

MARRIAGE

Excerpted from "Dictionary of Islam" by Thomas Patrick Hughes © 1886

The celebration of the marriage contract is called *nikah*. The festive rejoicings '*urs*.' Marriage is enjoined upon every Muslim, and celibacy is frequently condemned by Muhammad. It is related in the Traditions that Muhammad said : "When the servant of God marries, he perfects half of his religion;" and that " on one occasion Muhammad asked a man if he was married, and being answered in the negative, he said, 'Art thou sound and healthy?' Upon the man replying that he was, Muhammad said, "Then thou art one of the brothers of the devil." (*Mishkat*, book xiii. ch. i.) Consequently in Islam, even the ascetic orders are rather married than single.

It is related that one of the Companions, named 'Usman ibn Maz'un, wished to lead a life of celibacy, but Muhammad forbade him.

The following are some of the sayings of Muhammad on the subject of marriage (see *Mishkatu 'l-Masabih*, book xiii.) :

"The best wedding is that upon which the least trouble and expense is bestowed."

"The worst of feasts are marriage feasts, to which the rich are invited and the poor left out, and he who abandons the accept[ting] of an invitation, then verily disobeys God and His Prophet."

"Matrimonial alliances (between two families or tribes) increase friendship more than anything else."

"Marry women who will love their husbands and be very prolific, for I wish you to be more numerous than any other people."

"When anyone demands your daughter in marriage, and you are pleased with his disposition and his faith, than give her to him; for if you do not do so, then there will be strife and contention in the world."

"A woman may be married either for her money, her reputation, her beauty, or her religion; then look out for a religious woman, for if you do marry other than a religious woman, may your hands be rubbed with dirt." "

"All young men who have arrived at the age of puberty should marry, for marriage prevents sins. He who cannot marry should fast."

"When a Muslim marries he perfects half his religion, and he should practise abstinence for the remaining half."

"Beware! make not large settlements upon women; because, if great settlements were a cause of greatness in the world and of righteousness before God, surely it would be most proper for the Prophet of God to make them."

"When any of you wishes to demand a woman in marriage, if he can arrange it, let him see her first."

"A widow shall not be married until she be consulted, nor shall a virgin be married until her consent be asked." The Companions said, "In what manner is the permission of a virgin?" He replied, " Her consent is by her silence."

"If a woman marries without the consent of her guardian, her marriage is null and void; then, if her marriage hath been consummated, the woman shall take her dower; if her guardians dispute about her marriage, then the king is her guardian."

The subject of Muslim marriages will now be treated in the present article under the headings – I. The Validity of Marriage;

II. The Legal Disabilities to Marriage;

III. The Religious Ceremony;

I. The Validity of Marriage.

Muslims are permitted to marry four free women, and to have as many slaves for concubines as they may have acquired. See Qur'an, Surah iv. 8: ' Of women who seem good in your eyes, marry two, or three, or four; and if ye still fear that ye shall not act equitably, then one only; or the slaves whom ye have acquired."

Usufructory or temporary marriages were sanctioned by

the Prophet, but this law is said by the Sunnis to have been abrogated, although it is allowed by the Shi'ah, and is practised in Persia in the present day ...

Marriage, according to Muhammadan law, is simply a civil contract, and its validity does not depend upon any religious ceremony. Though the civil contract is not positively prescribed to be reduced to writing, its validity depends upon the consent of the parties, which is called *ijab* and *qabul*, "declaration" and "acceptance;" the presence of two male witnesses (or one male and two female witnesses); and a dower of not less than ten dirhams, to be settled upon the woman. The omission of the settlement does not, however, invalidate the contract, for under any circumstances, the woman becomes entitled to her dower of ten dirhams or more. (A dower suitable to the position of the woman is called *Mahrul-misl*.)

Liberty is allowed a woman who has reached the age of puberty, to marry or refuse to marry a particular man, independent of her guardian, who has no power to dispose of her in marriage without her consent or against her will; while the objection is reserved for the girl, married by her guardian during her infancy, to ratify or dissolve the contract immediately on reaching her majority.

When a woman, adult and sane, elects to be married through an agent (*wakil*), she empowers him, in the presence of competent witnesses, to convey her consent to the bridegroom. The agent if a stranger, need not see her, and it is sufficient that the witnesses, who see her, satisfy him that she, expressly or impliedly [implicitly], consents to the proposition of which he is the bearer. The law respects the modesty of the sex, and allows the expression of consent on the part of the lady by indirect ways, even without words. With a virgin, silence is taken as consent, and so is a smile or laugh.

Mr. Syed Ameer Ali says: " The validity of & marriage under the Muhammadan law depends on two conditions. First[ly], on the capacity of the parties to marry each other. Secondly, on the celebration of the marriage according to the forms prescribed in the place where the marriage is celebrated, or which are recognised as legal by the customary law of the Mussalmans.

"It is a recognised principle that the capacity of each of the parties to a marriage is to be judged of by their respective *lex domicili*. [law of country where party

lives] If they are each, whether belonging to the same country or to different countries, capable according to their *lex domicili* of marriage with the other, they have the capacity required by the rule under consideration. In short, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.

"The capacity of a Mussulman domiciled in England will be regulated by the English law, but the capacity of one who is domiciled in the *Belad-ul-Islam* (i.e. a Muhammadan country), by the provision of the Mussalman law. It is, therefore, important to consider what the requisite conditions are to vest in an individual the capacity to enter into a valid contract of marriage. As a general rule, it may be remarked, that under the Islamic law, the capacity to contract a valid marriage rests on the same basis as the capacity to enter into any other contract. Among the conditions which are requisite for the validity of a contract of marriage (says the *Fatawa-i-Alamgiri*, p. 377), are understanding, puberty, and freedom, in the contracting parties, with this difference, that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a *majnun* (*non compos mentis*) [not of sound mind, insane], or a boy without understanding, the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy (possessed) of understanding is dependent for its operation on the consent of his guardian.

Puberty and discretion constitute, accordingly, the essential conditions of the capacity to enter into a valid contract of marriage. A person who is an infant in the eye[s] of the law is disqualified from entering into any legal transactions (*tassarufat-i-shariyeh-tasarrufat-i-shar'iah*), and is consequently incompetent to contract a marriage. Like the English common law, however, the Muhammadan law makes a distinction between a contract made by a minor possessed of discretion or understanding and one made by a child who does not possess understanding. A marriage contracted by a minor who has not arrived at the age of discretion) or who does not possess understanding, or who cannot comprehend the consequences of the act, is a mere nullity.

"The Muhammadan law fixes no particular age when discretion should be presumed. Under the English law, however, the age of seven marks the difference between want of understanding in children and capacity to comprehend the legal effects of particular acts. The Indian Penal Code also has fixed the age of seven as the

period when the liability for offences should commence.

It may be assumed, perhaps not without some reason, that the same principle ought to govern cases under the Muhammadan law) that is, when a contract of marriage is entered into by a child under the age of seven, it will be regarded as a nullity. It is otherwise, however, in the case of a marriage contracted by a person of understanding. 'It is valid,' says the *Fatawa*, though 'dependent for its operation on the consent of the guardian.'

"A contract entered into by a person who is insane is null and void, unless it is made during a lucid interval. A slave cannot enter into a contract of marriage without the consent of his master. The Mussulman lawyers, therefore, add freedom (*kurriyet*) as one of the conditions to the capacity for marriage. "Majority is presumed, among the Hanafis and the Shiah, on the completion of the fifteenth year) in the case of both males and females, unless there is any evidence to show that puberty was attained earlier.

"Besides puberty and discretion, the capacity to marry requires that there should be no legal disability or bar to the union of the parties; that in fact they should not be within the prohibited degrees, or so related to or connected with each other as to make their union unlawful." (See Syed Ameer Ali's *Personal Law of the Muhammadans*, p. 216.)

With regard to the consent of the woman, Mr. Syed Ameer Ali remarks:

"No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it. A contract of marriage also implies mutual consent, and when the parties see one another, and of their own accord agree to bind themselves, both having the capacity to do so, there is no doubt as to the validity of the marriage. Owing, however, to the privacy in which Eastern women generally live) and the difficulties under which they labour in the exercise of their own choice in matrimonial matters, the Mohammedan law ... lays down the principle by which they may not only protect themselves from the cupidity of their natural guardians, but may also have a certain scope in the selection of their husbands.

"For example, when a marriage is contracted on behalf of an adult person of either sex, it is an essential condition to its validity that such person should consent thereto,

or, in other words, marriage contracted without his or her authority or consent is null, by whomsoever it may have been entered into. "Among the Hanafis and the Shiah, the capacity of a woman, who is adult and sane, to contract herself in marriage is absolute. The Shiah law is most explicit on this point. It expressly declares that, in the marriage of a discreet female (*rashidah*) who is adult, no guardian is required. The *Hidaya* holds the same opinion. A woman (it says) who is adult and of sound mind) may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians) and this whether she be a virgin or *saibbah*. Among the Shafi'i and the Malikis, although the consent of the adult virgin is an essential to the validity of a contract of marriage entered into on her behalf, as among the Hanafis and the Shiah, she cannot contract herself in marriage without the intervention of a wali. (Hamilton's *Hidayah*, vol. i. p. S5.)

"Among the Shafi'i, a woman cannot personally consent to the marriage. The presence of the *wali*, or guardian, is essentially necessary to give validity to the contract. The *wali*'s intervention is required by the Shafi'i and the Maliki to supplement the presumed incapacity of the woman to understand the nature of the contract) to settle the terms and other matters of a similar import, and to guard the girl from being victimised by an unscrupulous adventurer, or from marrying a person morally or socially unfitted for her.

It is owing to the importance and multifariousness of the duties with which a *wali* is charged, that the Sunni law is particular in ascertaining the order in which the right of guardianship is possessed; by the different individuals who may be entitled to it. The schools are not in accord with reference to the order. The Hanafi entrust the office first to the agnates [a relative whose kinship is traceable exclusively through males] in the order of succession; then to the mother, the sister, the relatives on the mother's side, and lastly to the Kazi.

The Shafais adopt the following order: The father, the father's father, the son (by a previous marriage), the full brother, the consanguineous brother, the nephew, the uncle, the cousin, the tutor, and lastly the Kazi; thus entirely excluding the female relations from the *wilayet*. The Maliki agree with the Shafi'i in confiding the office of guardian only to men, but they adopt an order slightly different. They assign the first rank to the sons of the woman (by a former marriage), the second to the father; and then successively to the full brother, nephew,

paternal grandfather, paternal uncle, cousin, manumittor and lastly to the Kazi,

Among the Mahkis and the Shafi'is, where the presence of the guardian at a marriage is always necessary, the question has given birth to two different systems. The first of these considers the guardian to derive his powers entirely from the law. It consequently insists not only on his presence at the marriage, but on his actual participation in giving the consent. According to this view, not only is a marriage contracted through a more distant guardian invalid, whilst one more nearly connected is present, but the latter cannot validate a marriage contracted at the time without his consent, by according his consent subsequently.

This ... doctrine, however, does not appear to be forced in any community following the Maliki or Shafi'i tenets. The second system is diametrically opposed to the first, and seems to have been enunciated by Shaikh Ziad as the doctrine taught by Malik. According to this system the right of the guardian, though no doubt a creation of the law, is exercised only in virtue of the power or special authorization granted by the woman; for the woman once emancipated from the *patria potestas* [signifies the power which a Roman father had over the persons of his children, grandchildren, and other descendants] is mistress of her own actions. She is not only entitled to consult her own interests in matrimony, but can appoint whomsoever she chooses to represent her and protect her legitimate interests. If she think the nearer guardian inimically inclined towards her, she may appoint one more remote to act for her during her marriage. Under this view of the law, the guardian acts as an attorney on behalf of the woman, deriving all his powers from her and acting solely for her benefit.

This doctrine has been adopted by Al-Karkhi, Ibn al-Kasim, and Ibn-i-Salaman, and has been formally enunciated by the Algerian Kazis in several consecutive judgements. When the *wali* preferentially entitled to act is absent, and his whereabouts unknown, when he is a prisoner or has been reduced to slavery, or is absent more than ten days journey from the place where the woman is residing, or is insane or an infant, then the *wilayet* passes to the person next in order to him.

The Hanafis hold that the woman is always entitled to give her consent without the intervention of a guardian. When a guardian is employed and found acting on her behalf, he is presumed to derive his power solely from her, so that he cannot act in any circumstances in

contravention of his authority or instructions. When the woman has authorised her guardian to marry her to a particular individual, or has consented to a marriage proposed to her by a specific person, the guardian has no power to marry her to another.

Under the Shiah law, a woman who is adult and discreet, is herself competent to enter into a contract of marriage. She requires no representative or intermediary, through whom to give her consent. 'If her guardians,' says the Sharaya, 'refuse to marry her to an equal when desired by her to do so, there is no doubt that she is entitled to contract herself, even against their wish.' The Shiahs agree with the Hanafis in giving to females the power of representing others in matrimonial contracts. In a contract of marriage, full regard is to be paid to the words of a female who is adult and sane, that is, possessed of sound understanding; she is, accordingly, not only qualified to contract herself, but also to act as the agent of another in giving expression either to the declaration or to the consent.

The *Mafatih* and the *Jama-ush-Shattat*, also declare 'that it is not requisite that the parties through whom a contract is entered into should both be males, since with us (the Shiahs) a contract made through (the agency or intermediation of) a female is valid.'

To recapitulate. Under the Maliki and Shafi'i law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorised *wali*, who would act as her representative. Under the Hanafi and Shiah law, the woman can consent to her own marriage, either with or without a guardian or agent." (*Personal Law of the Muhammadans*, p. 233.)

II. *The Legal Prohibitions to Marriage*

There are nine prohibitions to marriage, namely:

1. *Consanguinity*, which includes mother, grandmother, sister, aunt, niece etc.
2. *Affinity*, which includes mother-in-law, step-grandmother, daughter-in-law, step-granddaughter, etc.
3. *Fosterage*. A man cannot marry his foster mother, nor foster sister, unless the foster brother and sister were

nursed by the same mother at intervals widely separated. But a man may marry the mother of his foster sister, or the foster mother of his sister.

4. A man may not marry his wife's sister during his wife's lifetime, unless she be divorced.

5. A man married to a free woman cannot marry a slave. [This seems to mean that a man can marry only a free woman. Therefore if he wants to marry a slave-girl or concubine, he will have to give her her freedom first and then in her newly acquired status of a free-woman she can exercise her legal right to make an offer or acceptance of marriage. Because a slave woman or concubine does not have the legal capacity to make a decision of this kind in that a slave is a slave and since the master owns her, he is the only person who has the right to make all the decisions in relation to her including his decision to let her be married to someone else, which is in effect is tantamount to giving her freedom in order for her to get married.-- Editor]

6. It is not lawful for a man to marry the wife or *mu'taddah* of another, whether the *'iddah* be on account of repudiation or death. That is, he cannot marry until the expiration of the woman's *'iddah*, or period of probation.

7. A Muslim cannot marry a polytheist or *Majusiyah*. But he may marry a Jewess, or a Christian, or a Sabean.

8. A woman is prohibited by reason of property. For example, it is not lawful for a man to marry his own slave, or a woman her

9. A woman is prohibited by repudiation or divorce. If a man pronounces three divorces upon a wife who is free, or two upon a slave, is not lawful to him until she shall have been regularly espoused by another man, who having duly consummated the marriage, afterwards divorces her, or dies, and her *'iddah* from him be accomplished.

Mr. Syed Ameer Ali says : "The prohibitions may be divided into four heads, viz. relative or absolute, prohibitive or directory. They arise in the first place from legitimate and illegitimate relationship of blood (consanguinity); secondly, from alliance or affinity (*al-musaharat*); thirdly, from fosterage (*ar-riza*); and, fourthly, from completion of number (i.e. four). The ancient Arabs permitted the union of step-mothers and

mothers-in-law on one side, and stop-sons and sons-in-law on, the other. The Koran expressly forbids this custom; 'Marry not women whom your fathers have had to wife (except what is already past), for this is an uncleanness and abomination, and an evil way.' (Surah iv. 26) Then come the more definite prohibitions in the next verse: 'Ye are forbidden to marry your mothers, your daughters, your sisters, and your aunts, both on the father's and on the mother's side; your brothers' daughters and your sister's daughters; your mothers who have given you suck and your foster-sisters; your wives' mothers, your daughters-in-law, born of your wives with whom ye have cohabited. Ye are also prohibited to take to wife two sisters (except what is already past), nor to marry women who are already married.' (Surah 4:27)

"The prohibitions founded on consanguinity *tahrimu* 'n-nasab are the same among the Sunnis as among the Shiahs. No marriage can be contracted with the ascendants, with the descendants, with relations of the second rank, such as brothers and sisters or their descendants, with paternal and maternal uncles and aunts. Nor can a marriage be contracted with a natural offspring or his or her descendants. Among the Shiahs, marriage is forbidden for fosterage in the same order as in the case of *nasab*. The Sunnis, however, permit marriage in spite of fosterage in the following cases: The marriage of the father of the child with the mother of his child's foster-mother, or with her daughter; the marriage of the foster-mother with the brother of the child whom she has fostered; the marriage with the foster-mother of an uncle or aunt.

"The relationship by fosterage arises among the Shiahs when the child has been really nourished at the breast of the foster-mother. Among the Sunnis, it is required that the child should have been suckled at least fifteen times, or at least a day and night. Among the Hanafis, it is enough if it have been suckled only once. Among the Shafi'i it is necessary that it should have been suckled four times. There is no difference among the Sunnis and the Shiah regarding the prohibitions arising from alliance. Under the Shiah law, a woman against whom a proceeding by *laan* (li'an) has taken place on the ground of her adultery, and who is thereby divorced from her husband, cannot under

any circumstance re-marry him.

“The Shafi’i and Maliki agree in this opinion with the Shiah. The Hanafi, however, allow a remarriage with a woman divorced by *laan*. The Shiah as well as the Shafi’i, Maliki, and Hanbalis, hold that a marriage with a woman who is already pregnant (by another) is absolutely illegal. According to the *Hidaya*, however, it would appear that Abu Hanifah and his disciple Muhammad were of opinion that such a marriage was allowable. The practice among the Indian Hanifis is variable. But generally speaking, such marriages are regarded with extreme disapprobation [disapproval]. Among the Shafi’is, Maliki’s and Hanbali’s, marriages are prohibited during the state of *ihram* (pilgrimage to Makkah), so that when a marriage is contracted by two persons, either of whom is a follower of the doctrine of the above-mentioned schools whilst on the pilgrimage, it is illegal.

“The Hanafis regard such marriages to be legal. With the Shiah, though a marriage in a state of *ihram* is, in any case, illegal, the woman is not prohibited to the man always, unless he was aware of the illegality of the union. All the schools prohibit contemporaneous marriages with two women so related to each other that, supposing either of them to be a male a marriage between them would be illegal. Illicit intercourse between a man and a woman, according to the Hanafis and Shiah, prohibits the man from marrying the woman's mother as well as her daughter.

“The observant student of the law of the two principal sects which divide the world of Islam, cannot fail to notice the distinctive peculiarity existing between them in respect to their attitude to outside people. The nations who adopted the Shiah doctrines never seem to have come into contact with the Christian races of the West to any marked extent; whilst their relations with the Mago-Zoroastrians of the East were both intimate and lasting. The Sunnis, on the other hand, seem always to have been more or less influenced by the Western nations ...

" From these and similar directions, two somewhat divergent conclusions have been drawn by the lawyers of the two schools. The Sunnis recognise as legal and valid a marriage contracted between a Muslim on one side, and a Hebrew or a Christian woman on the other. They hold, however, that a marriage between a Mussulman and a Magian or a Hindu woman is invalid. The Akhbari Shiah and the Mutazalas agree with the Sunni doctors. The Usuli Shiah do not recognize as legal a permanent contract of

marriage between Muslims and the followers of any other creed. They allow, however, temporary contracts extending over a term of years, or a certain specified period, with a Christian, Jew, or a Magian female. Abu Hanifah permits a Mussulman to marry a Sabeian woman) but Abu Yusuf and Muhammad and the other Sunni Imams, hold such unions illegal.

"A female Muslim cannot under any circumstances marry a non-Muslim. Both schools prohibit a Muhammadan from marrying an idolatrous female, or one who worships the stars or any kind of fetish whatsoever. '

“These prohibitions are relative in their nature and in their effect. They do not imply the absolute nullity of the marriage. For example, when a Muhammadan marries a Hindu woman in a place where the laws of Islam are in force, the marriage only is invalid and does not affect the status of legitimacy of the offspring." (See Personal Law of the Muhammadans, p. 220.)

III. *The Religious Ceremony*

The Muhammadan law appoints no specific religious ceremony, nor are any religious rites necessary for the contract[ing] of a valid marriage. Legally, a marriage contracted between two persons possessing the capacity to enter into the contract, is valid and binding, if entered into by mutual consent in the presence of witnesses. And the Shi'ah law even dispenses with witnesses.

In India there is little difference between the rites that are practised at the marriage ceremonies of the Shi'ahs and Sunnis. In all cases the religious ceremony is left entirely to the discretion of the *Qazi* or person who performs the ceremony, and consequently there is no uniformity of ritual. Some *Qazis* merely recite the *Fatihah* (the first chapter of the Qur'an), and the *durud*, or blessing. The following is the more common order of performing the service. The *Qazi*, the bridegroom, and the bride's attorney, with the witnesses, having assembled in some convenient place (but not in a mosque), arrangements are made as to the amount of dower or *mahr*. The bridegroom then repeats after the *Qazi* the following:

1. The *Istighfar*. "I desire forgiveness from God."
2. The four *Quls*. The four chapters of the Qur'an commencing with the word "*Qul*." (cix, cxii, cxiii, cxiv).

3. The *Kalimah*, or Creed. "There is no deity but God, and Muhammad is the Prophet of God."

4. The *Sifwatu 'l-Iman*. A profession of belief in God, the Angels, the Scriptures, the Prophets, the Resurrection, and the Absolute Decree of good and evil,

The Qazi then requests the bride's attorney to take the hand of the bridegroom, and to say, "Such an one's daughter, by the agency of her attorney and by the testimony of two witnesses, has, in your marriage with her, had such a dower settled upon her; do you consent to it?" To which the bridegroom replies, "With my whole heart and soul to my marriage with this woman, as well as to the dower already settled upon her, I consent, I consent, I consent."

After this the Qazi raises his hands and offers the following prayer: "O great God I grant that mutual love may reign between this couple, as it existed between Adam and Eve, Abraham and [Hagar], Joseph and Zailkha) Moses and Zipporah, his highness Muhammad and 'Ayishah, and his highness 'Ali al-Murtaza and Fatimatu 'z-Zahra."

The ceremony being over, the bridegroom embraces his friends and receives their congratulations.

According to the *Durru 'l-Mukhtar*, p. 196, and all schools of Muslim law, the bridegroom is entitled to see his wife before the marriage.

What follows in the Dictionary of Islam is Part IV of this article which is a very lengthy description of the marriage of two wealthy persons according to the traditions and customs in India in late 1800s as well as a lengthy description of an Egyptian wedding at the same time. These have not been reproduced here –
Editor