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Capacity to Enter into a Marriage Contract

All the schools agree that sanity and adulthood (*bulugh*) are necessary qualities for both the parties to the contract, unless the contract is concluded by the guardian of any of them. The contract with the guardian shall be discussed later. The schools also agree that there should be no obstacle to marriage between the man and the woman such as consanguinity or any other disabling factor of a permanent or temporary character. We will discuss the legal obstacles to marriage in a separate chapter.

The schools also consider the ascertainment of both the parties to the contract as necessary. Therefore, when it is said. "I marry you to one of these two daughters." or "I marry myself to one of these two men." the contract will not be valid.

All the school except the Hanafi consider free consent as a *sine qua non* without which the contract does not conclude. The Hanafis are of the opinion that the contract is concluded even if coercion is present (*al-Fiqh 'ala al-madhahib al-'arbdah*). Al-Shaykh Murtada, al-'Ansari, an Imamiyyah scholar, after mentioning free consent as a condition, writes: "That which is commonly held by the Imamiyyah scholars of the latter period is that, when a person coerced consent freely later on, the contract is valid. In the book *al-Hada'iq wa al-riyad* their consensus has been reported on this issue." Al-Sayyid Abu al-Ha'san al-'Isfahani, an Imamiyyah legist, in his *al-Wasilah* in the chapter on marriage, writes: "Free consent of both the parties is a necessary condition for a valid contract. If both of them or any of them is coerced, the contract is invalid. But if the party coerced consents later, the reason in favor of the validity of the contract seems strong." According to the above-mentioned criterion, if the man or the woman pleads coercion and then willingly live together like a married couple and show the happiness of a newly married bride and groom, or if the woman takes the *mahr* or does any other act proving consent, the claim of coercion will be rejected and no other evidence will be accepted contradicting the consent.

According to the four school of fiqh, a contract recited in jest concludes the marriage. Therefore, when a woman says jokingly. “I marry myself to you” and the man accepts it in a similar fashion, the contract is concluded. Divorce and the freeing of a slave also conclude if recited in jest according to the tradition:

ثلاث جدهن جد وهزلهن جد: الزواج والطلاق والعتق

The three whose intentional and jestful* (*recital*) *is considered intentional are: marriage, divorce and freeing of a slave.

The Imamiyyah school considers all contracts involving jest as null and void due to the absence of the will to contract and as regards the above-mentioned tradition, they consider the narrators as unreliable.

The Hanafi and the Hanbali schools regard the marriage of an idiot as valid irrespective of whether the guardian has given permission or not. The permission of the guardian is necessary in the view of the Imamiyyah and the Shafi'i schools.

According to the Imamiyyah and the Hanafi schools, the consent given when the two conditions of sanity and adulthood (*bulugh*) are present concludes the marriage as per the authority of the tradition.

إفرار العقلاء على أنفسهم جائز

The consent of sane persons even if detrimental to their interest, is valid.

Al-Shafi'i, in the latter of his two views, considers the marriage as established when the bride being a sane adult acknowledges the marriage and the husband confirms her acknowledgement, because marriage is the right of both the parties. Malik recognizes a difference here. According to him, when the bride and the groom are in a foreign land their acknowledgement establishes the marriage; but when they are in their hometown they will have to furnish a proof of their marriage because it i convenient for them to do so. This was the former view of al-Shafi'i. (*al-Tadhkirah* by al- Allamah al-Hilli)

Bulugh

There is consensus among the schools that menses and pregnancy are the proofs of female adulthood. Pregnancy is a proof because a child comes into being as a result of the uniting of the sperm with the ovum: and menses, because, like the production of sperm in male, is a mark of female puberty. All schools, except the Hanafi, consider the growth of pubic hair as a sign of adulthood, but the Hanafis consider them no different from other hair of the body. According to the Shafi'i and the Hanbali schools, the adulthood of both the sexes is established on their completing fifteen years. According to the Malikis, it seventeen years for both the sexes. The Hanafis consider eighteen years for a boy and seventeen years for a girl a the age of maturity (Ibn Qudamah, *al-Mughni*, *Bab al-Hijr*. vol. 4). The Imamiyyah have mentioned fifteen years for a boy and nine years for a girl as the age of maturity on the authority of the following tradition narrated by Ibn Sinan:

إذا بلغت الجارية تسع سنين دفع إليها مالها وجاز أمرها وأقيمت الحدود التامة لها وعليها.

When a girl reaches the age of nine her property will he returned to her and it will be rightful for her to handle her own affairs, and the hudud are applied against her and in her favor.

Experience also proves that a girl can conceive at the age of nine, and the ability to conceive is equivalent to conception in all aspects.

Note: That which the Hanafis have said regarding the age of maturity is the maximum age limit for maturity. The minimum age limit according to them is twelve years and nine years for a boy and a girl respectively: because at this age it is possible for a boy to ejaculate and to impregnate, and for a girl to have orgasm. to menstruate, and to conceive (Ibn 'Abidin [1326 H.] *Bab al-hijr*, vol. 5, p. 100).

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