CHAPTER-3

MARRIAGE

"No one should cross the limit
Everything has its own importance."
1. INTRODUCTION:

In Arabic marriage is known as Nikah, which literally means joining together. In the Holy Quran it has been described as hisn (that is a fort), which means that it affords social, physical and moral protection to the couple joined together in wedlock, from the evil forces and carnal desires.

Marriage is a legal union of a man and a woman as husband and wife. It is a contract according to the form prescribed by law by which a man and woman capable of entering into such contract, mutually engage with each other to live their whole lives in state of union. The word also signifies the act, or formal proceeding by which persons are wedlocked with each other. Islam attaches great sanctity to marriage. The purpose of marriage is the establishment of a happy home the spouses are enjoined to guard their chastity and be considerate and loving. It is necessary for the continuance of generation as it provides the means of procreation of children which is the source of survival of human race Almighty Allah says."

"And marry such of you as are solitary"
And the pious
Of yourselves
And maid servants.
If they be poor
Allah will enrich them
Of His bounty.
Allah is of ample means, aware."2

He further revealed:

وَإِنَّ خَفْفَتُمْ أَنْ تُقِيسُواْ فِى أَلْيَتَدَمُّ فَانْكِحُواْ سَافِرٌ لَّكُمْ

"And if ye fear that
ye will not deal fairly
by the Orphans,
marry of the women,
who seem good to you."3

Bukhari reports that a group of three men came to the houses of the wives of the Prophet (SAW) asking how the Prophet Worshipped (Allah), and when they were informed about that, they considered their worship insufficient and said, "Where are we from the Prophet as his past and future sins have been forgiven." One of them said, "I will not marry forever". Allah's messenger came to them and said "Are you the same people who said so-and-so? By Allah I am more submissive and more afraid of Him than you; yet I fast and break my fast, I do sleep and I also marry women. So he who does not follow my tradition is not from me."4 Urwa (Raz.) says that he asked

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2 M.M. Pickthall, 'Holy Quran S 24 A 32
3 Ibid. A.3
Ayesha (Raz) about statement of Allah in sura 4 V 3⁵ Ayesha said. "O my nephew: this verse has been revealed in connection with an orphan girl under the guardianship of her guardian who was attracted by her wealth and beauty and intend to marry her with a dower (mahar) less than what other women of her standard deserve. So they (such guardians) have been forbidden to marry them unless they do justice to them and give them their full dower, and they are ordered to marry other women instead of them."⁶

2. NATURE OF MUSLIM MARRIAGE:

Jurists are of the different view regarding the nature of marriage. Ahadith are quoted that one who marries, completes half of his religion it now rests with him to complete the other half by leading a virtuous life in constant fear of Allah. Another tradition says -

"There are three persons whom the Almighty Allah himself has undertaken to help, first he who seeks but his freedom, second, he who marries ..."

It is also said that there is no act of devotion that has remained prescribed for us, since the time of Adam (AS) up to this moment and will be continued in paradise except marriage and faith⁷.

Traditions show that marriage has sacramental aspect also. However jurists have different opinions about its nature. Imam Abu Hanifa (Rah) considers the marriage as partaking of both sacrament as well as worldly affair⁸. Hanafis say that it has sacramental aspect because the recitation of sermon and organization of walima are Sunnah. Again it is detestable to get the marriage dissolved. The performance of waiting period and legal

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⁵ "And if ye fear that ye will not deal fairly by the orphans, marry of the women who seem good to you ---" Thus it is more likely that ye will not do injustice (Pickthall)
⁶ Bukhari op. cit. Vol.VII p. 2
impediment in remarriage makes the marriage other than the ordinary contract\(^9\). Moreover each and every Prophet was married. Prophet Mohammad (SAW) said "O assembly of youths, you marry as it gives restrain to the passion and protection to the eye.\(^{10}\)

Shafeyee(Rah) considers the marriage as a purely civil contract. It is only permitted (\textit{mabah}) and may be left for extra worship (\textit{nafl})\(^{11}\). If it were obligatory the Prophet (SAW) would have forbidden his companions who were not married. The verse 8 of sura 73\(^{12}\) also says to give away the woman\(^{13}\). Further the non-gamous quality of Yahya is appreciated in Holy Quran\(^{14}\). Again, Allah has warned –

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"Beautified for mankind is love for the Joys (that come) from women and offsprings—"\(^{15}\)
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According to justice Mehmood marriage is a civil contract. Justice Sulaman analysing Mehmood’s opinion says that the Judge accordingly felt compelled to make a deduction from certain privileges governing sale of goods and applying them to the contract of marriage.

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\(^{9}\) Fathul Bari, Vol. IX p.104

\(^{10}\) Maulana TaqiUsmani’Darse Tirmizi’(Deoband:Darulkitab,1412A.H.).III p.344.

\(^{11}\) Nihaya, Vol. I p. 160, Quoted by Darse Tirmizi, Vol.III 347

\(^{12}\) Darse Tirmizi p. 344

\(^{13}\) Holy Quran

\(^{14}\) But this inference is weak, as the Prophet himself has married.

\(^{15}\) Holy Quran S 3 A 39

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Mufti Shafi in “\textit{Maariful Quran}” also express his opinion that it (marriage) is only permitted thing (\textit{mabah}) and one who is so devoted to Allah like Yahya (AS) may not marry.
Justice Sulaiman says-

"The term of reasoning based on the analogy of sale has naturally been very severely criticized at pp. 148-9 in Wajid Ali Khan’s case by the Qudh Bench, and also by Mr. Ameer ali."¹⁶

Justice Sulaiman again quotes J. Mehmood

"The marriage cannot be regarded as purely a sale of person by the wife."¹⁷

Justice Sulaiman Further says –

"It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as a religious sacrament."¹⁸

Prof. Tahir Mehmood is of the view that ‘there is a popular misconception that no religious significance or social solemnity attaches to a Muslim marriage and that it is a mere “civil contract” this is not true. Of course, Islam does not regard marriage as a sacrament (sanskar) in the Hindu Religious sense of term. However, the Prophet did describe marriage (nikah) as his Tradition as a matter of fact it is only the form of the Muslim marriage that is contractual and non-ceremonial marriage itself, as a concept, is not merely a contract’.

Thus “the ultimate analysis… can be said that the marriage in Islam is neither purely a civil contract nor sacrament. It is devoid of none but the blending of the two”¹⁹

Justice Qadiruddin Ahmad²⁰ says that in marriage if religious ritual is not essential part of the transaction, it does not mean that it has no sacred

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¹⁵ S 3 A 14
¹⁶ Anis Begam & others V. Malik Mohammad Istafa wali Khan L J.R. (High Court) 1933, p. 1086
¹⁷ Ibid p. 1088
¹⁸ Ibid
¹⁹ Aquil Ahmad’s Muslim Law – Dr. I. A. Khan (Allahabad:Centred Law Agency )16th ed. p. 52
²⁰ Rahman p. 542
and no higher religious purpose, enjoining the sanctity of religion and pleasure of God. There is a sanctity attached from the beginning to the end by conceptions of rights and obligations which, if treated without the holiness which they possess in their nature, would be profane and cease to be Islamic in character.

THE VIEW OF IMARATE SHARIA:

Marriage is originally an act of devotion but incorporates the aspect of contract also. This is the point where belief is completed. For the rest they converge with the Hanafi view. Thus the view of Imarat Sharia is the crux of the views of the Hanafi jurists.

3. CAPACITY TO MARRY AND GUARDIANSHIP:

It is to be seen here whether there is need of guardianship in marriage or a girl is free to marry.

(1). HANAFI VIEW:

Hanafis say that it depends upon the age of the girl, if she is minor, the guardianship is needed. Where she is major it is immaterial that the marriage is of spinster or window, the consent is necessary. The marriage performed with the consent of the father of a girl is void provided she refuses to cohabit with her husband\(^\text{21}\). Moreover the women who are divorced if they want to marry with the divorcing husband may marry provided the divorce is not more than two and the guardians are forbidden to intervene\(^\text{22}\). The order

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\(^{21}\) Marriage of Khauza , D/o Khidam , Bukhari p. 52
\(^{22}\) Holy Qur'an S.2 V. 232. 89
made to the women to keep away from marriage in *Iddat* (of death) contains the permission to do the rightful act (marriage) after waiting period. This permission is granted to women and not men. The marriage of the Prophet (SAW) with Umme Salma (Raz) was not made by her guardians. The offer of a woman to the Prophet and her marriage with a companion of the Prophet shows that woman is free to marry herself. The marriage of Hafsa (Raz), the niece of Ayesha (Raz) was arranged by her without the guardian. The marriage made without the guardian was valid in the Caliphate of Ali (Raz). Thus for marriage a woman who is of sound mind attained puberty and is not slave can enter into marriage contract. However, Imam Yusuf (Rah) and

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وإذا طلقت فليس فيكم أعمل من أجلهن فلأتعفوهن إن ينكرهن أزواجهم إذا نبأوه بأعملهن بيوم التوفيق ذاك كيوعظ بهم من كان منكم يؤمنون بالله واليوم الآخر ذلكم أركان لكنم وأطهر والله تعلمو أنكم لا تعلمون

23 Holy Quran S 2 A 234

والذين ينفون منكم ويذرون أزواجهم ينكرهن بأفعالهن أربعة أشهر وعشراء فإذا بلغن أجلهن فلا جناح عليهكم فيما فعلن في أفعالهن بليوم التوفيق والله بما تعملون خبير

25 Bukhari , Vol. VII p. 49 (A lady came and presented herself to the Prophet (SAW) for marriage. Having seen the silence of the Prophet (SAW) a companion offered for marriage with whom the marriage was made).  
26 Tahavi , Vol. II p. 6. Here the tradition also shows that a woman can be guardian in marriage.  
28 Almarganani. 'The Hedaya' Tr. Charles Hemilton (Delhi: Islamic Book Trust, 1982) p.34

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Imam Mohammad (Rah) consider the consent of guardian as necessary.

ii). MALIKI VIEW:

As per Hedaya, Imam Malik is of the view that a woman can by no means contract herself in marriage to a man in any circumstances, whether with or without the consent of her guardians; neither she is competent to contract her daughter or her slave, nor to act as a matrimonial agent for any one, so as to enter into a contract of marriage on behalf of her constituent. But the two Traditions reported in *Muwatta* Imam Malik show that woman do not need guardian's consent for marriage. But no one has taken these traditions as negation of the consent of guardians. Anyway Dr. Tanzilur Rehman after a long discussion concludes the Maliki view in the following way –

"Imam Malik in his *Muwatta* has also reported two other Traditions (where virgin daughters were given in marriage without their consent) If each of the two Traditions be examined in the light of the social background of Medina, it shall become apparent that these Traditions merely indicate the general custom and usage in vogue in Medina. The consent and permission of a guardian as a condition precedent to a valid marriage contract can not be put for word as an explicit religious mandate".

In the light of the above analysis it may be concluded that Imam Malik (Rah) considers the permission of a guardian necessary for the completion of a marriage and not for validating it. Ibne Rushd and other Egyptian Maliki jurists appear to conform this view. Maliki Jurists of Iraq, however hold that the permission of a guardian is a condition precedent to a

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29. Ibid

“Sabarah Aslamiya was confined a few nights (Fortnight) after the death of her husband, when this was reported to the Apostle of Allah, he said; thou hast become eligible, marry thou wilt”
valid marriage.

It is submitted that the view of Tanzilur Rehman is better as it is more practicable

iii). SHAFEYEE VIEW:

The scholars of this school say that the woman is not allowed to marry her without the consent of guardian. They rely upon the Traditions of Abu Musa Ashari (Raz) and Ayesha (Raz) in which it is said that there is no marriage without the guardian. And a woman whose marriage is without the permission of a guardian, the marriage is void the marriage is void and the third time, the marriage is void. Moreover the Almighty Allah in sura 24 V. 32 has revealed "And marry such of you ...." has addresses the guardians and not the parties to the marriage. Again in sura 2 A 221 Allah has revealed-

ワラ ナンケーヒョーロ タニクラー クニト ノシビ イィス ヨウミン

"Wed not idolatresses till they believe, for lo! A believing ---- addresses the guardians and not the parties. Further Almighty Allah revealed--"And when ye have divorced women and they reach their term; place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness...". Thus the verses guide the guardians, which indicates that they have the capacity to give their wards in marriage.

iv). HAMBALI VIEW:

It is said that Hambalis are also of the similar view as Malikis or Shafeyees are. However there is difference between Hanafis and other scholars. The aspect of consent and guardianship in marriage is more favourable for women in Hanafi school.

v). IMARATE SHARIA'S VIEW:

31 Justice Tanzilur Rehman,' A Code of Muslim Personal Law (Karachi: Hamdard Academy
Like Hanafi school the Imarate Sharia allows major women to marry in their status (kufu) according to their wish. The founder of Imarate Sharia Abul Mahasin Mohd. Sajjad has mentioned this view. However the marriage need consent of their guardians. In the presence of near guardians ijbar the consent of remote one is ineffective. Mere silence of guardian is not consent. However it is equal to consent if a major woman do so. Where there is undue influence upon guardian for consent the sending to the bride to her marital home is implied consent. While in another case the cohabitation of the marrying parties was not treated as consent of the guardians. Apparently there is contradiction between two and there is need of clarification from Imarate Sharia. In the case of Shama Perveen V. Anwar Hasan the Qazi held that in marriage of vergointacta the silence is equal to consent provided guardian of the bride is taking the consent. But in all those cases where non guardians (awlia) are taking the consent the silence is not enough to prove the consent. But the newly published Fatawa book treats the silenced of a victim of aqde fuzuli as her consent. So the Imarat's view is not encouraging for women esp in the time when there is demand of gender justice all over the world. Here the schools of jurisprudence other than Hanafi School do not seem to be in accordance with the need of the time while Imarate Sharia is at par.

vi). AGE OF PUBERTY:

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32 Fatawa Imarate Sharia pp. 105, 106 & 113
33 Ibid p.109
34 Ibid p.102
35 35/12806/1409AH
36 Ibid p. 113
37 Ibid
38 Ibid p. 107 (Istifta no. 69) Aqde Fuzuli means where marriage is solemnized without the authority of the parties (or guardians in case of Minority ).
Every person governed by Muslim Law is entitled to marry. No injunction can be granted to restrain marriage on a Muslim who is of age or who has attained the puberty. The age of puberty in Muslim law as the judicial committee observed, referring *Hedaya*, that the earliest age is nine years for girl and 12 years for boys. Tayabji says that in the absence of evidence of attainment of puberty the age of competence is 15 years for the girl.

4. LEGISLATIONS

The following are the enactments made in different countries regarding age of puberty -

(I). TURKEY:

Art 88 of The Turkish Civil Code 1926 fixes the age of marriage as 17 and 15 years respectively of boys and girls. However guardians may apply for early marriage and court may permit on 15 and 14 years respectively.

(II). CYPRUS:

The age of marriage is 18 & 17 years of boy and girl respectively. Before 17 years the marriage of girl is not permitted unless there is consent of guardian. However the guardian may take permission of the court on the age 15&14 years respectively.

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39 *Muhammad Yamin V. Razia* (1919) 17 All. L. J. 1138
41 *Sadiq Ali Khan V. Jai Kishore* (1928) 30 Bomb. L. R. 1346
ibid P. 283 also in
42 Faiz Badruddin Tyabj 'Muslim law' Muhsin Tayabji ed. (Bombay : N .M .Tripathi Pvt .Ltd .1968) F. 52 Also see *Aikta Begum V. Md. Ibrahim* AIR1916 PC 250

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(III). EGYPT:

For marriage the age must be 18 & 16 of a boy and a girl, if it is complied the parties will get any relief from the Court. However the offspring will be considered legitimate.

(IV). JORDAN:

In Jordan also the age of marriage is 18 & 16 years of man and a woman. For marriage, between whom 20 years difference exist, the permission of Qadhi is necessary.

(V). SYRIA:

In Syria the age of marriage of man and woman are 18 and 17 years. Where there is age difference the permission of Court is necessary.

(VI). TUNISIA:

The marriage age is 20 years. But Court may permit boy & girl of below 20 years and 17 years respectively. Even the girl may marry before 17 years; provided she gets the permission of the guardian.

(VII). MORACCO:

In Moracco the marrying age is 18 and 15 years of male & female respectively. In order to get the early marriage the consent of guardian is necessary.

(VIII). IRAQ:

Normally the minimum age for marriage is 18 years. For early marriage the court may permit; provided the parties have attained puberty and guardian consent.

(IX). IRAN:

The minimum age of marriage is 18 & 15 years of male and female respectively. Marriage prior to the said age is punishable under Art –2 of the marriage law 1931.

(X). CEYLON:

For registration of marriage the female party must have attained the 12 years of age. However for registration of minor marriage permission of the Qazi of the minor's area is necessary.

Thus we see that failure to obtain the necessary permission for ijbar impedes registration of the marriage and even renders the parties liable to statutory penalties but it does not invalidate the marriage. The modern legislation relating to marriageable age has nearly abolished the right of marriage guardian to contract a valid marriage by ijbar. However, in India a guardian may still validly give his minor ward in marriage by ijbar notwithstanding the punitive sanctions attached to the marriage of minors (boys below 18 years of age and girl below 16) by the Indian Child Marriage Restraint Act 1929. Anyway a girl so contracted in marriage during minority may repudiate the marriage even if she is given in the marriage by her father or grand father, provided marriage is not consummated.

5. FORMALITIES:

In marriage the following ingredients are to be fulfilled-

1. Offer and acceptance (Ijab wa Qubul).
2. Dower
3. Witnesses
4. Same meeting

1. OFFER AND ACCEPTANCE:
The offer and acceptance is also necessary for marriage. There is no difference among the scholars of different schools in this regard. The only difference is that where the offer or acceptance is vitiated by coercion, undue influence, fraud, mistake or misrepresentation, what will happen? The Hanafis consider the marriage as valid. The scholars of other Schools do not agree with the Hanafis view. The former's view is taken from the Tradition where the Prophet (SAW) said, "there are three things, which whether done in joke or earnest, shall be considered as serious and effectual, 1st marriage; the 2nd divorce and the 3 rd taking back in nikah." while other scholars rely upon Tradition reported by Ayesha (Raz) who says, "I have heard the Prophet of God say, there is no divorce and no emancipation by compulsion"

Imarate Sharia also considers the offer and acceptance as necessary for marriage. Where the marriage has been solemnized by the consent of the parties was declared void one the ground that there was no offer. So offer must be express other wise the marriage will not be valid.

Here the view of Imarate Sharia does not seem good as the present day situation demand the acceptance of implied offer. If any one goes by bus on the way from Aligarh to Delhi, there cannot be any formal offer and acceptance. There is an open offer when the bus is driven. The riders act is equivalent to the acceptance. More over the marriage made by non-authorized persons (Aaqde Fuzuli) is depended upon the verification of the parties.

(2). DOWER:

Dower is given by the husband to the wife as a mark of respect. It is considered necessary before the every School of Muslim Law. The difference is only of amount, It is to discussed in the separate chapter of dower.

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44 Balughul Maram , p. 581
45 Tayabji , pp. 53.
46 Akhtari Bano V. Haji Mohammad Siddique 166/15849/1416AH
47 Akhtari Bano V. Haji Mohammad Siddique 166/15849/1416AH
(3). WITNESSES:

Abdullah Ibne Abbas (Raz) narrates

But there is no detail of witnesses of marriage in the Holy Quran.

About general witnesses the Holy Quran has revealed—

قُالَتْنَا لَهُمْ أَوْحَى إِلَى أُولِي الْكُرْبَاءِ مَا أَفْكَارُكُمْ وَلَمْ يَكُنْ كَائِنًا بِالْمَعْدِلِ وَلَوْ يَكُن كَائِنًا فَكَانَ كَأَنَّهُ كَأَجْمَعُ أَلْلَهُ فَلَكُنْ كَائِنًا وَلُمْ يَكُنْ مِنْهُ شَيْئًا فَإِنَّ الَّذِينَ عَلِيَّنَاهُمْ لِيُشْهَدُوا أَوْ ضَعْفًا وَلَا يَشْتَيَطُعُونَ أَنْ يُبِلِّهُنَّ فَلَكُنْ كَائِنًا وَلُمْ يَكُنْ مِنْهُ شَيْئًا وَأَشْهَدُوا فَإِذَا قِيلَ عَلَيْهِمْ إِنَّهُمْ أَفْخَضُوا

O ye who believe

47 Shama Perveen V. Anwar Hussain Supra Note
48 Tirmizi, Vol. II p. 411
49 S 2 A 282 (this is for evidence generally)
When ye ---
And get two witnesses ,
Out if your own men
And if there are not two men,
Then a man and two women,
Such as ye choose,
For witnesses."

i). HANAFI VIEW:

The Hanafi view regarding the evidence of marriage is described in Hedaya. It contains" evidence required is that of two men, or of one man and two women. Whether the case relate to property, or to other rights such as marriage, divorce ---"But Imam Mohammad is of the view that two male witnesses are necessary. However the view of Imam Abu Hanifa is followed by Hanafis".

ii). MALIKI VIEW:

Imam Malik (Rah) is of the view that the witnesses are not necessary for performance of marriage. Imam Tirmizi explains the view of Imam Malik (Rah) that Malik (Rah) does not require two witnesses at a time for the proof of marriage. Even one witness who has participated in the marriage ceremony is enough provided he has told the other witness about such performance. Tayabji observes that Maliki law does not place emphasis for witnesses for the validity of marriage contract. But for its declaration amongst the people to make it distinct from adultery which is done secretly.

iii). SHAFEYEE VIEW:

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50 Hamilton - Hedaya , p . 354
51 Darse Tirmizi Vol. III p. 384. Imam Abu Hanifa is of the view that where marriage is with scriptures the witnesses may be non-Muslim.
Imam Shafeyee(Rah) considers the witness as necessary for marriage. According to him two male witnesses are necessary and the evidence of one man and two women is not acceptable. *Hedaya* says that to Shafeyees, the evidence of two women and one man is not enough in the matter of marriage, though it may be in the matter of property. *Fatawa Alamgiri* contains the opinion of Shafeyee(Rah) that two male witnesses are necessary for establishment of marriage. The evidence of women is not acceptable.

iv). HAMBALI VIEW:

Ahmad bin Hambal (Rah) is of the view that marriage is established with two male witnesses. However one man and two women can also fulfill the requirement of the witnesses. Thus the views of Hambalis are similar to Abu Hanifa (Rah) in the matter of witnesses.

v). INDIAN JURIST'S VIEW:

The witnesses need not be Muslims. If the witnesses are for proof of marriage it will be made by the non-Muslims also but if it is considered a necessary procedure, the Muslim Law of procedure is not applied in India. Where there are no witnesses, presumption of marriage, with consent of the parties may be inferred provided the parties live like spouses. It is submitted that the view taken by the Court are correct. It is also in consonance with the spirit of Islam that marriage being one of the necessities of life it may not be invalidated due to non availability of the Muslim witnesses.

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52 Rahman.p.78
53 *Hedaya* – p. 354
54 Darse Tirmizi.p.384
55 Mohammedan Law , Verma 1953 , p . 44

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vi). IMARATE SHARIA’S VIEW:

Imarate Sharia is of the view that witnesses are necessary and they must be knowing the weaker sex. That is why the witnesses of the locality are preferable. The marriage is also to be made in the locality of the female counterpart. This will be helpful in the administration of justice. The non-Muslim cannot be the witness of marriage. However there is no impediment for Muslims of any character where two Muslims are not available one male and two female can be the witness in accordance with the commandment of the Holy Quran. If there is any marriage without witnesses the marriage will be solemnized again. This process is also inevitable where marriage is performed in the presence of non-Muslims. Where the persons are two but only one of them was present at the time of marriage and the other was informed by the parties and the witness, he will not be treated as witness. However this type of evidence is good before Maliki School.

Thus the view of Imarate Sharia seems good because witnesses of locality know the whereabouts of the parties. In non-Islamic countries like India the evidence of non-Muslims be accepted where there is extreme necessity. The opinion of the Courts that where parties lives like spouses from long time there may be presumption of marriage, seems good. So relaxation is needed although only in extreme cases where it is not possible to produce the witnesses.

*In Shama Parveen V. Anwar Husain* the plaintiff Shama Parveen who was 18 years old and was given in the marriage of the defendant without

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\[35/17806/1409AH\]
her consent. She produced three witnesses in which one was with Qazi at the
time of taking permission and other person was with bridegroom's procession.
When the witness No. 1 asked her to consent she started weeping when more
than one hour was passed, a lady, who was standing near by told that she has
consented and they moved from there. But soon after this there was abnormal
situation in the house. When they asked, they came to know that the bride did
not consent and she is crying. Witness No. 3 said that when the father of the
defendant asked plaintiff's father that why had he called the bridegroom he
told that there was chance of impediment from the defendant as his second
daughter was also going to be married at that day. When the marriage was
performed the bride's condition became abnormal and expressly rejected the
performance of marriage. The plaintiff on the other hand told her mother and
sister not to marry her with the defendant as he was older than her and not
having enough means of subsistence and belong to lower caste she also
showed her dissent to her father before the performance of marriage. The
defendant had never faced the proceeding in person. Only he had submitted
the written statement. Which was not enough for rebutting the saying of the
plaintiff. So the Qazi held that it was established that the plaintiff was major
and did not consent for marriage and the marriage was performed without her
consent. Even after solemnization of marriage she expressly denied to ratify
the same. Thus Shami says that when the marriage consents are taken by the
guardian of the bride (wali), the virgin's consent would be her silence. Even
the weeping without voice will be considered her consent. But where she is to
consent other persons than her guardians (aulia) her silence cannot be
considered as consent. The marriage of non-virgin (where 2nd marriage is
performed) the silence cannot be considered as consent. The marriage
performed in contradiction to above rule will be void (Shami, Vol. II, pp.

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210 – 214) Here the negation of consent was proved she neither performed the local traditions of marriage nor went to her marital home. So the Qazi held that the marriage of Shama Parveen with Hussain was performed without her consent and after the performance she did not ratify. In the eyes of Sharia the marriage was not performed and the plaintiff was not the wife of the defendant (Petition was accepted)

COMMENT:

1. In the light of the above judgment it can be said that where bride does not consent marriage will not be deemed to be performed.

2. The Qazi has relied upon the circumstantial evidence while saying "that is why the traditional rites were not performed and she was not sent to the marital home".

3. Instead of relying upon the foremost primary sources the Qazi has relied upon Shami, which is a commentary upon Hanafi Law it is submitted that the Qazi should have quoted Quran and Traditions.

4. The plaintiff's father's act must have been condemned who did all the things at the cost of the reputation of bride and bridegroom.

5. PROHIBITIONS:

Among certain persons there is prohibition for marriage. Almighty Allah says ---

{Arabic text}
“And marry not women
Whom your father married,
Except what is past
It was Shameful and adieus,
An abominable custom indeed.
Prohibited to you
For (marriage) are –
Your mothers, daughter,
Sister, father’s sister,
Mother’s sisters, brother’s daughters,
Sister’s daughters, foster-mothers
(who gave your suck) foster sister,
Your wives mothers
Your step—daughters under your
Guardianship, born of your wives
To whom ye have gone in,—
No prohibition if ye have not gone in,
(those who have been)
Wives of yours son's proceeding
From your Laws,
And two sisters in wedlock
At one and the same time,
Except for what is past;
For Allah is oft forgiving
Most Merciful;—
Also (prohibited are)
Women already married,
Except those
Whom your right hands possess.
Thus Allah ordained
(Prohibitions) against you
Except for those, all others
Are lawful, provided
Ye seek (them in marriage)
With gifts from your property,—
Desiring chastity, nor fornication.
Give them their dowry
For the enjoyment you have."

Apart from these certain other persons are prohibited due to
musahirat as Hanafi Scholars say. If a man commits fornication or adultery
with a woman, her ascendants and descendents are prohibited to him.\(^{58}\)
Shafeyees maintain that they are not prohibited.\(^{59}\) If a woman is touched in
lust, Hanafis say the ascendants and descendents of that woman are prohibited
to him. Here again Shafeyees do not agree with Hanafis.\(^{60}\)

\(^{57}\) Holy Quran S 4 A 22 – 24.
\(^{58}\) Hedaya p. 29
\(^{59}\) Ibid
\(^{60}\) Ibid

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According to Iman Abu Hanifa and some other scholars like Sufyan Sauri, Iman Awzai and Iman Ahmad bin Hambal if a man commits adultery with a woman her mother and her daughter shall, for marriage purposes be forbidden to him and the sanctity of affinity shall be established against the adulterer and the adulteress. According to Imam Shafeyee, however the sanctity of affinity is established only on account of a valid marriage contract and not on account of adultery. Therefore, marriage by the said man is not prohibited. But the Ulema of Hanafi School say that the real ground of prohibition is the sexual intercourse. If any step has been forwarded in this direction that will occasion prohibition. But Shafeyees say that if Allah(SAW) intended to do so he could have explained it. Even there is no explanation of this kind in Traditions (Hadith). So the view of Abu Hanifa and other Ulema is not preferable over Shafeyee’s view who rely upon the Holy Quran. However Imarate Sharia follow the Hanafi view in this regard. Hanafis do not consider the marriage illegal if it is made during “Ehram, the Great prohibition in Haj pilgrimage. But Shafeyees do not allow it.

6. STIPULATIONS:

There may be three kinds of stipulations.\(^6\)

1. Which are necessary after marriage.

2. Which is in against the objective of marriage.

3. Other than the above mentioned heads.

i). HANAFI VIEW:

After marriage the parties get some rights and they are also subjected to certain duties. These are necessary and need not be explained. If

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\(^6\) Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp. 30-39*. The Muslim Personal Law Board (MPLB) has decided to discuss this issue in its meeting to be held on 29
there is any stipulations against it, that will not be effective. Where A, a male marries B, a female with the condition that A will neither provide her maintenance nor the residence. As a husband is under duty to provide her the maintenance as well as residence these condition are contrary to the purpose of marriage so these conditions are also void. A, a male enters into marriage contract with B on the condition that B will have the Right not to allow A to go to see C, another wife of A. This is against the purpose of marriage and void. Like this where A agrees with the B not to compel B to begate the children this is also against the purpose of marriage and hence void. Again where A is agreed to divorce C the 1st wife, while enters into 1Ind marriage contract, this condition is also void under Hanafi Law. However there is difference of opinion whether the carrying the wife from her home to marital home is to be kept in 1Ind class or in class IIInd. If it is kept in 1Ind class this condition will be void. But where it is kept in IIInd class of stipulations it will be valid. In Kaukadurri it is kept in 1Ind class. While Allama Aini considers it in class three. Where there is stipulation to dissolve of the marriage after a specific time it is also against the purpose and void. But where there is intention to dissolve the marriage after certain period but not expressed the marriage will be valid.

Hanafis are of the view that even the stipulations which are to be kept in class IIIrd are not enforceable by the courts even then the enforcement of those conditions is morally necessary.

iii). SHAFFEE VIEW:

Shafyeecs are having different view regarding 1Ind class conditions. Where the marriage is on the condition that after consummation there will be
divorce the marriage will be void. Where one marries for *halala* in that condition also the marriage will be void. Where the condition that after consummation there will be divorce, the stipulation is void and the marriage will be valid. While there intention of divorce after consummation the marriage is valid but abominable.

In the matter of class IIIrd conditions Taqi Usmani in this book *Darse Tirmizi* reports that Shafeyees consider the stipulation of class three as valid and that can be enforced through the courts. But Allama Navavi and Allama Ibne Qudama say that Shefeyees follow the Hanafis view in the matter of stipulation of class three.

iv). HAMBALI VIEW:

Hambalis consider the condition of dissolution of marriage as void. Where there is intention of dissolution that marriage will be void. If the divorced wife wants to marry her former husband who had pronounced the IIIrd divorce cannot marry if she has gone through another marriage on the condition of dissolution.

Where there is condition of class IIIrd that is valid and wife has right to enforce that condition through the court.

v). IMARATE SHARIA'S VIEW:

Imarate Sharia's view is similar to the view of Hanafis.

vi). SUBMISSION:

Here the stipulations of Imam Ahmad bin Hambal seem good. The Hanafis are lenient about dissolution of marriage. It may be due to their strictness in divorce related matters. So the condition of dissolution of marriage is compensated in divorce related matters. However it is submitted

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*Where there is triple divorce the spouses are not authorised to marry unless the fair sex is married with another person and the marriage is consummated. This is called halala.*

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that there is clear-cut Hadith against *halala*. Although the stipulation to
dissolve the marriage is void the dissolution if made for *halala* that (*halala*)
will be valid i.e. the cohabitation will validate the re marriage with the man
who had pronounced triple divorce to his wife.