

Concubinage and Consent

KECIA ALI

Department of Religion, Boston University, Boston, Mass.; e-mail: ka@bu.edu

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In our imperfect world, rape happens frequently but nearly no one publicly defends the legitimacy of forcible or nonconsensual sex. So pervasive is deference to some notion of consent that even Da'ish supporters who uphold the permissibility of enslaving women captured in war can insist that their refusal or resistance makes sex unlawful.¹ Apparently, one can simultaneously laud slave concubinage and anathematize rape. A surprising assertion about consent also appears in a recent monograph by a scholar of Islamic legal history who declares in passing that the Qur'an forbids nonconsensual relationships between owners and their female slaves, claiming that "the master–slave relationship creates a status through which sexual relations *may become licit*, provided both parties consent." She contends that "the sources" treat a master's nonconsensual sex with his female slave as "tantamount to the crime of *zinā* [illicit sex] and/or rape."² Though I believe in the strongest possible terms that meaningful consent is a prerequisite for ethical sexual relationships, I am at a loss to find this stance mirrored in the premodern Muslim legal tradition, which accepted and regulated slavery, including sex between male masters and their female slaves.³

Western scholars have generally assumed that in Islamic jurisprudence, *milk al-yamīn*, typically rendered "ownership by the right hand," automatically granted free male owners licit sexual access to enslaved females whom they owned.⁴ My research on marriage and divorce in formative-period Sunni legal texts paid close attention to the jurists' frequent analogies between marriage and slave ownership, as well as to doctrines governing marriages involving enslaved persons. I showed that jurists understood *milk al-nikāḥ* (marriage) and its attendant spousal claims through analogies with gendered and sexualized slavery. I never explored the possibility that the jurists considered an enslaved female's consent necessary for a licit sexual relationship outside of marriage. I do so now in this brief essay. Although I limit myself to formative-period sources, the main contours of shared legal doctrines on *milk al-yamīn* persist until the modern era.

Notably, Qur'anic passages on slavery differ strikingly in terms of their terminology and main preoccupations from later jurisprudential texts.⁵ That the text of the Qur'an does not permit sexual access simply by virtue of *milk al-yamīn* is a defensible theological claim.⁶ Whether jurists took this stance is a historical question. If—as I have assumed—they did not, then to accept the former claim means that the jurists misunderstood or departed from scripture by disregarding enslaved women's consent. The other possibility is that generations of scholars, including me, have misunderstood the legal tradition.

Did a man who wanted to have sex with his own female slave need to obtain her consent for that relationship to be licit according to early Muslim jurists? It is difficult to prove a negative, but the answer seems to be a clear no. Any argument must be largely from silence, as the sources simply do not discuss the issue. I recall no instance in any Maliki, Hanafi, Shafi'i, or Hanbali text from the 8th to 10th centuries where anyone asserts that an owner must obtain his female slave's consent before having sex with her. Indeed, I am aware of no case where anyone asks whether her consent is necessary or

even asserts that it is not required. The mere absence of discussion proves nothing, of course. Sometimes things escape mention because they are universally accepted. What jurists take for granted—particularly across *madhhab* boundaries—is often more telling than what they state explicitly. One could perhaps argue that slaves’ consent to sexual relationships with their masters was such an obvious requirement that no one thought it necessary to mention. Yet in sharp contrast to their silence about slaves’ consent to sex with their owners, scholars paid significant attention to consent to marriage. They agreed unanimously that an enslaved female’s consent was never required for a marriage contracted by her owner. Al-Shafi’i (d. 820) is typical: “He may marry off his female slave without her permission whether she is a virgin or non-virgin.”⁷ It strains logic to suggest that an enslaved woman is subject to being married off without her consent or against her will to whomever her owner chooses but that he cannot have sex with her himself without her consent. It is even more of a stretch to accept that the need for consent within concubinage was so obviously a condition for its legitimacy that no one considered it necessary to say so, but that the absence of the need for a slave’s consent to her marriage required explicit affirmation.

A slightly different example reinforces the legal distinction between marriage and concubinage. In discussing withdrawal (*‘azl*) as a method of contraception the jurists distinguish between consent (possibly) required from wives and that (never) required from enslaved concubines. They disagreed about whether husbands needed their enslaved wives’ agreement to practice *‘azl* or that of their wives’ masters. (A person cannot simultaneously own and be married to the same slave, though people can under certain circumstances marry other people’s slaves.) All accepted—sometimes tacitly, sometimes explicitly—that a man could practice withdrawal with his own female slave without seeking her permission.⁸

As this example demonstrates, the rights of wives and slaves differ. *Milk al-nikāḥ* and *milk al-yamīn* are incompatible; they cannot be combined. If a man who is married to someone else’s slave comes to own her (e.g., via gift, purchase, or inheritance) she ceases to be his wife, but sex remains lawful by virtue of *milk*.⁹ No jurists discuss her consent to the transfer of ownership; none suggest that her consent is preferred let alone required for the continuation of their relationship under its new regime. If, on the other hand, a man wishes to marry his own female slave, he must either sell her to someone else, who in turn must consent to the marriage, or he must free her, making her own consent to the marriage necessary. (The manumission must take place before the marriage, else the marriage would impermissibly mingle the two sorts of *milk*; if she agrees but after being freed refuses to marry him, she may owe compensation but is not re-enslaved.)

The jurists’ works, which both liken *milk al-nikāḥ* and *milk al-yamīn* and distinguish between them, provide no basis for the claim that nonconsensual sex within the latter is “tantamount to the crime of *zinā* and/or rape.” Jurists define *zinā* as vaginal intercourse between a man and a woman who is neither his wife nor his slave. Though seldom discussed, forced sex with one’s wife might (or, depending on the circumstances, might not) be an ethical infraction, and conceivably even a legal one like assault if physical violence is involved.¹⁰ One might speculate that the same is true of forced sex with an enslaved woman. This scenario is never, however, illicit in the jurists’ conceptual world. Nonconsensual sex—what contemporary Westerners would term rape—might be either a coercive subset of *zinā*, with blame lifted from the coerced participant, or a

type of usurpation (*ighṭisāb*), a property crime that by definition cannot be committed by a husband or owner, who possesses an entitlement to, or ownership over, his wife's or slave's sexual capacity. Thus, as Hina Azam writes, "sexual coercion within clearly licit contexts (such as marriage or slavery) . . . fell outside the scope of *zinā*."¹¹

Azam's observation about classical Hanafi texts applies more broadly to the pre-modern *fiqh* universe: "concerns about consent in sex acts were secondary to concerns about the moral-legal status of those sex acts."¹² In other words, and in sharp contrast to our contemporary situation, consent was not a key "moral-legal concern." A man's intercourse with a female slave might constitute *zinā* only if she belongs to someone else. Even if he marries off his own slave and no longer has lawful access to her, his having sex with her is a lesser transgression than *zinā*. The jurists' occasional affirmations that a married female slave whose owner nonetheless has sex with her is not to be punished is the closest any of these texts comes to considering the relevance of an enslaved woman's consent. Notably, the issue emerges only because she is married to another man, a marriage for which jurists uniformly agree that her consent would have been unnecessary.

In sum, the books of marriage, divorce, and related topics in formative period Sunni *fiqh* compilations express no explicit concern whatsoever with the consent of an enslaved female to a sexual relationship with her owner. Further research might extend beyond the legal contexts of marriage, divorce, support, and manumission to other portions of *fiqh* texts, such as books of sales. Other types of texts, too, may preserve countervailing voices, in tension with the ideal *fiqh* model in which enslaved women's consent is simply disregarded. A handful of intriguing accounts in biographical and hagiographical texts portray (exceptional) female slaves who preserved their chastity. For instance, the first enslaved woman to be mother to a Shi'i imam—the previous imams having been born to free women—preserved her virginity despite passing through multiple owners. Clearly intended to demonstrate miraculous workings in the lives of the imams, the story assumes that without divine providence, a desirable enslaved female would have no choice about her sexual partners.¹³ Although not directly about consent to sex, one account in Ibn al-Sa'i's (d. 1275) *Nisa' al-khulafa'* (Consorts of the Caliphs), which mingles stories of Abbasid-era wives and enslaved concubines, discusses an enslaved woman sought for purchase by an elite man for an enormous sum. Her female owner asks her if she wishes to be sold—which would presumably entail becoming the purchaser's concubine. She says no; her owner frees her on the spot.¹⁴ At least in literary retellings, then, some slaves had a certain amount of say in the conduct of their sexual lives. (Read in a certain light, a few passages in jurisprudential texts suggest submerged evidence of enslaved women's ruses to avoid sex with their owners.¹⁵ If they do reflect such stratagems, they further show that a slave's simple "no" would not suffice.) In literary anecdotes, however, the point is not to record lived experience, but to affirm an imam's miraculous status, a concubine's cleverness, or an owner's largesse.

These stories also call into question the usefulness of the legal category of slave as an historical and social descriptor. Any enslaved female had a fixed set of enforceable rights (e.g., food and shelter) and duties (i.e., work as her owner chose, including sex with him). In practice, the sultan's favorite and a palace drudge might have had little in common beyond their formal status. Writing about a much later and better-sourced period, Ottoman historian Ehud Toledano presents a model of unequal but reciprocal

relationships between slaves and owners.¹⁶ One can think about the possibilities for resistance and agency in what were, after all, human—even if deeply unequal and unjust—relationships without succumbing to the temptation to read contemporary ethical norms into early Muslim texts which possess very different sensibilities.

NOTES

¹Graeme Wood, personal communications with the author, June–July 2016. Some of his UK-based informants assume consent as the default position, but insist that because forcible rape is basically beating, and because unjust beating is never permissible, rape is not allowed. Wood addresses this topic in *The Way of the Strangers: Encounters with the Islamic State* (New York: Random House, forthcoming). For additional discussion of Da'ish and slavery, consult Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*, revised and expanded edition (London: Oneworld, 2016), 67–71; and Ali, “Redeeming Slavery: The ‘Islamic State’ and the Quest for Islamic Morality,” *Mizan: Journal of Interdisciplinary Approaches to Muslim Societies and Civilizations* 1 (2016): accessed 6 October 2016, <http://www.mizanproject.org/journal-post/redeeming-slavery/>

²Intisar Rabb, *Doubt in Islamic Law* (Cambridge: Cambridge University Press, 2014), 152n78. Italics in original.

³Noting that “Classical Islamic family law generally recognized marriage and the creation of a master–slave relationship as the two legal instruments rendering permissible sexual relations between people,” Rabb cites two examples of later classical scholars who mention the “objections” of earlier figures to slave concubinage. *Doubt in Islamic Law*, 50n6. These examples bear further exploration but do not address the question of an enslaved woman’s consent among the vast majority who considered *milk al-yamin* to create an entitlement to sex. (It remains debatable whether *milk* is best understood in these contexts as entitlement, ownership, or some mélange of the two.) On enslaved people’s consent to sexual relationships including marriage, consult Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, Mass.: Harvard University Press, 2010), esp. chap. 1. Angeliki E. Laiou, ed., *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (Washington, D.C.: Dumbarton Oaks, 1993) presents comparative examples.

⁴Access would be licit barring extraordinary conditions such as her marriage to another man; her possession of a contract of emancipation (*kitābah*), granting her a liminal status; or shared ownership. Ali, *Marriage and Slavery*, 154–58, 167–68; Jonathan Brockopp, *Early Mālikī Law: Ibn ‘Abd al-Ḥakam and His Major Compendium of Jurisprudence* (Leiden: Brill, 2000), 199; Rabb, *Doubt in Islamic Law*, 50.

⁵Brockopp, *Early Mālikī Law*, 121–24. See pp. 128–38 for an overview of Qur’anic discussions of slavery.

⁶Mohammad Ali Syed considers jurists who allowed nonmarital sex with slaves “totally mistaken.” Syed, *The Position of Women in Islam: A Progressive View* (Albany, N.Y.: State University of New York Press, 2004), 33–36, esp. 36. Asifa Quraishi-Landes expresses “skepticism” about whether scripture permits it. Quraishi-Landes, “A Meditation on *Mahr*, Modernity, and Muslim Marriage Contract Law,” in *Feminism, Law, and Religion*, ed. Marie Failinger, Elizabeth Schiltz, and Susan J. Stabile (New York: Routledge, 2014), 178–79. Consult also Susan Spector, *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin, Tex.: University of Texas Press, 1993), esp. 25, 27, 29–30.

⁷Quoted in Ali, *Marriage and Slavery*, 40. Jurists disagreed about compelling an enslaved woman only where her freedom was in abeyance (e.g., she was an *umm walad* [168]).

⁸On withdrawal, consult Ali, *Sexual Ethics and Islam*, xxxv, 8, 58–62.

⁹Ali, *Marriage and Slavery*, 166–67.

¹⁰*Ibid.*, 82–83; Ali, *Sexual Ethics and Islam*, 11–12.

¹¹Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (New York: Cambridge University Press, 2015), 186.

¹²*Ibid.*, 180.

¹³Matthew Pierce, *Twelve Infallible Men: The Imams and the Making of Shi‘ism* (Cambridge, Mass.: Harvard University Press, 2016), 135–36. See also Michael Dann, “Between History and Hagiography: The Mothers of the Imams in Imami Historical Memory,” in *Concubines and Courtesans: Women and Slavery in Islamic History*, ed. Matthew S. Gordon and Kathryn Hain (Oxford: Oxford University Press, forthcoming).

¹⁴Ibn al-Sa‘ī, *Consorts of the Caliphs: Women and the Court of Baghdad*, ed. Shawkat M. Toorawa (New York: New York University Press, 2015). Jocelyn Sharlet records a roughly similar story of resistance to

sale or gift. Sharlet, "Educated Slave Women and Gift Exchange in Abbasid Culture," in *Concubines and Courtesans*.

¹⁵One example is the slave who tells the man who bought her that she has a husband. Ali, *Marriage and Slavery*, 158–59.

¹⁶Ehud Toledano, *As If Silent and Absent: Bonds of Enslavement in the Islamic Middle East* (New Haven, Conn.: Yale University Press, 2007).