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Claim of Marriage

If a man claims having married a woman and she repudiates the claim, or the woman claims so and the man repudiates it, the burden of proof will lie on the claimant and the party negating the claim will take an oath.

The schools concur regarding an acceptable proof that it requires the testimony of two just men. The evidence of women alone or along with a man is not acceptable except to the Hanafi school which considers the evidence of a just man and two just women as acceptable. Therefore, the *'adalah* of witnesses is necessary according to the Hanafi school, at the time of establishing the fact of marriage when any of the parties negates or contends it, but not a condition at the time of conclusion of the marriage contract.

The Hanafi and the Imamiyyah schools consider the testimony of a witness as sufficient without his mentioning any conditions and details of the marriage. But the Hanbali school considers it necessary that the witness describe the conditions of marriage because there is a divergence of opinion regarding the conditions and it is possible for a witness to believe in the validity of a marriage whereas it may have been actually invalid.

The Imamiyyah, the Hanafi, the Shafi'i and the Hanbali schools regard a marriage as proved even if a few people have knowledge of it and it is not necessary that it be commonly known.

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From time to time claims of marriage are brought before Shari'ah courts and often the claimant brings witnesses to prove their living together and having a common residence in the manner of a husband and wife. The question now is, does this prove marriage or not?

On the face of it, it can be said that marriage is *prima facie* considered as established unless the contrary is proved. This means that the living together of a man and woman apparently establishes marriage, and this conclusion compels the acceptance of the claimant's contention unless he is proved

to lie. Apart from this, to decide the contention of the claimant claiming marriage as a lie is very difficult on the basis of the Imamiyyah view which considers the presence of witnesses as not necessary at the time of marriage. But this prima facie conclusion in favor of the claimant is contrary to the general rule according to which every event—marriage or something else—whose occurrence is doubtful is assumed not to have occurred unless there is evidence to the contrary.

Accordingly, the stand of the respondent, repudiating the claim of marriage, becomes congruent with the general rule. Therefore, the proof of marriage will be demanded from the claimant, and in the event of his failure to do so the respondent will take an oath and the claim will be dismissed.

This way of settling a claim is the right approach which corresponds with the rules of the Shari'ah, because the Imamiyyah scholars accept the rule that, when there is a conflict between a prima facie conclusion and a general rule, the rule will be given precedence and the prima facie conclusion will not be given credence without additional proof in its favor and there is no such proof in this case.

When it is known that a marriage contract has been recited, but there is a doubt regarding its having been carried out correctly, the contract will be undoubtedly considered valid. But when there is a doubt as regards the occurrence of the contract itself, it is not possible to substantiate it on the strength of the social intercourse or co-residence of the two.

A question can be raised here: The principle that the act of a Muslim is to be considered as valid on the face of it, compels the acceptance of the claim of the person claiming marriage by giving precedence to *halal* over *haram* and to good over evil. We are also commanded a regards every act in which there is a possibility of it being valid or invalid, that we rule out the possibility of its invalidity and give credit to the possibility of its validity.

The reply is that, the consideration of the act of the claimant as valid in the present problem does not prove marriage, and that which is proved is that the two have not committed any *haram* by social intercourse and sharing a common residence. The absence of any ground to consider their association as illegitimate may be due to marriage or due to a misconception (*shubhah*) on their part about the legitimacy of marriage, such as when both of them imagine it as *halal* and later on discover it to be *haram* (details of this will come later while discussing doubtful *nikah*). It is obvious that a general premise does not prove a particular one. For Instance, when you say, "There is an animal in the house," it does not prove the presence therein of a horse or a deer. In the same manner, here, when a man has social intercourse with a woman, not knowing the cause we may say, "She is his wife," but we should say that, "They have not committed *haram*," for it is possible that their associating with one another may be the result of marriage or the result of a misconception of marriage.

We shall give another example to further clarify the point. If you hear a passer-by say something without knowing whether that utterance is a curse or a greeting, it is not permissible for you to consider it a curse. Also, in such a situation it is not binding on you to return the greeting, because you are not sure

of the greeting. But if you are certain that he greeted you and doubt whether it was meant as a greeting or intended to ridicule, it is binding upon you to return the greeting, considering it to be a genuine greeting and by giving precedence to good over evil. Our problem is also like this. Even if living together be considered valid, it does not prove the presence of a contract. But if we are sure about the occurrence of a contract and doubt only its validity, we will consider the contract as valid without any hesitation.

In any case, the social intercourse by itself does not prove anything, but it supplements and strengthens any other proof available. The decision in such a situation depends upon the view, satisfaction, and assessment of the judge. on the condition that he does not consider their living together as an independent proof in itself for basing his judgement.¹

The above-mentioned conclusion was as regards the establishment of marriage. But as regards children, the rule of considering the act of a Muslim as valid compels the regarding of the children as legitimate at all times, because the living together of the parents is either the result of marriage or the result of a false impression of marriage, and the children born due to such false impression are equal in status to children born of marriage for all legal purposes. Therefore, if a woman has claimed a man as her lawful husband and also of having a child by him, while the man refutes marriage but acknowledges the child is his, his claim will be accepted because it is possible that the child was born due to a false impression of marriage.

To conclude, it needs to be mentioned that this problem is based on the supposition that witnesses are not required for concluding a marriage contract, as is the Imamiyyah view. But according to the other schools, it is for the party claiming marriage that it mentions the name of the witnesses, and if the party pleads its inability to present the witnesses due to their death or absence, it is possible that the above-mentioned criterion be applied.

It is also necessary to point out that the living together does not prove marriage when there is contention and disagreement to that effect; but when there is no such disagreement; we settle the claim of inheritance and it's like by giving credit to the possibility of marriage, and on this issue there is a consensus among the schools.

¹. Apart from this, the statements of the legists in al-Bulghah, al-Shara'i, and al-Jawahir (chapter on marriage) regarding the question at hand indicate that living together prima facie shows the presence of marriage, and this is not farfetched.

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