

## THE CONCEPT OF CONSENT IN MUSLIM MARRIAGE CONTRACTS: IMPLICATIONS FOR WOMEN IN BANGLADESH

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### Introduction

The option or freedom of choice which allows a woman to select or reject a spouse demonstrates her status in other aspects of life and her freedom of choice generally. Closely connected with the age of marriage is the concept of consent since a child is not generally construed as capable of giving an informed consent and neither is a person consenting on her behalf, taking into consideration her opinions even if she were capable of expressing any.

The reality of women's consent to marriage is an important indicator of their status. The typical Bangladeshi woman herself is generally unaware that she has any real option other than to agree to a match arranged by her family, which in truth she usually does not have. The socio-cultural and religious norms which demand seclusion of a woman are at odds with the requirement imposed by religious law of obtaining the consent of the woman.

Since the consent of an adult woman is an essential condition of marriage under religious law, it is necessary to discuss the assertion on one hand that there is generally absence of consent on the part of a Bangladeshi girl, and on the other hand that Muslim marriage requires, as an essential condition, the free consent of both parties to the marriage if they are adults.

This article<sup>1</sup> deals in depth with the religious law regarding the consent of the woman and includes various aspects of such law, for example,

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1. This article is an adapted and updated version of Chapter seven of the author's unpublished Ph.D. dissertation:

Huda, Shahnaz (1996) 'Born to be Wed'—Bangladeshi Women and the Muslim Marriage Contract; University of East London, UK. It contains the results of the empirical investigation undertaken by the author during her field work in mainly two villages; a) Dhitua village in Muktagacha Upazilla (sub-district), Mymensing District and b) Komolpur village in Shaturia Upazilla, Manikganj District. Both quantitative and qualitative data was obtained in the field work. Secondary evidence to update the article has been utilized throughout.

agency in marriage, the concept of equality, the procedure for expressing consent and the position of the civil law of the State regarding consent. Another substantial portion of the article deals with the reality of a Bangladeshi woman's right of choice as evidenced by work in the field, which necessarily deals with arranged marriages, the position of law as regards consent, and the perception of women about their right to choose whether or not to consent

### Consent under Muslim Law

Under Muslim Law, a marriage is a contract between a man and a woman. This marriage contract must fulfill the necessary conditions in order that it is a valid union. In short, a Muslim marriage consists of an offer or proposal and the acceptance of that offer, both made in the presence of witnesses. Thus, the consent of the parties to the marriage is vital. Consent is expressed by declaration (*ijab or ejab*) and acceptance (*qabul/kabool*).<sup>2</sup> Without the consent of the parties or their guardians (where the parties are minors) there can be no marriage. The two primary sources of Islamic Law, the *Quran* and the *Sunna* are both clear as to the requirement of consent in marriage. Verse 2:232 of the *Quran* is interpreted as saying: "Prevent them not from marrying their husbands when they agree among themselves in a lawful manner."<sup>3</sup>

In the *Quran*, marriage has been referred to as a '*Mithaq*' which means a covenant, between the husband and the wife.<sup>4</sup> The Holy *Quran* is said to lay down expressly that the husband and the wife *both* must agree to the marriage. It is reported from the traditions of the Prophet that "(t) he father or the guardian cannot give a virgin or matron in marriage without her consent".<sup>5</sup> He was also reported to have said that: "a matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission."<sup>6</sup> The *Sahih Muslim* records companions of the Prophet reporting that '*Allah's Messenger*'

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2. Baillie, Neil B.E. (1875). *A Digest of Moohummudan Law*, 2nd Edition; Smith, Elder and Co.; London at p. 4.
  3. Ali, Maulana Muhammad (1973). *The Religion of Islam; The Ahma-diyya Anjum Ishaat Islam*, Lahore at p. 511 and Doi, A. Rahman I.(1984). *Shahriah-the Islamic Law*; Ta Ha Publishers, London at p.123.
  4. Op.cit. Ali (1973) at p.511.
  5. *Bukhari* (1986). *The Translation of Meanings of Sahih-Al-Bukhari*, Arabic to English, Vol.II, by Dr. Muhammad Muhsin Khan; Kazi Publications, Lahore at p. 51.
  6. *Ibid* at p.52.

(the Prophet) had said: a woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought.<sup>7</sup> The *Sahih Muslim* in the *Kitab Al-Nikah* (book of marriage) also contains account of various companions of the Prophet to the effect that: "A woman who has been previously married (*Thayyib*) has more right to her person than her guardian. And a virgin should also be consulted..."<sup>8</sup> Although it is unclear from the above reports of the traditions whether 'virgin' includes also minors, it has been well established that minor girls, below the age of puberty, may be married by their guardians. The *Hanafi* School has qualified what has been referred to as a virgin, and has added the qualification of adulthood with regard to the need of consent.<sup>9</sup> This would imply that consent is required only of girls above the age of puberty. The necessity of consent is stressed upon, as we have seen above, in the *Hadith*. So much so, that according to reports, if a man gives his daughter in marriage in spite of her disagreement, such marriage is invalid.<sup>10</sup>

Narrated Khansa bint Khidam Al-Ansariya that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Apostle and he declared that marriage invalid.<sup>11</sup>

The reasoning behind allowing a woman to contract her own marriage, or making her consent one of the essentials to the marriage, is that since a sane adult woman is capable of distinguishing good from evil and is by law capacitated to act for herself in all matters of property, she likewise has the capacity to choose a husband or to decide upon her own marriage which is an act affecting only herself.<sup>12</sup> The *Hanafis'* thus hold that a woman is quite capable of deciding her own marriage and that it is not

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7. *Muslim (Sahih Muslim)* (1972). Being traditions of the sayings and doings of the Prophet Muhammad as narrated by his companions and compiled under the title *Al-Jami-us-Sahih* by Imam Muslim; Translated by Abdul Hamid Siddiqui Vol.II; Sh.Muhammad Ashraf, Lahore at p.714.

8. *Ibid.*

9. See *The Hedaya* (1870). Commentary on the Muslim Laws; Translated by the order of the Governor-General and Council of Bengal by Charles Hamilton; H. Allen & Co., London at p.34.

10. *Op. cit. Bukhari* (1986) at p.52.

11. *Ibid.*

12. *Op. cit. Hedaya* (1870) at p.34.

lawful for a guardian to force into marriage an adult virgin against her consent<sup>13</sup>

Unlike the *Hanafi* School, other schools (for instance the *Hanbali* or the *Shafi*) do not agree that a woman is capable of deciding for herself about her own marriage, and are of the opinion that her guardian must decide on her behalf. The crux of the disagreement between the *Hanafis*' and the other schools is that the majority restricts the freedom of choice of the woman and makes her guardian share with her in taking charge of her marriage.<sup>14</sup>

The argument of the *Hanafi* doctors is that an adult virgin is free and subject to all the obligatory observances of the law, (such as fasting, prayer and so forth) and no one has any absolute authority over her like in the case of an infant.<sup>15</sup> An adult virgin that is to say one who has attained discretion 'is the same as an adult son; and that all her acts with respect to matrimony are good and valid'.<sup>16</sup> The confusion results from some contradictory reports of the Prophet's traditions, which is shown by the other schools in support of their view. In the *Mishcat-ul-Masabih* it is narrated from Abumusa that the Prophet had said that "there is no marriage without the permission of the father".<sup>17</sup> The Prophet's wife Aayeshah is reported to have narrated that according to him: (e)very woman who marries without the consent of her father, her marriage is null and void, is null and void, is null and void.<sup>18</sup>

Again Abuhurairah reports the Prophet's tradition according to which:

One woman shall not give another woman in marriage; nor a woman give herself in marriage; because she is a fornicatrix who giveth herself to a man.<sup>19</sup>

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13. Ibid.

14. Alami, Dawoud S.El (1992). *The Marriage Contract in Islamic Law*; Graham and Trotman, London at p.57.

15. Op. cit. *Hedaya* (1870) at p.34.

16. Ibid.

17. Khan, Mahomed Yusoof (1891-92). *Tagore Law Lectures 1891-92. Mahomedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors, according to the Soonnees, Vol.I*, reprinted edition of 1984; Law Publishers, Allahabad at p.100.

18. Ibid.

19. Ibid.

Robertson W. Smith,<sup>20</sup> while reiterating that in Muslim law a guardian cannot dispose of his adult ward in marriage, says that the traditions on this head show quite plainly that the necessity of consent on the part of the woman was an innovation and long a matter of dispute amongst scholars of Islamic law.

### Consent of a Hanafi female

To summarize therefore, the law regarding the consent of an adult *Sunni Hanafi* woman: although a *Hanafi* girl, who is under the age of puberty may, under the religious law, be contracted into marriage by her guardian, a woman who has become an adult, that is to say has reached the age of puberty, must give her consent to any marriage she is a party to, either personally or through an agent (*wakil*). 'Proposal and consent are essential to a contract of marriage' says Macnaghten.<sup>21</sup>

Although in the case of a minor this consent may be given by her guardian, in the case of an adult woman her own consent either expressed personally or through an agent is a pre-requisite. The adult woman has been granted full freedom in the choice of her husband and she must not be married without her own consent: the consent of her father cannot take the place of her own consent;<sup>22</sup> she may even engage in the contract without his agreement.<sup>23</sup>

In *Asgur Ali Chowdhury vs. Muhubut Ali*,<sup>24</sup> a case on appeal from a decision of a subordinate court of Chittagong, a Mahomedan girl had been given in marriage to a man, on the strength of her father's consent who alleged that the girl was a minor. The husband, suing for establishment of conjugal rights, failed on the ground that the girl was of age and had not consented to the contract.<sup>25</sup>

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20. Smith W. Robertson (1990). Kinship and Marriage in Early Arabia; Darf Publications, London at p.103.
  21. Macnaghten W.H.(1825). Principles and Precedents of Moohummudan Law; Calcutta at p.56.
  22. Verma B.R. (1988). Muslim Marriage, Dissolution and Maintenance, 2nd Edition; The Law Book Co., Allahabad at p. 25.
  23. Op. cit. *Hedaya* (1870) at p.34.
  24. WR 1874 403.
  25. Ibid.

Again in the case of *Mst. Atkia Begum vs. Muhammad Ibrahim*,<sup>26</sup> an Allahabad case, it was held that the guardian's consent is unnecessary and a woman would be legally entitled to please herself and to marry the man of her choice, despite family or social opposition. The action, out of which an appeal had arisen before the Privy Council, was instituted by the respondent for the restitution of conjugal rights. It was held that the plaintiff, in order to succeed, had to establish that either the marriage was contracted with the consent of the girl's lawful guardian, or that the girl having reached majority it was contracted with her own consent.<sup>27</sup>

Case law shows that courts of the undivided sub-continent as well as later have from very long ago recognized that a *Hanafi* woman who has reached puberty cannot be forced into marrying against her will. Nor can she be stopped if she marries a Muslim by free choice.<sup>28</sup> As soon as a woman has arrived at puberty, like a man under Muslim law, she has the right to contract herself into marriage.

According to Baillie<sup>29</sup> along with the other conditions required to be fulfilled:

The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin or *suyyib*, that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.

### **Legality of the marriage contract**

The permission of the woman must be present in order that the contract of marriage has legality. Without her consent there would be no valid marriage. As Baillie<sup>30</sup> reiterates, 'no one, not even a father or the Sultan, can lawfully contract a woman in marriage who is adult and of sound mind, without her own permission...' 'If anyone does contract such a marriage on behalf of an adult woman the marriage is suspended on her sanction, if assented to by her it is lawful, if rejected it is null'<sup>31</sup>

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26. AIR 1916 250.

27. Ibid.

28. Maududi, Abul Ala (1972). *Purdah and the Status of Women in Islam*; Islamic Publications Ltd., Lahore at p. 155.

29. Op. cit. Baillie (1875) at p. 10.

30. Ibid at p.55.

31. Op.cit. Baillie (1875) at p.55.

### How consent is to be expressed

The consent in a Muslim marriage must be given by the parties themselves, i.e. the bride and the groom, or an agent on their behalf; or in the case of a minor by a competent guardian.<sup>32</sup> The consent of a virgin is taken to be implied by her silence,<sup>33</sup> since she may be suffering from shyness; her laughter may also signify assent whereas weeping may be construed as disapproval.<sup>34</sup> As regards a *thyabbib* or *siyaaeba* (woman who is not a virgin), it is necessary that her compliance be particularly expressed by words' since she:

has not the same pretence to silence or shyness as a virgin, and consequently the silent signs before intimated are not sufficient indications of her assent to the proposed alliance.<sup>35</sup>

In the case of a virgin, if consent is given by a father, uncle or brother, silence is tantamount to consent but a woman who is not a virgin must express her consent in person and silence cannot be taken to signify assent.<sup>36</sup>

### Consent by coercion, compulsion, force or fraud

Although the importance of consent on the part of an adult *Hanafi* woman has been clearly established, there remains confusion as to the effect of consent obtained by compulsion, coercion or fraud. There exist contradictory reports as to the legality of marriages in which consent has been obtained by any of the above means. According to Ameer Ali,<sup>37</sup> as under English Law, consent of a woman to a marriage obtained by compulsion or fraud has no effect and the marriage or '*nikah*' is not valid. However:

Silence on the part of the girl, after learning that a marriage has been contracted for her, amounts to ratification whilst the marriage is subsisting.<sup>38</sup>

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32. *Sobrati vs. Jungli* 2 CWN 245 1898.

33. Op. cit. *Bukhari* (1986) at 52; Op. cit. *Hedaya* (1870) at p. 35 and Op. cit. Baillie (1875) at p.55.

34. Op. cit. *Hedaya* (1870) at p. 35.

35. *Ibid.*

36. *Jainan vs. Rulia* IC Punjab 1912 43.

37. Ali, Ameer (1929). *Mahommedan Law*, Vol.II, 5th Edition; Thacker, Spink and Co., Calcutta at p. 305.

38. *Ibid.*

The *Hanafi* School however declares that a marriage contract is valid, even though it has been made under compulsion, although if it has been brought about fraudulently it is void.<sup>39</sup> Baillie contends that even when a woman has been forced into a marriage it is only when there is inequality or her dower is less than the proper amount that she has any option; otherwise not.<sup>40</sup> A difference is therefore made between compulsion/force and fraud—the former is not considered as ground for the invalidity of marriage while the latter is. According to Baillie therefore

When a woman is constrained to enter into a marriage, and does so, the contract is lawful, and no responsibility attaches to the compeller. If the husband be her equal, and the specified dower more than or equal to that of her equals, it remains lawful'.<sup>41</sup>

However if the specified dower is less than that of her equals, and she demands that it be made up to the proper amount, the husband may be required to increase the amount or otherwise to separate.<sup>42</sup>

The above rule is based on the tradition of the Prophet reported in the *Mishcat-ul-Masabih* which says that there are three things which whether done in joke or in earnest shall be considered as serious and effectual; one, marriage; the second divorce and the third, taking back.<sup>43</sup> Whether the forcing of a woman into marriage can be construed as 'a joke' seems questionable. The author of the *Radd-ul-Mukhtar* is of the opinion that if divorce under compulsion or by way of joke is valid, marriage contracted under compulsion should also be.<sup>44</sup>

Contradicting the above are the traditions of the Prophet which report him as giving the right to a virgin, as well as a matron, to repudiate marriages which were contracted against their wishes. This clarifies that marriage under coercion or force is invalid. Since for all purposes a contract of marriage under Muslim law is treated as a civil contract, the same consequences which attaches itself to a contract where consent has

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39. Tyabji, Faiz, Badruddin (1968). *Muslim Law (the personal law of Muslims in India & Pakistan)*, 4th Edition; N.M.Tripathi Ltd., Bombay at p.52.

40. *Op. cit.* Baillie (1875) at p.72.

41. *Ibid.*

42. *Ibid.*

43. *Op. cit.* Tyabji (1968).at p.52.

44. Ali, Ameer (1929). *Mahommedan Law*; Thacker, Spink and Co. Calcutta. At p.360.



been obtained by coercion or force should apply— more so in fact, since one of the characteristics of a Muslim marriage contract is its permanence.

It has been conclusively stated that it is not lawful for a guardian to compel a virgin who has attained majority to marry according to his wishes and against her wishes. There also exist instances where the Prophet annulled the marriages of women who complained to him that they were contracted by their fathers into marriages against their will.<sup>45</sup>

If she is coerced or deceived into granting her consent, her marriage contract would be vitiated and would be deemed to be an irregular marriage unless ratified afterwards. Tanzil-Ur-Rahman<sup>46</sup> states:

A Muhammadan woman after attaining puberty becomes a sui juris, able to look after her interests herself and if she does not consent to a marriage of her free will and the consent is obtained by coercion or undue influence, such marriage will not bind her.

According to Ameer Ali,<sup>47</sup> free consent on the part of the woman forms the very essence of the contract of marriage and therefore when the consent has been obtained by coercion or fraud the marriage would be invalid unless ratified after the coercion has ceased, or the duress has been removed, or when the consenting party, being undeceived, has continued the assent.

The correct view, from the above, appears to be, that under Muslim law, lack of free consent invalidates the marriage unless it is ratified by the woman. It is certainly the just and equitable view to allow the woman today to have a say in her own marriage.

### **Concept of equality in marriage (*kafa'at*)**

The Prophet is reported as 'commanding':

Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals...<sup>48</sup>

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45. Tanzil-ur-Rahman(1978). A Code of Muslim Personal Law; Hamdard Islamicus, Karachi at p.51.

46. Op. cit. Rahman (1978) at p.71.

47. Op. cit. Ali (1929) at p. 358.

48. Op. cit. *Hedaya* (1870) at p. 40.

The logic behind the concept of equality is that the purposes of marriage are 'cohabitation, society, and friendship' and these cannot be enjoyed except when the couple are equal.<sup>49</sup> Tahir Mahmood<sup>50</sup> calls the marriage of unequals "ill-sorted marriages". The *Hedaya*<sup>51</sup> states:

if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it.

The concept of equality in marriages laid down by Muslim law somewhat vitiates the woman's right to consent. While on one hand declaring in no uncertain terms that the consent of the woman is an essential requirement, this condition or right given to the woman is qualified by giving her guardian the right to dissolve the contract of marriage if the husband is not the wife's equal.

The *Hanafis'* give more importance to the concept of equality than the other schools. According to the *Hanafi* school, in the case of marriage the man should be equal to the woman he is marrying, in the following respects: religion; lineage; freedom; calling or profession; opulence or wealth; piety, virtue, character or integrity.<sup>52</sup> This means that the man and the woman must share the same religion, that is Islam; they must be equal in descent or lineage; the profession of the husband should be of the same status as the wife's family; there should not be disparity in financial status and their moral standards should be similar. The remaining point as to freedom has become superfluous since the institution of slavery no longer exists. Thus Abu Hanifa gives the woman freedom in making the contract of marriage while at the same time protecting the right of the guardian by allowing him to dissolve an unequal union.

The concept of equality requires the husband to be the equal of the wife and not vice versa.<sup>53</sup> This requirement seems to be inconsistent with the idea of Islam being a caste and class-less religion under which all are equal. In the *Quran* (XLIV: 10) it is stated that the Believers are brethren; the Prophet is also said to have declared:

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49. Ibid.

50. Mahmood, Tahir (1982). *The Muslim Law of India*; 2nd edition; Law Book Co., Ltd., Allahabad at p. 67.

51. Op. cit. *Hedaya* (1870) at p. 40.

52. For more on the criteria of equality see Op. cit. Rahman (1978); Op. cit. Baillie (1875) and Op. cit. *Hedaya* (1870).

53. Op. cit. Baillie (1875) at p.62.

that all human beings are equal, regardless of their individual or racial status, and that no one can claim any preference or superiority over others, except by reason of his piety.<sup>54</sup>

Tanzil-Ur-Rahman,<sup>55</sup> is of the opinion that the law about equality seems to have been based upon practical difficulties experienced at the time of marriage and that some of the grounds of inequality have now lost their significance. From a legal standpoint, according to the *Hanafis*, the marriage between a man and a woman, even where the man is not the equal of the woman, is valid.<sup>56</sup> The guardians have however been given the authority to object on the grounds of inequality, and of getting the marriage cancelled or annulled, if they wish to do so but only through a Court.<sup>57</sup> This right exists only until the birth of a child.<sup>58</sup>

In practice, the conditions of equality are not adhered to strictly in most cases. Ameer Ali,<sup>59</sup> quoting a passage of the *Futawa Alamgiri* declares that '(e) xcept Islam and freedom, equality in any other respect is not invariably observed in a country other than Arabia'. In practice, although according to the Sunni school the guardians may go to court to set aside an unequal marriage it rarely happens. In the case of *Jamait Ali Shah vs. Mir Muhammad*<sup>60</sup> the Court held that inferiority in the social status of the husband does not render the marriage invalid *ab initio*, nor does it justify the court in dissolving the nuptial tie. It is only when equality has been stipulated for and there has been breach of that stipulation that the marriage can be set aside on the grounds of inequality. The Courts have clearly put more emphasis on the reality of the contemporary situation where equality does not have the same significance as it had before. Thus, even though the doctrine of equality in marriage is a part of the substantive law of the Muslims and continues to apply to Muslims,<sup>61</sup> the above is proof that the judiciary in its role as interpreters of law can play a crucial role in bringing about reforms where necessary.

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54. Op. cit. Rahman (1978) at p.207.

55. Op. cit. Rahman (1978) at p.199-200

56. Op. cit. Baillie (1875) at p.67 and Op. cit. Rahman (1978) at p.215.

57. Ibid.

58. Op. cit. Rahman (1978) at p.215.

59. Op. cit. Ali (1929) at p.367.

60. IC Punjab 1916 10.

61. Op. cit. Rahman (1978) at p.200.

### Agency in marriage (*wakiliyat*)

As already stated, the parties to a marriage may personally give their consent or their consent may be given through an agent or representative. According to the *Hedaya*,<sup>62</sup> agents in matrimony are persons employed and authorized by the parties concerned to enter into contracts of marriage on their behalf; and the power so delegated is termed *Wikalit-ba-Nikkah*. An agent on behalf of a party to a marriage is merely a person who negotiates or represents that party. All the rights and duties arising out of the marriage attaches not to him but to the principals that is the bride or the groom, whomever he represents. The agent:

is no more than a negotiator, and the principal himself must be referred to as the contracting party, and he alone is entitled to the rights and liable to the obligations of the contract.<sup>63</sup>

The agent who contracts into marriage must be sane and adult; he may be agent for either or both the parties to the contract and must be authorised by the parties to act as agent. Although an unauthorised person may contract another person into marriage, such a contract is valid only upon the ratification or approval of the parties.<sup>64</sup>

In Bangladesh the common practice is that the bride is always represented by an agent. A Bangladeshi woman's modesty, coupled with the fact that she may be in seclusion and cannot appear before the witnesses, makes the practice of agency in marriage the norm.

As regards the question as to whether a woman can be a matrimonial agent, there seems to be no clear-cut rule. On one hand we have a reported tradition of the Prophet which relates that 'one woman shall not give another woman in marriage' while in the *Hedaya*<sup>65</sup> we find that there is mention of a man contracting a woman or a woman contracting a man. According to Shama Churun Sircar:<sup>66</sup>

A woman adult and discreet can not only marry of her own accord and authority, but appoint an agent to contract her in marriage and can herself act as an agent in another's marriage.

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62. Op. cit. *Hedaya* (1870) at p.42.

63. Op. cit. Baillie (1875) at p.75.

64. Op. cit. Ali (1929) at p. 316 and Op. cit. Baillie 1875 at p.85.

65. Op. cit. *Hedaya* (1870) at p. 42.

66. Shama Churun Sircar (1875). *The Muhammadan Law—Tagore Law Lectures 1874*; Thacker, Spink and Co., Calcutta at p.369.

Ameer Ali<sup>67</sup> also agrees that a woman may act as an agent. Therefore, it may be construed from the above that, according to the *Hanafi* school, a woman may act as an agent in marriage. However, in Bangladesh a woman rarely becomes a matrimonial agent.

### The Bangladesh Situation

As we have seen from the above, an adult girl (i.e. one who has attained puberty) must consent to her own marriage and may do so in a variety of ways.<sup>68</sup> Among the *Hanafis*' there is no disagreement about this necessity. However, in Bangladesh the consent of the woman in the rural, as well as in many cases the urban areas, is not considered as important and is regarded as more of a formality than anything else.

There are several considerations which affect the way in which, and the reasons for which, consent is, or is not, given properly. The practice of arranged marriages is one such practice. Again it is important to note the cases in which the women have formally consented, but in reality there is no real freedom of choice.

### Arrangement of marriages

Due to various practices like *purdah*, patriarchy as well as the great degree of control that parents have over their children in Bangladesh, there exists a system whereby the marriage of a couple is arranged by their families, and not by themselves. There is very little opportunity generally, in the conservative social system of Bangladesh, for young people to meet, get to know or interact with each other. As in many other Muslim societies:

The element of freedom of choice of the mate for either party is very limited, while romantic reasons for entering upon a marriage are almost completely foreign to the participants.<sup>69</sup>

Marriage is the most important event practically in every woman's life, both in the rural and the urban setting. For this most important event, she has to leave her fate almost entirely to the judgment of her family, especially the men. The system of arranged marriages is not unique to Bangladesh. In fact:

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67. Op. cit. Ali (1929) at p.316.

68. As to how consent may be expressed see above.

69. Korson, Henry J.(1967). "Dower and Social Class in an Urban Muslim Community" in *Journal of Marriage and the Family*; Vol.29 No. 3, August 1967, pp.527-532 at p.527.

The traditional system of mate selection in Muslim societies has been a marriage arranged by the families of the principles, usually with the consent of the couple.<sup>70</sup>

It is not unusual for the bride and the groom to see each other for the first time on the day of the marriage, unless he is a relative she played with when she was very young.<sup>71</sup> According to various authors, in rural Bangladesh, marriage:

... is always arranged, and the father and the other male relatives play a dominant part in the marriage negotiations. The girl's opinion is never sought. While her consent is necessary in Muslim marriages, it is only a formality.<sup>72</sup>

The male members of the family usually have the greater and the final say in the arrangement of marriages, although the female members may be consulted. The proposal usually comes from the groom's side and the bride's family has to decide on whether or not to accept the proposal. Financial stability, as well as family lineage are matters which are taken into consideration amongst other things. Economic affluence may make up for the absence of a lot of other qualities. Emotional ties are expected to develop between the couple after the marriage 'and it is primarily the wife's responsibility to make the marriage a success'.<sup>73</sup>

Apart from the economic status of both families, the personal qualities of the groom, for instance education, health, character and position and those of the bride such as moral reputation, obedience, manners, piety, complexion, health and her skills to be a good housewife, are taken into consideration by the families.<sup>74</sup> Although sometimes the boy's opinion or acceptance is taken into consideration, a girl's rarely is.<sup>75</sup> Even in the urban areas, in spite of less poverty and more education, arranged

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70. Korson, Henry J.(1969). "Student Attitudes Towards Mate Selection in a Muslim Society: Pakistan" in *Journal of Marriage and the Family*;Vol.31 No. 1, February 1969, pp.153-165 at p.153.

71. Abdullah and Zedenstein (1982). *Village Women of Bangladesh—prospects for change*; Pergamon Press, Oxford et al. at p.74.

72. Chaudhury, Rafiqul Huda and Ahmed, Nilfer Raihan (1980). *Female Status In Bangladesh*; The Bangladesh Institute of Development Studies, Dhaka at p.14.

73. Papanek, Hanna (1973). "Purdah: Separate Worlds and Symbolic Shelter" in *Separate Worlds—Studies of Purdah in South Asia*; Papanek, H. et al (eds.), Chankya Publications, Delhi at p.41.

74. USAID (1977). *Profile of Bangladeshi Women—selected aspects of women's role and status in Bangladesh* at pp.37-38.

75. Ibid.

marriages are still the norm and '(a)n overwhelming majority of urban, educated woman still accept and prefer arranged marriages.'<sup>76</sup>

Nowadays, in the urban areas, usually the boy and the girl get to see each other before the marriage, in the presence of guardians and relatives. However, even if they are allowed to have a glimpse of each other, they rarely get an opportunity to meet and exchange views and ideas. There are still many instances where the urban bride and the groom see each other, for the first time, on the day of the wedding.

With the spread of Western ideas and somewhat more freedom in the urban areas, in infrequent cases, some couples may get an opportunity to get to know each other before the wedding. Parents will usually hesitate to admit that the couple have decided upon their own future and will hide the fact if possible. This is true especially in the case of a girl. Such a marriage, known as a "love marriage", is considered to be 'a gross mis-step' by the couple, almost an immoral act.<sup>77</sup> The parents of the girl are considered to have failed to properly guard and protect their daughter's character.

Most village women consider marriages where the girl and the boy have married by choice faintly indecent, at least immodest. This was confirmed by the empirical investigation conducted for the dissertation on which this article is based. Views of rural women of various ages and status were elicited in order to get a greater understanding of women's choices and their opinions. Jamila was married to Hatem Ali of Dhitua village in 1969. Since Jamila had not reached puberty at the time of her marriage, her consent was not necessary under religious law and was not sought. She had never seen her husband, her in-laws, or come to her husband's village before her marriage. Jamila was embarrassed when she confessed that her daughter married by her own choice.

Batashi is above 50 years old; she was married when she was 13 or 14 to a man she had never set her eyes upon before marriage. Batashi, who was widowed in 1979, had the following to say about rural marriages:

It is not like the marriages that take place nowadays, where the boy sees the girl and even the girl sees the boy.

About her own wedding she says with pride: "we were not even consulted, neither were the boys".

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76. Jahan, Rounaq (1975). "Women in Bangladesh" in *Women For Women*, University Press Limited, Dhaka, pp.1-30 at p.7.

77. Op. cit. Korson (1969) at p.155.

For Batashi as for many other women, the fact that her marriage was arranged and that she did not even see the person she was marrying, is evidence of the fact that she has led a virtuous and chaste life.

Although the majority of arranged marriages take place with the brides implicit, if not explicit consent, there are instances where such consent is obtained under some sort of compulsion. In a good number of cases 'consent of the adult girl is obtained by camouflaged force'.<sup>78</sup> Thus a thin line may often exist between arranged marriage and forced marriage.

A Bangladeshi girl usually consents to the marriage arrangements made for her by her family. In most cases the girl consents willingly since from very early on she has been taught to accept the decision of her elders. Only in rare cases, would a girl protest against her guardian's decision—and there have been instances where girls have been forced into marriages.<sup>79</sup>

#### Consent of a Bangladeshi girl

There are cases where the girl is married, as mentioned before, without her consent being asked at all, her acquiescence taken for granted. Again, sometimes girls may be forced into consenting to a marriage. The requirement of consent from the girl herself, when she is above the age of puberty, is not strictly followed in practice, and the father or other legal guardian may consent to the marriage, as if she was a minor. Respondent Fawzia's marriage was arranged by her husband's brother-in-law who is from her own village. She saw her husband for the first time after the marriage was solemnized. Fawzia says:

I just knew I would have to say yes (*qabul*). Nowadays some girls are asked before the wedding is arranged whether they agree to the match; but not all.

Robert and Pauline Whyte,<sup>80</sup> found that the practice of arranged marriages exists throughout Asia where the parents' religious and social obligation:

...of seeing ones daughters married as advantageously as possible, as early as possible in the interests of family honor, overshadows considerations of their probable happiness even though it must not be assumed that such considerations are altogether absent.

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78. BNWLA (2001). *Forced Marriages--A Blot in Women's Freedom of Expression*; BNWLA (Bangladesh National Women Lawyer's Association), Dhaka at p.26.

79. *Op. cit.* Chaudhury and Ahmed (1980) at p.28.

80. Whyte, Robert and Pauline (1982). *The Women of Rural Asia*; Westview Press, Colorado at p.68



One must remember that for a village woman financial and economic stability to a large extent translates into happiness and it would be presumptuous to say that the rural parent does not have his/her offspring's interests in mind when he/she tries to think of a future free from basic needs.

Although education (at least basic education) for girls has become more popular and may postpone a daughter's marriage for a couple of years, there is no change in the general consensus that when it comes to marriage, the parents know best. In all fairness, it should be mentioned that women who have themselves been married very young, or have not been consulted about their own marriages, do not wish their daughters to have any option of choice either. For instance, Wazifa from Dhitua, who was married below the age of puberty, recalls that she was too small to have anything to say about her own marriage or have any opinions, although she remembers being frightened.

Although Wazifa wishes to postpone arranging her own daughter's marriage (depending on her husband's wishes of course) until she is 16, 17 or 18 so that the daughter may continue her education, she is vehement about arranging the marriage. Asked whether she will ask her daughter's opinion before arranging the marriage, Wazifa answers:

no, she must get married wherever I want her to; I'll murder her otherwise. Of course I shall try to find a suitable husband for her; after that it is in *Allah's* hands. If her fate is good she will be happy-- we will do our best.

From my field study it was quite obvious that for most rural women, the idea that their consent was required for their marriage seemed incomprehensible. They accepted the idea that their guardians had complete power and authority over their lives. The placidity of their attitude showed that it would not occur to them that they had any say in choosing their husbands.

For example, Shahanaz comes from a village several miles away from her husband's village of Dhitua and had never seen her husband before. She was married the same day her husband's family came to see her. She says she willingly consented at the time of her marriage i.e. when she was asked, although she had never seen the groom before and was scared to go to an unknown house.

Romesa also says she willingly consented, at the time of the marriage ceremony, to the match which her parents arranged. She had seen her husband before, since they lived in the same village. The general trend is usually to arrange marriages outside the birth village of the girl since in the words of one of the respondents, Monowara:

there is less chance of bad blood and fights. The parents can also avoid knowing if their daughter is unhappy.

However marriages are also arranged within the village or even within the *bari* itself (for example between cousins). Out of the 317 respondents married after puberty, the majority said they had willingly consented to a match arranged by their parents. In the table below 8.5% (27 respondents) married by choice. This may seem quite a high number considering the stigma attached to 'love marriages'. However all 27 respondents were urban educated university students who quite freely admitted that they had chosen their own husbands. This may explain the high percentage. The following is a chart of the responses obtained:

#### RESPONDENTS CONSENT, LACK OF CONSENT AND TYPE OF CONSENT TO MARRIAGE

	Frequency	Percent
Willingly consented to the marriage arranged by parents/guardians	280	88.3
Forced into consent against will	2	.6
Forced into marriage without consent being asked	6	1.9
Married by own choice	27	8.5
Do not know	1	.3
Does not recall consent being asked	1	.3
<b>Total</b>	<b>317</b>	<b>100</b>

The women were quite unaware of the distinctions regarding consent to marriage between a girl who has reached puberty and one who had not. At the time of the marriage being solemnized by the *munshi*, the girl is asked to and does express her agreement. Yaar Jaan says she was asked to say *qabul* at the time of her ceremony; before that she was just informed of the fact that her marriage had been arranged.

Hazera's parents arranged her marriage when she was too young to understand the significance of marriage,

We were told that small people, when they get married, have small babies while older people have bigger babies!

Hazera says her consent was not asked before the marriage, neither was she asked to say *qabul* or signify her acceptance: I only remember the time when we were formally shown each other at the *shahnazar* ceremony and

when I was asked to pray. The marriage was solemnized outside, without my participation.

Monowara's marriage was arranged by a *ghatak* (marriage negotiator). Monowara described the procedure:

The guardians' of both the bride and the groom that is, the male guardians, see the prospective bride or groom. The parties themselves do not see each other. At the ceremony the girl is asked to consent by her *wakil* (*ukil*).

As Jharna Nath<sup>81</sup> reported, the formal consent is asked 'during' the ceremony and the girl can never disagree because by doing so she would be giving her family a bad name and would also probably lose respect and the possibility of ever getting married. This formal consent which is obtained from the woman at the time of the ceremony is more of an acquiescence than anything else. Girls are brought up with the idea that they would have to agree to any match arranged by their parents.

Sufia was married in 1968 before puberty. She says that unlike girls now, even though she lived in the next village she had never seen her husband, nor visited Dhitua before her marriage. She was informed by her guardians that she was to be married. During the ceremony of marriage she was asked to say *qabul* and she did so, not really comprehending what marriage entailed. When Sufia's daughters got married, their consent was not asked beforehand; they said *qabul* during the wedding ceremony. Sufia explains the lack of consent by saying: "In the village marriages do not take place in that manner".

Most of the respondents, (all above puberty at the time of the marriage) had not seen their prospective husbands before the wedding day.

### Consent and Bangladeshi Law

In Bangladesh there is no specific civil law regarding the requirement of consent to marriage. In 1956 the Family Law Commission, dealt with the question as to:

what machinery should be provided to insure that marrying parties have freely consented to marry each other, and that neither of them has been a victim of undue influence.<sup>82</sup>

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81. Nath, Jharna (1981). "Belief and Customs observed by Muslim Women During their Life Cycle" in *The Endless Day—Some case material on Asian Rural Women*; Epstein, T. Scarlett and Watts, Rosemary A. (Editors) *Women in Development Series Vol.3*; Pergamon Press, Oxford et al at p. 21.

82. The Pakistan Gazette Extraordinary, June 20, 1956 at p.1208.

The Members of the Commission expressed the opinion that it would not be feasible for a Government official to be present at every marriage to satisfy himself that the parties concerned had freely consented to marry each other.<sup>83</sup> Section 5 of the Muslim Family Laws Ordinance prescribes a standard form of *nikah nama* which is to be signed by the parties or their agents. The Commission could only hope that this document would ensure the consent of the parties to the marriage and that, with the spread of education, even in rural areas women would refuse to sign the *nikah-nama* if they had not given their consent freely.<sup>84</sup> Maulana Ehtishamul-Huq a member of the Commission, who dissented, almost on every point, with the others, nevertheless agreed that legislation could not in any way ensure consent of the parties, although mutual consent was essential under the *Shariat*. He had no objection to the marrying parties signing the *nikah nama* although he quite rightly pointed out that if the parties can be forced into wedlock, their signatures or thumb-impresions can also be taken in the same manner.<sup>85</sup>

Maudoodi,<sup>86</sup> a critic of the Commission's report, in his argument as to why proof of consent was not required, said, 'for legal purposes it is not necessary to ascertain whether the marrying parties have freely consented' to the marriage. According to him the *Shariah* has prescribed a method for ascertaining assent which should suffice. Therefore when pressure is alleged the burden of proving such pressure is on the one who alleges it and demanding proof for absence of pressure will not only completely frustrate the basic purpose of law, but also create a good many practical difficulties, which will merely aggravate the complexities.<sup>87</sup> Since under religious law marriage can be contracted without any particular ceremony, neither does the contract have to be in writing, a marriage is valid even if there is no *nikah nama* or *kabin nama* as required by the Muslim Family Laws Ordinance of 1961. In Bangladesh many marriages take place orally and without any *nikah nama*. In such cases there is no proof as to whether the consent of the parties were taken as required by Muslim law. Although the majority of girls do consent, whether or not through the full

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83. The Pakistan Gazette Extraordinary, June 20, 1956 at p.1208.

84. Ibid at p.1956.

85. The Pakistan Gazette Extraordinary, Aug.30, 1956 at p. 1577.

86. Maudoodi, Syed Abul Ala (1961). "The Family Law of Islam (The Questionnaire and its Reply)" in Studies in The Family Law of Islam; Ahmad, Khurshid (ed.) Chiragh-e-rah Publications, Karachi, pp.13-34 at pp.16-17.

87. Op.cit. at p.17.

exercise of their right to choose, there may be cases where the parents exert undue influence upon their daughters in order to force them into consenting formally. As discussed earlier, according to the *Hanafi* School even such a marriage is binding although upon this point various jurists have disagreed. There is confusion as to whether such a marriage would be valid, voidable or void or whether ratification later would give it validity. According to Mulla<sup>88</sup>, a marriage without the consent of either party (where the parties have attained puberty) is void.

Since marriage is a civil contract, the consent required would fall within the Contract Act, 1872. Until the enactment of this Act, the Muslim law of contract was applied to contracts between Muslims. Since its enactment, the Muslim law of contract is regarded, for all practical purposes, to be superseded by the Contract Act of 1872.<sup>89</sup> In an Indian case, it was held that since Muslim marriage is a civil contract 'it should attract all the incidents of contract as any other stipulated in the Contract Act.'<sup>90</sup>

According to Section 14 of the Contract Act of 1872, in order that an agreement may become a contract, free consent of the parties must be present (Sec.10). According to Sec. 14 consent is free when it is not caused by coercion, undue influence, fraud and misrepresentation. Where the relation between the parties is such that one is in the position to dominate the will of the other and to obtain advantage, the contract is said to be induced by undue influence and such consent is not free. Under section 19 of the above Act a contract without free consent is 'voidable at the option of the party whose consent was so caused'.<sup>91</sup>

When consent is obtained by fraud or force, such marriage is invalid unless ratified.<sup>92</sup> The confusion which still exists is whether force, coercion or undue influence exercised by the father would fall within the Contract Act, since the Act speaks of coercion, fraud or undue influence exerted by one party to the contract over the other, and the father or other relations who may exert influence, are not directly parties to the contract.

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88. Mulla (1990). Principles of Mahomedan Law, by Hidayatullah, Arshad; 18th N.M.Tripathi and Co.,Bombay at p.223.

89. Pollock and Mulla (1972) at pp.2-7.

90. *Mahmad Usaf Abasbhai Bidiwale vs. Hurbani Mansur Atar* 1978 Maha. L.J. 26.

91. Op. cit. Pollock and Mulla (1972) at p.170.

92. *Abdul Latif Khan vs. Niyaz Ahmed Khan* 1909 345; *Kulsumbi vs. Abdul Kadir* 1921 45 Bom 15.

In *Mt. Bibi Ahmad-un-Nisa Begum vs. Ali Akbar Shah*,<sup>93</sup> it was held that under the Mahomedan law the regular procedure for obtaining the consent of the girl must be proved and in the absence of the proof that the procedure was gone through, no valid marriage can be taken to have been established:

Where the girl brings a suit for declaration of her marriage as invalid definitely asserting that she had not consented to the marriage and it was against her wishes and in support of the allegations produces witnesses, the onus shifts to the defendant to prove that the nikah (sic) was properly performed.

Justice Mir Ahmad in his judgment in the above case was forceful in his opinion that 'consummation had no value if there was an invalid marriage ab initio' and lack of consent invalidates a marriage. The doctrine of *factum valet* cannot be invoked to validate an invalid marriage under Muslim law.<sup>94</sup>

When marriages are arranged, as they mostly are in Bangladesh, the question which may arise and with which the courts may have to deal with is whether:

pressure from one's family or community, stopping short of any threat to life, limb or liberty, amount in law to duress?<sup>95</sup>

In the English case of *Singh vs. Singh*<sup>96</sup>, counsel for the petitioners had argued that the command of her parents had as much punitive sanction on the petitioner as if they had been backed by the threat of physical violence.<sup>97</sup> The Court of Appeal in that case strictly construed the rule that duress can be evidenced only if there is fear caused by threat of immediate danger to life, limb and property.

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93. 29 AIR 1942 Pesh 19.

94. Sampath, B.N. (1969). "Marriageable Age, Consent and the Soundness of Mind in Indian Matrimonial Law: A Plea for Rationalization" in *The Benaras Law Journal*, 1 & 2, Jan-Dec, 1969, pp.28-52 at p. 39.

95. Bradney, A. (1984). "Arranged Marriages and Duress" in the *Journal of Social Welfare Law*, 1984, pp.278-281 at p.278.

96. 1971 P.226; 1971 2 WLR 963

97. Op. cit. Bradney (1984) at p.278.

According to the Court, since the petitioner had married obeying the wishes of her parents out of respect for or a sense of duty or obligation; there had been reluctance but not fear<sup>98</sup>This case dealt with an arranged marriage where the parties were Sikhs; since arrangement of marriages are based almost on the same considerations for Muslims in Bangladesh the case has bearing on the subject under discussion. In a later and similar case, *Singh vs. Kaur*<sup>99</sup> again in Britain, it was held that the existence of duress in marriage would mean that the parties could challenge their marriages and not that such arranged marriages would be legally invalid *per se*.<sup>100</sup> Recent cases in the sub-continent have also upheld earlier decisions that consent of an adult woman is a pre-requisite to a valid Muslim marriage. In *Dr. A.L.M. Abdullah vs. Rokeya Khatoon*<sup>101</sup> it was held:

Unless it is established by clear, direct and specific evidence that the woman gave her consent to the marriage anything just short of that will not prove marriage.

In the absence of consent of the bride who categorically denied the marriage the conclusion is that there was no valid marriage between the plaintiff and defendant...<sup>102</sup>

In 2004, in Pakistan, in the much publicized Saima Waheed's case, the Pakistan Supreme Court upheld the decision of the Federal Shariat Court allowing adult Muslim girls to marry without the consent of their '*wali*' or guardian. The Court observed that a female adult is not required to have the consent of her guardian or father to enter into a valid marriage.<sup>103</sup>

The primary problem in Bangladesh is that a woman who has been married without her consent, or who has been forced into consenting under duress to the marriage, will rarely go to court. There is again the system of agency in marriage which may operate to vitiate free consent of the girl. The agent is selected by her relatives, usually her parents. Even if she is formally asked to signify her consent it has rarely happened that at the time she is asked by the *wakil*, whether she wishes to or not, the girl has refused. The preparations that take place for a wedding and the elaborate ceremonies that take place before the actual solemnization

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98. Ibid.

99. 1981 Fam.Law 152; 1972 1 WLR 105.

100. Op. cit. Bradney (1984) at p.279-280.

101. 1969 21 DLR 213;

102. Ibid.

103. The Daily Star January 4, 2004. See also *Abdul Waheed vs. Asma Jahangir* PLD 1997 Lah 331.

prevents the wife-to-be from dissenting. The whole affair progresses to the stage that when her formal consent is asked for, she is quite helpless. Sufia Ahmed and Jahanara Chowdhury<sup>104</sup> consider that the social conditions that exist have made the requirement of consent 'nugatory':

The question of giving consent apart, in many cases the girl is not at all consulted in the matter of selection of the bridegroom with whom her future is almost irretrievably tied and she is under pressure of the social custom to say 'yes' to the selection made by father or any other male relation with whom she has to put up.<sup>105</sup>

The last few decades have seen the increase in what may be termed as forced marriages. Bangladesh National Women Lawyer's Association (BNWLA) defines a forced marriage as one "which is contracted between two adults without free consent of both or one of the parties and may involve enticement, fraud, treachery, coercion, mental abuse, emotional blackmail, family or social pressure which may extend to physical violence, abduction, detention, threat of grievous hurt, rape or even murder.<sup>106</sup> Many expatriate Bangladeshi families who have settled in the West wish to continue 'arranging' the marriages of their children, especially their daughters. For the latter, i.e. the younger generation who have been born and brought up in the West, the dichotomy between their private conventional family backgrounds and their more unconventional public lives give rise to conflict. There has been growing concern about the number of Bangladeshi girls being brought back against their will to Bangladesh and being forced into marriages. It was found in a study that 'the degree of compulsion on young women for their consent in such arranged marriages is such that the parents are often known to take recourse to seizing their passports and even their return air tickets'.<sup>107</sup>

Due to the existing economic situation, the poverty-stricken father may give his daughter into marriage to a man in exchange of a price, without regard to her consent or happiness. In 1991 the case of the Indian Muslim girl Ameena made headlines. According to a report published in The

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104. Ahmed, Sufia & Chowdhury Jahanara (1979). "Women's Legal Status in Bangladesh:" in *Situation of Women in Bangladesh ; Women for Women*, Dhaka, pp.285-331 at p.302.

105. *Ibid* at pp.302-303.

106. *Op. cit.* BNWLA (2001) at p.27.

107. *Op. cit.* BNWLA (2001) at p.29.



Lawyers,<sup>108</sup> Ameena, whose age was found on medical examination to be between 12 and 14 was married a week after she attained puberty to a 60 year old Saudi Arabian national. Ameena was discovered, reluctant and crying, by an Indian Airlines air hostess when she was being taken by her 'husband' to Delhi from Hyderabad. According to Ameena she had been married without her consent and her parents had been paid a lot of money by Al Sagieh. Hundreds of girls apparently are sold each year into marriage and Ameena's case was merely the 'tip of the iceberg'.<sup>109</sup>

In view of the rise in incidences of illegal trafficking of women and children in Bangladesh, often in the guise of marriages, the Government has been forced to enact progressively stricter laws. Starting from the Cruelty to Women (Deterrent Punishment) Ordinance in 1983, Nari O Shish Nitjaton Daman (Bisesh Bidhan) Ain 1995 [Women and Children Repression (Special Provision) Act, 1995] to the Nari O Shishu Nirjaton Daman Ain, 2000 [Women and Children Repression Prevention Act, 2000], successive laws have tried to tackle the growing and world wide problem of trafficking of women and children. Many poor parents are tricked into agreeing to marriages. One of the ways of procurement of young girls and children for the purpose of trafficking, sale and prostitution is through marriages. Men employed abroad and earning a lot of money come back to their village homes to get married:

After marriage the young wife accompanies the husband to his place of work and since then, no trace can be found of these young girls.<sup>110</sup>

Where the daughter is of age and has consented to the marriage and later is trapped into prostitution or sold, the parents are as innocent and misled as the wife herself. But there are cases where parents, unable to stand the poverty and unable to feed their families, sell their daughters

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108. Gopal, R. (1991). "Child Welfare: A Far Cry in Ameena's Case" in *The Lawyer*, October 1991, pp.4-8.

109. See *ibid* at p.8.

110. Shamim, Ishrat (1992). "Slavery and International Trafficking of Children: Its nature and Impact"; Country paper presented at NGO Forum on Children's Rights in South Asia, 10th December 1992 at p.6.

into marriages, like Ameenah. This is another area where the laws regarding consent should be strictly enforced, which means that as far as Muslim law is concerned, a girl over puberty cannot be married without her consent. The other alternative is to make marriages below the minimum age totally void so that there is no danger of parents being in the position to sell their children. The age of marriage and of consent is inextricably interwoven. If there is a uniform age below which a marriage cannot take place and that age corresponds to the age when a girl's consent is required under the law that may go a long way towards solving some of the problems.

### **Conclusion**

When the Muslim Family Law's Ordinance was promulgated in 1961, it did not seem necessary to make special provisions to ensure that the girl had consented. After close to forty five years, when there are still questions as to whether consent is properly given, special provisions need to be made to make sure that free consent on the part of the woman is present.

However, there exists confusion regarding what consent really means. The thought that naturally arises is that the importance placed on consent of the woman is somewhat negated by her general lack of freedom to choose or select. This contradiction is symptomatic of contemporary Bangladeshi society in the sense that while on one hand the state authorities emphasize the crucial necessity for women to participate in economic activities, social institutions continue to hinder such participation.

Keeping the cultural and religious context in mind, freedom of choice for Bangladeshi rural women would mean freedom to choose options other than marriage, for example to postpone marriage in favour of education or gainful employment so that when she eventually enters into the marriage contract she does so as an equal partner.

According to Mohammad Shabbir,<sup>111</sup> the only method of expressing mutual consent in a Muslim marriage, in the absence of a 'viable

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111. Shabbir, Muhammad (1988). *Muslim Personal Law and the Judiciary*; Law Book Company Ltd., Allahabad at p.17.

alternative', is through formal proposal and acceptance. According to him this form of expression 'does not possess the intrinsic value to conclusively and exclusively determine the nature of Islamic marriage'. Since:

final expression of mutual consent to tie the marriage-knot is a step of definite and precise nature to assert the desire to be united in marriage (sic) it is imperative to put it on firm footing in the best possible manner.<sup>112</sup>

Thus, the procedure of expressing consent in a Muslim marriage, which is so vital to its proper formation, should be such that it leaves no scope for anything less than free consent on the part of both husband and wife.

The system of arranged marriages may seem offensive or unfair on the couple but it would be a mistake to assume that in all arranged marriages the wife is doomed to unhappiness. Given the rate of divorce in Western countries, where there is greater freedom of choice, it also does not follow that choice has anything to do with contentment. Many of the respondents interviewed, married without their consent in any real way being asked, are content with their lives. For example, Moriyom, married at the age of seven back in 1929 was terrified at the time of her marriage and recollected how she dreaded going to her husband's house. She finally went to her new home after one and a half years. Moriyum and her husband were married for 62 years until his death in 1991. Looking back, she says, "I was happy with him".

The women themselves do not see anything wrong in the way marriages take place with the bride, or for that matter the groom, having little say in the choice. In fact it would be wrong to think that arranged marriages are viewed as unfair by the women themselves. As mentioned earlier, when asked whether their daughters' consent would be taken when they get married most replied in the negative. Asked whether the consent of the daughter is taken Raziya says:

No, we do not consult the daughter. We get her married according to our wishes.

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112. Ibid.

Hazera's daughters were both married above the age of puberty although below the legal minimum age. Asked whether their consent was asked, Hazera like Raziya replied firmly,

No, we did not ask their opinion. After all, when we got married, nobody asked us, so we did not ask our daughters. When during the marriage ceremony they were asked to say *qabul* they did so.

Freedom of choice is one of the basic freedoms of a human being and the lack of it means lack of power to decide other important matters. Lack of empowerment to decide her future translates later into perception of inferiority which affects her decision making power in her married life, for example with respect to control of her fertility, matters concerning the children or on the use of her own property. To the women themselves however the system of marriage arrangements, with the consent of the woman being a mere formality, seems suitable enough since they are quite happy to continue the process for their daughters. Monowara for instance says that although she will ask her daughters for their consent at the time of their marriage, they will not be allowed to see or mix with the prospective bridegrooms.

The question therefore remains as to how feasible it is to make laws regarding consent without taking it into consideration that even if a woman freely consents, her decision is one which is affected by many considerations outside the scope of law because there is always a limit to how much the state can interfere with the lives of its citizens. Thus, in truth the only way to ensure that a woman's opinion is given consideration is to ensure her empowerment in other aspects of her life. The most important among these is economic empowerment which is only possible through the recognition of the woman's capability and need to contribute to and participate in economic activities so that she does not have to depend for subsistence on men.

An excellent example in Bangladesh is that of the young girls working in the garment industries who have become economically strong enough to have some say in their own futures. With the spread of female education also, the woman will be better able to dictate the terms of her own marriage contract or at least be aware of her own rights and her signature on the document will have much more significance. The NGOs may play an important role in the above.

Putting aside the debate as to how real a Bangladeshi girl's consent can be, nevertheless the woman's formal consent to her marriage must be more clearly evidenced in order to prevent the worst abuses. This must be done by whatever means possible, whether by procedural mechanisms

or by changing or attempting to change the social structure (specially relating to women's work and economic activities) so that she has a greater say in all aspects of her life.

Thus, the reality of consent of the women to their own marriages can only be ensured by also ensuring a more general reality of choice. Practically of course mechanisms to ensure that consent has been given by both parties can be made stronger. This may be possible by putting more responsibility on the marriage Registrar to ensure that assent to the contract of marriage is present; as well as making sure the woman not only assent orally but that her signature or thumb print is present on the *nikah nama*. This is to make the woman participate in some overt act to show her refusal or acceptance. At present even if the bride does not sign the contract of marriage as long as the agent's signature is present the marriage is valid.

The Western concept of "free" and individual consent is radically different from the meaning of consent in a country like Bangladesh. The view of the majority of the women of the third world countries being passive and submissive, especially as regards consent to marriage is not false, but it must be stressed that cultural norms of obedience to elders and the importance placed on marriage are the constraining factors which erode free will. The problem however is the limits to which enquiries into a person's will and thus consent may go. The problem arises when there is no active dissent; on the other hand there is active assent in the sense that the woman (whether she means it or not) formally consents to the marriage during the ceremony. It is irrelevant for the purposes of judging the validity of the marriage that a party had consented to the marriage because she was expected to, or to escape poverty, or for future economic security; as long as there was absence of real threat of violence, physical or otherwise.<sup>113</sup> For those women who have the means to successfully question in court the validity of their marriages because of lack of viable consent, it would be useful to introduce the concept of nullity in marriage which would make a marriage non-existent from the very beginning so the question of divorce would not arise. As Lim says:

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113. Lim, Hilary (1996). "Messages from a rarely visited Island: duress and the lack of consent in marriage" unpublished article, manuscript with author, pp.1-14.at p.6.

a decree of nullity contains a particular magic, a promise that history can be rewritten such that an unwanted marriage, with all its emotional and psychological baggage, is symbolically wiped away.<sup>114</sup>

For most rural women, who cannot go to court, any discussion regarding consent to marriage must take place within the context or situation of their lives which means with an awareness of the lack of alternatives that is characteristic. The only real solution that can ensure freedom of choice to Bangladeshi women in general is to ensure viable alternatives to marriage. As Pateman<sup>115</sup> rightly points out, when women can contribute:

to all the work of the community along with men, and could make equal call on communal resources in their own right, the basis of sexual domination would be undermined.

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114. Ibid.

115. Pateman, Carole (1988). *The Sexual Contract*; Basil Blackwell Ltd., London at p.157.