

Equality in Marriage

(al-Kufv)

Edited by Syed Mumtaz Ali

We have reproduced here an edited excerpt from *Mohammedan Law* ⁽¹⁾ by Syed Amir Ali, P.C. C.I.E., LL.B., M.A., who was a member of the Judicial Committee of His Majesty's Privy Council (Nov. 20, 1880). Ever since its publication, this authoritative work has not only been used as a legal authority in courts of law and other tribunals, but also as a textbook in law schools - even today. Similar or even higher is the authoritative status of the *Futawa Alamgiri*, which is in Persian, and was prepared by the command of the Emperor Aurungzab Alumgeer. The English translation by Neil B.E. Bailie entitled *Digest of Moohummudan Law* ⁽²⁾ was chiefly based upon this work but is from a much earlier date than *Mohammedan Law* by S.A. Ali. Because of this, Bailie's language was quite archaic and so we decided not to reproduce his chapter on Equality ⁽³⁾. Instead we have reproduced S.A. Ali's version from *Mohammedan Law* ⁽⁴⁾ which is a more concise version that the modern-day reader will find easier to follow. More information on the issue of **equality** in Islamic Law can readily be found in most classical texts and books of *Fiqh* and as well as in modern works. Some of the more popular classical *Fiqh* authorities will be cited in the footnotes.

This principle of **Equality in Marriage** is based on the Prophetic Traditions. Usually one finds reference to three A'jamied by the Companions: Ali⁽⁵⁾, A'isha, and Jaber ⁽⁶⁾, may Allah be pleased with them all. All three Traditions are considered **weak** (*Zaeef*) That is, according to the technicalities of the special system of auditing, classifying, rating and grading the *Hadith* literature, these Traditions do not belong to the top ranking authentic/sound class of Traditions. Nevertheless they are regarded to be sound enough for inclusion in the *Sunnah* provisions of Islamic Law. The *Sunnah* of the Prophet, p.b.u.h., is of course the second source of the Islamic Law (*Shari'ah*). The holy Qur'an is the first source.

"O ye who believe! Obey Allah, and obey the

Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination." [Qur'an 4:59 Yusuf Ali translation]

Obedience of the Prophet, p.b.u.h., through following the provisions of the Prophetic Traditions referred to above, is therefore obligatory for all Muslims. As to the holy Qur'an itself, as a source of law in this respect, we will quote these two relevant verses:

Qur'an 24:3⁽⁷⁾

Yusuf Ali translation: *Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an unbeliever: nor let any but such a man or an unbeliever marry such a woman: to the believers such a thing is forbidden.*

Marmaduke Pickthall translation: *The adulterer shall not marry save an adulteress or an idolatress, and the adulteress none shall marry save an adulterer or an idolater. All that is forbidden unto believers.*

M.H. Shakir translation: *The fornicator shall not marry any but a fornicatress or idolatress, and (as for) the fornicatress, none shall marry her but a fornicator or an idolater; and it is forbidden to the believers.*

Qur'an 24:26

Yusuf Ali translation: *"Women impure are for men impure, and men impure for women impure and women of purity are for men of purity, and men of purity are for women of purity ..."*

Marmaduke Pickthall translation: *"Vile women are for vile men, and vile men for vile women. Good women are for good men, and good men for good women ..."*

M.H. Shakir translation: *"Bad women are for bad men and bad men are for bad women. Good women are for good men and good men are for good women."*

Clearly then, when these two verses are read in the context of the concept of Equality in Marriage (*kufv*), those Prophetic Traditions referred to above can also be seen as an elaborate application of the principle thus derived from the holy Qur'an itself. Most modern writers tend not to interpret these Quranic provisions, but one can deduce from them that only the pure/good consorts are meant for (and therefore 'equal to') each other and the impure belong with the impure. Allah knows best. [-- *Editor*]

Equality in Marriage (al-Kufv)

Why equality is insisted upon

The Prophet Muhammad, p.b.u.h. appears to have viewed with disapprobation mismatched marriages. He is said to have declared that women should not be contracted in marriage except to their equals. "Take ye care," said he, "that none contract women in marriage but their proper guardians, and that they be not so contracted except with their equals," "because," adds the Hedaya, "cohabitation, society and friendship cannot be completely enjoyed except by persons who are each other's equal (according to the customary estimation of equality), as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore, that regard be had to equality with respect to the husband, that is, the husband should be the equal of the wife."⁽⁸⁾

Hanafi doctrines relating to equality

The Hanafis, accordingly, hold that *equality* [*Kufv*, compatibility] between the two parties is a necessary condition in marriage, and that a mismatched union is liable to be set aside by a decree of the judge.

The Hanafi doctrines regarding equality are chiefly founded on Arab analogies [similar in many, though, not in all, respects to Arab practice, customs, or traditions]. For example, it is declared that the husband should be the equal of the wife in lineage and rank; should not be a slave; should be a Muslim; should possess sufficient means to pay the wife's dower and provide for her maintenance; should be virtuous and pious should be the wife's equal in trade or business. A profligate [degenerate] is not the equal of a good woman . . . A person marries his young daughter to a man under the impression that he is virtuous. If afterwards it appears that he is a habitual drunkard, and the girl, upon attaining puberty, declares that she is not content with the

marriage under these circumstances, and if the father was not aware of his being a drunkard, then the marriage is liable to be cancelled.

Equality is not necessary in the case of a wife, for a husband can raise her to his own rank, however high. But this refers to the case of an adult, for a man who is *suis juris* can marry anyone he likes. But if a father or grandfather were to marry an infant to a low born girl, such a marriage would not be valid.

Equality is insisted upon at the outset, so that if the man were equal to the woman at the time of the marriage, and becomes lowered afterwards, either morally or materially, the marriage cannot be invalidated.

Nor can a marriage be invalidated on the ground of discovery of inequality on the part of the man if the *walis* [guardian for marriage purposes] had entered into a contract of marriage with her express agreement. But if the *walis* insisted upon equality at the time of the marriage and the man gave them his assurance, about equality, or if they required the assurance from him that he was well behaved and not given to drinking etc., and if he gave his assurance and this was subsequently found to be untrue, then in such cases, both the girl and the *walis* will have the power to have the contract cancelled.⁽⁹⁾

A minor girl contracted in marriage by the father

It is different in the case of a minor girl. If she is married by her father or grandfather to a person whom they believe to be either socially or morally her equal, and if he subsequently turns out to be low-born or depraved, or taken to alcohol consumption, the right to have the contract cancelled is given to her as well as her *walis*.⁽¹⁰⁾

Under the Hanafi Law there are six requisites for equality: -

- (1) *Nasab*, family or descent
- (2) Islam
- (3) Profession
- (4) Freedom
- (5) Good character
- (6) Means

According to the *Fatawai Hamadia*, there is another requisite for equality - potency - so that if a father were to contract a marriage for his minor daughter to a person who was known to be impotent, the marriage would be invalid. Although, on the other hand, according to the

Bahr-ur-Raik, the marriage would be lawful (as long as the man is in other respects her equal), if the girl is an adult. However the woman would have the power to obtain a nullity of the marriage on the grounds of impotency if this were the case.⁽¹¹⁾

Malik gives the preference to all the descendants of the Prophet over everyone else; but the Hanafis and Shafi'i's will not give any opinion as to who is superior to the other, *viz.*, A'isha or Fatima't-az-Zajra (the daughter of the Prophet).

A Hanafi male is the equal of a Shafi'i female, and a Hanafi may lawfully marry a Shafi'i. So if a Shafi'i adult virgin were to marry a Hanafi, the marriage would be considered valid according to the Hanafi Law.⁽¹²⁾

A merchant is superior in rank to a tradesman; a Qazi or a *Fakih* (jurist) to a merchant.

If the boy has no means, but his parents or grandparents do, then he is considered to have means.⁽¹³⁾

The Malikis and the Shi'ahs

The Malikis and the Shi'ahs differ materially from the Hanafis in their estimate of the character of these conditions. According to them, Islam as well as the ability to support a wife are the two necessary conditions which constitute a well-matched marriage. According to the Malikis and the Shi'ahs, a Muslim who possesses sufficient means to marry a wife may marry any Muslim woman, without question of lineage or rank for, it is pertinently asked "are not all Muslims equal?"

If an adult woman contracts herself in marriage to one who is not her *equal* however, the *walis* have a right to object.

Ability to support a wife

The question of ability to support a wife has been a fruitful subject of discussion among the early lawyers. The consensus of opinion seems to be that if the husband possesses the means to maintain his wife for one month, along with the prompt portion of the dower, it is sufficient "ability" in law.

Needless to say, cases bearing on the point of equality required under the Hanafi Law rarely arise in India, inasmuch as the family of the bride and bridegroom take great care to ascertain the *nasab* (descent) and *hasab* (character) of the parties. Yet

predicaments may arise which lead to serious discussions on the subject of equality.

"Except Islam and freedom," says the *Futawai'Alamgiri*, "equality in any other respect is not invariably observed in a country other than Arabia."

It has already been mentioned that the Shi'ahs and the Hanafis allow the greatest freedom to women, who are, if *suis juris*, free to contract themselves in marriage. But this freedom is restrained by the power of veto or objection possessed by the guardians in the case of an alliance. Among the Shi'ahs this right of veto is almost nil, because of the fact that the conditions of equality, according to their doctrines, refer only to the Islam of the husband and his ability to support a wife. If an adult woman of the Shi'ah school were to marry a non-Muslim, her relations would have the same rights of objection as the relations do under the Sunni Law.

Hanafi Law right of veto possessed by the wali

According to the Hanafis, however, this right of objection has far greater importance. In the case of the rule laid down for the guidance of guardians when entering into a contract of marriage for their wards, the principle and the limits are easily definable. For example, the guardians are directed to take into consideration a) the ages of the parties (not to marry a young girl to a very old man and vice versa); not to allow a marriage to take place between the female of a noble family and a man beneath her in b) rank or status, should he not possess some qualification to justify the alliance; and not to marry minor girls on c) grossly inadequate dowers

Unequal marriage contracted by an adult woman

In the case of a mismatch contracted by an adult woman, the question of inequality is one that involves some difficulty. An **analysis** of the various decisions collected together in several digests, notably the *Futawai'Alamgiri* the *Fatwai Kazi Khan* and the *Radd-ul-Muhtar*, leads to the conclusion that **great disparity** in 1) rank, 2) refinement, 3) culture, 4) social position or 5) means, can furnish reasonable and proper grounds for the guardian or *wali* to object to a marriage contracted by a female who is *suis juris*. For instance, if a woman were to contract a run-away marriage with a servant of her family, the marriage could be annulled by the *Qazi* upon the application of the *wali*. A difference

of faith would always justify an objection to a marriage. It is only the *asabah*, [agnates, eternal relatives] whether within the prohibited degrees or not, who can raise any objection to a marriage contracted by an adult girl on the grounds of inequality.⁽¹⁴⁾

A mismatched (incompatible) marriage or a misalliance contracted by a woman remains intact with all its consequences until annulled by the order of the Qazi. The judge alone has the power of cancelling marriages on the grounds of inequality. However, the judicial separation effected by the *Qazi* is not equivalent to a *talak*, [final divorce]. In other words, if the marriage has not been consummated, the woman is not entitled to any part of the dower. But if consummation has taken place, or there has been a "valid retirement" into the nuptial chamber, then the husband is liable for the whole dower and for maintenance during the '*iddat*.'⁽¹⁵⁾

The delay of a guardian in instituting proceedings to set aside a marriage on the grounds of a misalliance does not lead to the forfeiture of his right. "But after the woman has actually borne a child to her husband, the guardians will then have no right to have the marriage cancelled, for it would damage the interests of the child" [*Radd-ul-Muhtar*, also in *Durrar*.]

Once the guardian has by word or deed, expressly or implicitly acquiesced in the marriage, he loses absolutely his right of objection. In other words, when one guardian has consented, no other, except one higher in degree, can object. The *Radd-ul-Muhtar* says that if some of the *wali's* agree, it is tantamount to all agreeing, because the *aman* [guarantee of safety] given by one Muslim to a *harbi* [enemy] holds good against all Muslims.

The power of objection belongs exclusively to the '*Asabah*' of the woman and not to the uterine relations. There is no reason why the Civil Courts in British India should not entertain a judicial proceeding or suit by a Muslim father to set aside, on the ground of inequality, a marriage contracted by an adult daughter. If either of the married parties should die before the decree of the Judge is issued which cancels the marriage, the survivor would be entitled ordinarily to a share in the inheritance of the deceased.

suis juris - one who has all the rights to which a freeman is entitled; one who is not under the power of another, as a slave, a minor, and the like (a person of full

legal capacity, eg. who can enter into a contract, sue and be sued without the need for anyone else to act as his 'guardian.')

End Notes

1. *Mohammedan Law*, Volume II, published by All Pakistan Legal Decisions, Lahore, Pakistan. ©1965.
2. *Digest of Moohummudan Law*, published by Premier Book House, Lahore, Pakistan
3. *Ibid*, Chapter V pages 62-74
4. *Mohammedan Law*, Volume II, published by All Pakistan Legal Decisions, Lahore, Pakistan. ©1965. pages 326 - 331
5. Tirmidhi collections
6. Dar Qutni collection
7. Qur'an 24:3 "This verse explains that Islam commands sex [sexual] purity, for men and for women, at all times - before marriage, during marriage, and after the dissolution of marriage. **Those guilty of illicit practises are shut out of the marriage circle of chaste men and women.**" Footnote 2957 A. Yusuf Ali - *The Glorious Qur'an*
8. *The Hedaya*, translated by Charles Hamilton, published by Islamic Book Trust, Delhi, India © 1982
9. *Radd-ul-Muhtar*, Vol II, page 521
10. *Ibid.*, page 519
11. *Ibid*, page 522
12. *Ibid*, page 530
13. *Ibid*, page 531
14. *Ibid*, page 486
15. *Futawai Alamgiri*, Volume I, page 412