [9] ‘Alī ibn Khalaf ibn Baṭṭāl, *Sharḥ Ṣaḥīḥ al-Bukhārī* (al-Riyāḍ: Maktabat al-Rushd Nāshirūn,

2003), 7:127. Ibn Baṭṭāl (d. 1057) writes, “The scholars agreed that it is permissible for fathers to marry off their young daughters even if they are in the cradle, except it is not permissible for their husbands to consummate the marriage with them until they are prepared to safely have intercourse.”

[10] Muḥammad ibn Ismāʿīl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Bayrūt: Dār Ṭawq al-Najjāh, 2002), 9:21 #6946. The ḥadīth is recorded under the chapter heading, “The forced marriage is not permissible.” See also: <https://sunnah.com/bukhari:6946>

[11] Zayn al-Dīn ibn Ibrāhīm ibn Nujaym, *Al-Baḥr al-Rāʾiq: Sharḥ Kanz al-Daqaʾiq* (Bayrūt: Dār al-Kitāb al-Islāmī, 1970), 3:128.

[12] Taqī al-Dīn ibn Taymīyah, *Majmūʾ al-Fatāwā* (al-Madīnah al-Munawwarah: Majma al-Malik Fahd li-Ṭibā at al-Muṣḥaf al-Sharīf, 1995), 29:17. Ibn Taymīyah (d. 1328) asks, “As long as social customs are not affirmed to be prohibited, how can they be judged to be forbidden? ... The default principle of customs is permission, such that none are disallowed but what is forbidden.”

[13] Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad ibn Ḥanbal* (Bayrūt: Muʾassasat al-Risālah, 2001), 6:84 #3600. The chain of authorities is considered “fair” by Shuʾayb al-Arnāʾūṭ.

[14] “Age Of Consent By Country 2021,” *World Population Review*. Accessed June 14, 2021. <https://worldpopulationreview.com/country-rankings/age-of-consent-by-country>

[15] Jalāl al-Dīn al-Suyūṭī, *Al-Ashbāh wal-Nazāʾir fī Qawāʾid wa Furūʾ Fiqh al-Shāfiʿiyah* (Bayrūt: Dar al-Kutub al-ʿIlmiyah, 1990), 1:7-8.

[16] Ibn Mājah, *Sunan Ibn Mājah* (Bayrūt: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1975), 2:784 #2340.

[17] Yaḥyá ibn Sharaf al-Nawawī and Taqī al-Dīn Subkī, *Al-Majmūʾ Sharḥ al-Muhadhab* ([Bayrūt]: Dār al-Fikr, 1991), 16:409.

[18] Muḥammad ibn ʿĪsá al-Tirmidhī, *Sunan al-Tirmidhī* (Bayrūt: Dār al-Ġarb al-Islāmī, 1998), 3:386 #1921.

[19] Ella Cockbain and Waqas Tufail, “Failing victims, fuelling hate: challenging the harms of the ‘Muslim grooming gangs’ narrative,” *Race & Class*. 61.3 (2020):3-32.