

## The Marriage Contract and its Conditions

All the five schools of fiqh concur that marriage is performed by the recital of a marriage contract which contains an offer made by the bride or her deputy (*na'ib*), such as her guardian or agent (*wakil*), and a corresponding acceptance by the groom or his deputy. A mere agreement without the recital of the contract does not amount to marriage.

The schools also agree that a marriage contract is valid when recited by the bride or her deputy by employing the words, *ankahtu* or *zawwajtu* (both meaning. I gave in marriage) and accepted by the groom or his deputy with the words, '*qabiltu*' (I have accepted) or '*raditu*' (I have agreed).

The schools of *fiqh* differ regarding the validity of the contract when not recited in the past tense or recited by using words other than those derived from the roots *al-zawaj* and *al-nikah*, such as, *al-hibah* and *al-bay'*.

The Hanafi's say: A marriage contract is valid if recited by any word conveying the intention of marriage, even if the words belong to the roots *al-tamlik*, *al-hibah*, *al-bay'*, *al-'ata*, *al-'ibahah* and *al-'ihlal*, provided these words indicate their being used for the purpose of marriage. But the contract will not conclude if the word used are derived from *al-'ijarah* (hiring) and *al-'arah* (lending), because these words do not convey the meaning of perpetuity and continuity.

They have based their argument on this narration from the Sahih al-Bukhari and the Sahih Muslim. A woman came to the Prophet (s) and said: "O Apostle of Allah. I have come to offer myself to you." On hearing this, the Prophet (s) lowered his head and did not reply. Then one of those present said: "If you do not want her marry her to me." The Prophet (s) asked him: "Have you anything?" He replied, "By God. I have nothing." Again the Prophet asked him. "Have you any knowledge of the Qur'an?" He replied regarding the extent of his knowledge of the Qur'an. Then the Prophet said. "I make her your property in exchange for your knowledge of the Qur'an" (using the word *mallaktul*)<sup>1</sup>.

The Maliki's and the Hanbali's say: The contract is valid if recited by using the words *al-nikah* and *al-zawai* or their derivatives and is also valid when the word used is *al-hibah*, with the condition that the

amount payable as dower (*mahr* or *sidaq*) is also mentioned. Words other than these cannot be used. They have based their argument for the use of the word *al-hibah* on this verse of the Qur'an (see Abu Zuhrah. *al-'Ahwal al-shakhsiyyah* [1948] p. 36):

وَأَمْرًا مُؤْمِنَةً إِنْ وَهَبَتْ نَفْسَهَا لِلنَّبِيِّ إِنْ أَرَادَ النَّبِيُّ أَنْ يَسْتَنْكِحَهَا

**...And a believing woman if she gave (*wahabat*, derived from *al-hibah*) herself to the Prophet, if the Prophet desired to marry her... (33:50)**

The Shafi'i scholars consider it *wajib* that the words used in the contract should be either the derivatives of the root *al-zawaj* or that of *al-nikah*.

The Imamiyyah say: It is *wajib* that the offer be made by using the words *ankahtu* and *zawwajtu* in the past tense. The marriage is not concluded if the word used is not in the past tense and does not belong to the roots *al-zawaj* and *al-nikah*, because these two roots conventionally convey the meaning of marriage and the past tense conveys the meaning of certainty and also because the Qur'an testifies their use:

فَلَمَّا قَضَى زَيْدٌ مِنْهَا وَطَرًا زَوَّجْنَاكَهَا

أُرِيدُ أَنْ أُنكِحَكَ

(33:37 ,28:27).

Apart from -this, the absence of consensus invalidates the use of words other than these in such a contract. For acceptance, according to them, the word *qabiltu* or *raitu* can be used.

The Imamiyyah, the Shafi'i and the Hanbali schools mention 'immediacy' as a condition for a marriage contract. By immediacy they mean the acceptance of the offer without any delay. The Malikis consider a minor delay inconsequential, such as a delay caused due to the recital of a short sermon or the like of it. The Hanafi school is of the opinion that immediacy is not necessary.

Even if a man addresses a letter to a woman conveying his proposal of marrying her and the woman gathers witnesses and reads out the letter to them and says. "I marry myself to him," the marriage is performed (*al-Fiqh 'ala al-madhahib al-'arbiah*, vol. 4. the discussion regarding conditions of marriage; *al-'Abwal al-shakhsiyyah* by Muhammad Muhy al-Din 'Abd al-Hamid).

All the schools concur that the contract can be recited in any language when it is impossible to recite it in Arabic but differ as regards the validity of the contract when so recited despite the possibility of its being

recited in Arabic. The Hanafi, the Maliki and the Hanbali schools consider this as valid. The Shafi'i and the Imamiyyah Schools consider it as invalid. (Abu Zuhrah. *al-'Ahwal al-shakhsiyyah*. p. 27)

The Imamiyyah, the Hanbali and the Shafi'i schools consider a contract in writing as invalid. The Hanafi school is of the opinion that a written contract is valid provided the bride and the groom are not present together at the place of contract. The schools concur that a dumb person can convey his intention to marry by signs in case he is incapable of expressing it in writing. If he can express it in writing, it is better for him to combine both, writing and signs. in conveying his intention.

According to the Hanbali and the Hanafi schools, if a clause is included in the contract giving a choice to the bride and the groom to annul the contract. The contract is valid but the condition is void. The Maliki school is of the opinion that, if the marriage is not consummated, this condition as well as the contract are both void. But if the marriage has been consummated, the condition is void, not the contract. The Imamiyyah and the Shafi'i schools have declared both the contract and the condition as void irrespective of whether the marriage has been consummated or not.<sup>2</sup> (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4; *al-Tadhkirah* by al-'Allamah al-Hilli, vol. 2; and *al-Masalik* by al-Shahid al-Thani, vol. 2J)

As a matter of course, the offer is made by the bride and is accepted by the groom. The bride says, '*zawwa jtuka*' (I have married myself to you) and the groom accepts by saying, '*qabiltu*' (I have accepted). The question which now arises is, is the contract valid when the acceptance precedes the offer and the groom addresses the guardian of the bride saying, '*zawwijnih*' (marry her to me) and the guardian replies, '*zawwa jtukahu*' (I have married her to you)? The Hanbali school considers it as invalid while the other schools concur on its validity (*al-Tadhkirah* by al-'Allamah al-Hilli, vol. 2). Al-'Allamah al-Hilli, an Imamiyyah scholar, in his book *al-Tadhkirah*, says, "A marriage contract cannot be made contingent on a future event because certainty is one of its conditions. If a condition is included prescribing a certain time or a certain quality, such as, when the offer is made with the condition that the marriage will conclude at the beginning of the forthcoming month and this offer is accepted, the contract is not valid. Al-Shafi'i is of the same opinion."

Abu Zuhrah, a Hanafi scholar, writes in his book *al-'Ahwal al-shakhsiyyah*: "A marriage should be concluded on the recital of the contract, because marriage is a contract and the consequences of the contract cannot be delayed after its conclusion. Therefore it is not possible to postpone the consequences of a contract till the fulfillment of a future condition". In the book *A'lam al-muqilin*, Imam Ahmad has been referred to as validating a conditional contract of marriage.

## **A Subsidiary Issue**

*Al-Fiqh 'ala al-madhahib al-'arba'ah*, quoting Hanafi and Shafi'i scholars, states: If an illiterate person mispronounces the word '*zawwaitu*' and says instead, "*zawwajtu*," the contract is valid. Al-Sayyid Abu al-Hasan al-'Isfahani, an Imamiyyah scholar, in his *Wasilat al-najat*, gives a similar fatwa.

## Witnesses

The Shafi'i, the Hanafi and the Hanbali schools concur that the presence of witnesses is a necessary condition for a valid contract. The Hanafi school considers as sufficient the presence of two men or a man and two women. However, if all the witnesses are women, the contract is not valid. This school does not consider 'adalah' (justice) as a condition for the acceptability of the witnesses. The Shafi'i and the Hanbali schools consider as necessary the presence of two male Muslim witnesses possessing the quality of 'adallah'.

According to the Malikis, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated. Therefore, if the contract is recited without the presence of witnesses, it is valid. But, when the groom intends to consummate the marriage it is incumbent upon him to have two witnesses. If the marriage is consummated without the witnesses, the contract becomes void compulsorily, and this is considered as amounting to an irrevocable divorce. (*Bidayat al-mujtahid* by Ibn Rushd: *Maqсад al-nabih* by Ibn Jamii'ah al-Shafi'i)

The Imamiyyah do not consider the presence of witnesses as *wajib* but only *mustababb*.<sup>3</sup>

- <sup>1</sup>. The Imamiyyah have narrated this tradition with different words. According to their version: A woman came to the Prophet (s) and said, "Get me married." The Prophet then announced, "Who is ready to marry her?" One of those present stood up and said, "I". The Prophet (S) then asked him, "What can you give her?" He replied, "I have nothing." The Prophet said, "No." The woman repeated her request and the Prophet (S) repeated the announcement but none stood up except the same man. The woman again repeated her request and the Prophet (s) announced again. Then the Prophet (s) asked him, "Do you have any good knowledge of the Qur'an?" He replied, "Yes. I do." The Prophet (s) then said, "I marry her to you (zawwajtukaha) in exchange for your teaching her what you know well of the Qur'an." Therefore, the word used was al-zawaj, not al-milk.
- <sup>2</sup>. This is the view of most of the Imamiyyah scholars. But some of them, such as Ibn Idris among the early legists, and al-Sayyid Abu al-Hasan al-'Isfahani among the recent ones are of the opinion that the contract is valid and the condition is void. Accordingly, the Imamiyyah scholars in both their views are on the whole like the scholars of the other schools.
- <sup>3</sup>. Dr. Muhammad Yusuf Musa, in his book al-Ahwal al-shakhsiyyah (1958) page 74, states: "The Shi'ah consider the presence of witnesses as necessary for marriage." He considers the Shi'ah and the Hanafi, the Shafi'i and the Hanbali schools to hold a common view. But there is no source of reference for what he states.

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