



MODULE 7 FAMILY LAW



Module 7: So Far

- 1] Meaning of nikah (marriage) according to Shariah.
- 2] The ruling on nikah.
- 3] The manners of proposal and seeking.
- 4] Suitability



LEARNING OBJECTIVES

- 1] The pre-requisites of marriage
- 2] The pillars of marriage
- 3] Contractual details



WHAT NOW?

Khalid was told about Layla. He was interested in marriage, so he went to Abu Layla and spoke about his interest. The parents of both Khalid and Layla spoke and arranged for the two to meet. They got to know one another in a halal way, and after both made istikhara, they agreed to set a date for marriage in the future. The hall was rented, and the catering service has been hired...what now?



PRE-REQUISITES OF MARRIAGE

1] **Marriagability**—Khalid and Layla are permissible for one another. They are neither unmarriageable kin nor siblings through wet-nursing. Both are Muslim.

2] **Consent**—Abu Layla is arranging the marriage of his daughter Layla to Khalid, but consummation of the marriage cannot happen without her consent.

3] **The Wali**—Abu Layla is Layla's guardian. The wali must be male, mature, and Muslim.



PRE-REQUISITES OF MARRIAGE

4] **Sadaq/Mahr**—The bridal gift given to the wife. The amount is to be agreed upon between both parties. Consummation of the marriage cannot occur until the mahr is agreed upon. It can be paid over time, and can be a tangible (money, car, etc.) or a non-tangible, such as teaching her a chapter of the Quran.

5] **Witnesses**—the contract is not valid without witnesses according to Imams Abu Hanifa, al-Shafi'i, and Ahmad. According to Imam Malik, the contract is valid without witnesses, but cannot be consummated until there are witnesses to the marriage.



THE PILLARS OF MARRIAGE

Proposal and Acceptance (ijab and qabul)

- The marriage is a contract of transfer of maintenance from the father to the groom.
- The father says, 'I marry you to my daughter, so-and-so, in accordance with the Quran and Sunna, and upon the mahr agreed upon between us.'
- The groom says, 'I accept the marriage of your daughter, so-and-so, in accordance with the Quran and Sunna, and upon the mahr agreed upon between us.'
- This is valid in any language, and in writing or the medium of any modern technology provided that the identities of the individuals are known.



CONTRACTUAL ISSUES

CONDITIONS OF EFFECTIVENESS

- 1] Expression of proposal and acceptance in words that convey the meaning.
- 2] That the proposal and acceptance are uttered and heard.
- 3] No unreasonable delays between the proposal and acceptance.
- 4] That the soundness of both parties entering the contract be ascertained. (Verified absence of disqualifiers)

If these (among others) are in place, **the contract is sound**, but there may be other things that affect the contract...



CONTRACTUAL ISSUES

CONDITIONS OF VALIDITY

- 1] Those pertaining to the groom—fulfills the conditions.
- 2] Those pertaining to the bride—fulfills the conditions
- 3] Those pertaining to the guardian—fulfills the conditions
- 4] Absence of compulsion—she cannot be compelled
- 5] Not being in ihram for Hajj or 'Umra
- 6] Absence of mortal illness
- 7] Witnesses



CONDITIONS IN THE CONTRACT

1] Conditions that are already implied in the contract by its very nature

- Agreement to care for the wife financially (it's already implied in the contract)
- Agreement not to harm her
- Agreement to clothe her
- Agreement for her to live with him.

The presence or absence of these conditions are the same—they do not change the nature of the contract, and there is no harm if they are articulated in the contract or left out.



CONDITIONS IN THE CONTRACT

2] Conditions that contradict what is implied in the contract by its very nature

- Putting as a condition in the contract that she cannot live with him or:
- She is not to be provided for
- She is not to inherit from him

(In the Maliki school, these conditions would invalidate the contract if mentioned at the time of the contract, causing it to be annulled before consummation. If they were mentioned before or after, the marriage still stands, but the conditions are invalid and have no legal bearing.)



CONDITIONS IN THE CONTRACT

3] Conditions that are neither implied in the contract nor contradicted by its very nature

- That he not get married to a second wife
- That he not move her to another country

There are details concerning these types of conditions



CONDITIONS IN THE CONTRACT

- In the Maliki school these conditions are disliked (makruh) but do not invalidate the contract.
- All of the conditions in this third category are not binding as a legal obligation, but are recommended to be fulfilled by the spouse (even though stipulating them is disliked)
- The only time these would be binding conditions is if is enacted by a solemn oath (yamin) and they are linked to divorce.
- In fiqh, this is called ‘tafwid al-talaq’.



CONDITIONS IN THE CONTRACT

- In the Maliki school these conditions are disliked (makruh) but do not invalidate the contract.
- All of the conditions in this third category are not binding as a legal obligation, but are recommended to be fulfilled by the spouse (even though stipulating them is disliked)
- The only time these would be binding conditions is if is enacted by a solemn oath (yamin) and they are linked to divorce.
- In fiqh, this is called ‘tafwid al-talaq’.



CONDITIONS IN THE CONTRACT

In the Hanafi school, this is valid: provided one condition is met: that the offer of marriage is **initiated by the woman coupled with the demand for *tafwid al-talaq*, and the man accepts this**. If the opposite takes place, it will be void.



EXAMPLES OF POSSIBLE CONDITIONS

- To guarantee implementation of the Quran's command to *tabkim* [4:35] and combine it with other family guidelines encouraging *shuhud* for *talaq* or *raj'ah*, each party is encouraged to designate a trusted Muslim family or community member to serve these offices.
- When either spouse seeks their assistance, they should mediate to bring harmony between the two, using tools of conflict resolution. If after studying the situation of the spouses they agree there is neglect in rendering rights or transgression of rights, they may petition an imam to decree separation by coerced *tatliqa* (divorce pronouncement)

This may be put in a contract, and the groom and bride may sign and designate their relative name of choice for this function.

CONDITIONS ALLOWING TAFWID AL-TALAQ

These conditions are to be made binding on the groom, and by writing them and signing them in the presence of witnesses, the document aid Islamic entities in performing *faskh* or ratifying divorce.

- The groom grants the bride agency in pronouncing divorce herself with the supervision of and written endorsement by any imam or Islamic scholar educated in Islamic Law.



EXAMPLES OF POSSIBLE CONDITIONS

1] If the husband refuses to provide the necessities of life for the wife for a period of X months from the date of signing, or for any unforeseen period of X consecutive months thereafter, regardless of the reasons, and it was the case that he cannot commit to it or be obligated to it.

2] If the husband refuses his wife her conjugal rights for a period of four months without valid excuse such as travel or temporary illness. Also, if the husband becomes permanently incapable of such, and she desires chastity.

3] If the husband is diagnosed with a communicable chronic illness putting wife or children at risk.



EXAMPLES OF POSSIBLE CONDITIONS

4] If the husband loses some of his mental capacity via diagnosed dementia, Alzheimer's, insanity, etc.

5] If the husband is imprisoned for a period considered unbearable for the wife, at least X months, or the couple are otherwise prevented from cohabitating.

6] Any type of negative addiction or illegal activity by the husband which makes family life difficult to continue or unbearable for the wife or jeopardizing safety of herself and or children.



EXAMPLES OF POSSIBLE CONDITIONS

7] If the husband's whereabouts remain unknown for a period of X months and upon reasonable verification and notification [4:129] (reduced to 4 months if he was sole provider).

8] If the husband prevents or hinders the wife from practicing her basic obligatory religious duties or if he solicits her or children to do anything categorically forbidden in Islam by classical scholars despite her protest.

9] If the husband leaves off the basic pillars of Islam, not establishing the prayer, giving zakat, fasting Ramadan, and commitment to perform Hajj if he or wife have not done so previously and it is within their ease and ability.

