



The Marriage Contract

Marriage in Islam is a contract. Thus, as in any contract in Islam, there are elements which are considered essential to its existence, called Arkaan. Each of these Arkaan should be understood properly in order to ensure that the marriage has been performed in the proper manner and the rightful effects of the marriage are granted to each of the participating partners.

The Arkaan of a Marriage Contract

- Offer and acceptance.
- The two parties to the contract: the prospective husband and the guardian of the woman.

Some also count the following among the arkaan:

- The presence of witnesses.
- Dowry.

The Wording of the Contract

There are a variety of opinions as to exactly which phrases are valid in the transaction of the marriage contract. Of all these opinions, it seems clear that the best of them is that any wording that makes the intent of the contract clear to all involved should be considered a valid marriage, while the best format would be that actually used by the Prophet (sallallahu alaihi wasallam) and his companions. Also, it is considered best if the contract is executed in spoken form. However, due to need or necessity, it may be done through writing or signing.

Among the different possible phraseology, the very clear terms such as "I marry you" is accepted by all. Anything which indicates a temporary nature of the contract is forbidden. In others there is some difference of opinion such as "I present to you", "I give to you", "I sell to you", etc.

Does it Have to be in Arabic?

According to the majority of the scholars, it is not necessary for the marriage contract to be transacted in Arabic, even for those who have the ability to speak Arabic.

Conditions for Initiating the Contract

- The two people must meet the qualification of legal competence, i.e, they must be adult and sane. If they are not, the marriage will be invalid.
- Secondly, the woman cannot be from those categories of women that are forbidden for a man to marry. For example, suppose a man married a woman and later discovered that they had been breastfed by the same woman. In this case, it is as if the marriage never took place because those two were not qualified or allowed to marry each other and the marriage becomes null and void.
- The offer and acceptance must be done in one sitting. In general, this means that the response must be immediate. Exactly what is considered a "sitting" depends on custom and related factors.
- The acceptance must correspond to what is being offered. If the guardian says: "I marry you to Khadijah", a response of "I accept Fatimah as my wife" would not constitute a valid contract.
- The wali cannot rescind the offer. Unlike transactions of selling, neither party can say "I have changed my mind" once they have uttered the offer/acceptance. It is immediately binding. In a sale, they both continue to have the option to change their mind until the "sitting" is over and they part.
- The marriage must be effective immediately. If the wali says "I will marry her to you after one month", there is no marriage and the two remain unmarried.

Note that the custom of saying "I accept" three times common in some Muslim cultures has no legal significance. Once the first "I accept" has been uttered, everything after that is meaningless - whether positive or negative.

Adding Stipulations to the Marriage Contract

This is where one party states a stipulation binding on the other party for specific reasons or goals. The offer/acceptance are tied to this stipulation by mention. There is a difference of opinion among the scholars concerning the validity of conditions of this nature.

Conditions of contracts are two types:

- Those imposed directly by the shari'a
- Those drawn up by one or more of the parties.

When any contract is entered into, the first type of conditions are covered automatically even if they are not stated in the contract.

Stipulations Based on what is Customary

It is a general principle in fiqh that customs can take the status of law. It becomes understood that people are going to behave in a certain fashion. Since

that is understood, one party has the right to ask it of the other even if it is not stated in the contract. In the area of marriage, there are some stipulations that are known by custom. These do not have to be mentioned in the contract to be considered binding. However, there are some strict conditions that must be met before a customary act is considered something equivalent to a legal stipulation. These conditions are as follows:

- The customary practice cannot contravene or contradict anything expressly laid down by the shari'a. For example, it is custom in some parts of the world for the woman to pay dowry to the man. In other parts, it is customary to prepare two or three times amount of food that the guests could possibly eat at the walima (wedding feast). Neither party has the right to demand of the other the fulfilment of such customs.
- The customary act must be common, well-known and universal and not something practiced only by some portions of the population.
- The custom must have been in existence and known before the marriage contract took place.

Other Stipulations Laid Down by the Two Parties

Any stipulation which contradicts, compromises or nullifies the main goals and purposes of the marriage contract itself are rejected and, even if stated, are of no legal consequence. For example conditions which state that the woman receives no dowry or that he does not have to support her or that they will not consummate the marriage are all null and void and of no effect whatsoever.

Sound and Acceptable Stipulations

There are two types of sound and acceptable stipulations:

- Those embodied in the contract even if they are not stated. This includes conditions known from the shari'a as well as those known from custom as discussed previously. The Prophet (sallallahu alaihi wasallam) said:

"The conditions which you have the most duty to fulfill are those by which you have made marital relations lawful." (Bukhari & Muslim)

Many scholars understand this hadith to be referring to these kinds of conditions only, that is, those that are covered by the shari'a in the first place.

- Those conditions not covered by the essential nature of the contract but which are agreed upon by the contracting parties. These are those stipulations that do not contradict the general goals of the contract, do not bring harm to anyone and which apply to things which are permissible and within the right of the person to agree - that is something that does not go against the shari'a. They are laid out in the beginning to avoid any conflict or hardship in the future.

Fulfilling Contracts

Generally speaking, Muslims must comply with any agreements that they make. Allah says about the believers:

...And those who fulfill their pacts when they make one... (Al-Baqara: 177)

O you who believe fulfill your contracts... (Al-Ma'idah: 1)

The Prophet (sallallahu alaihi wasallam) said:

"Muslims are bound by their stipulations." (Abu Daud & Al-Hakim)

During the time of Umar ibn Al-Khattab, a man married a woman upon the condition that he would not move her from his house. The time came when he wanted to move her. They took their dispute to Umar and he said: "She has the right to her stipulation." The man said, "In that case, they will certainly end the marriage." He said, "The rights are broken off due to the stipulations." This was the view of many of the Companions and scholars.

There is another opinion which says that external stipulations - those not covered by the nature of the contract itself - carry no weight and need not be met. The proof for this opinion is the hadith:

"Every stipulation which is not in the book of Allah is void even if it be one hundred stipulations." (Muslim & Bukhari)

The scholars who permit such stipulations in the marriage contract have responded to the above:

As for the hadith **"Every stipulations which is not in the book of Allah..."**, they say that for a woman's wali to make some conditions to her advantage is something permissible and does not go against the Book of Allah. Actually, such conditions do not violate the Book of Allah and do not make anything forbidden permissible, etc. They simply give the woman the right to annul the marriage if the condition is not satisfied.

This discussion boils down to the understanding of two seemingly contradictory hadith:

"Every stipulation which is not in the book of Allah is void even if it be one hundred stipulations." (Muslim & Bukhari)

"The conditions which you have the most duty to fulfill are those by which you have made marital relations lawful." (Muslim & Bukhari)

It seems clear from the second hadith along with the fatwa of Umar mentioned earlier that there is some room for adding stipulations to a marriage contract. It also seems clear from the first hadith that there are limits on what can be stipulated. Specifically, any stipulations which go against the basic goals and principles of the marriage contract are not allowed and, if stated, are null and void. Thus, the only remaining problem is understanding exactly how this principle applies in practical situations.

For those scholars who don't accept such external stipulations at all, they have no effect, are not binding, and don't affect the validity of the underlying contract. For those who accept them, they give the woman the option to annul the marriage upon her request if the condition is violated. We only mention the woman because the man can divorce at any time with or without a particular

cause and so has no need of such an option. Notice that even in the fatwa of Umar, he didn't require the man to fulfill the condition, rather he allowed that she could end the marriage if she so demanded.

Invalid Conditions

Even those who accept these stipulations all agree that certain conditions are not allowed. Among them are the following:

- **Nikaah Ash-Shighaar.** This is where the two dowries are stolen and "exchanged". For example a man marries his son to another's daughter in "exchange" for the other marrying his daughter to the first one's son. Neither woman receives their dowry.
- **Nikaah Al-Mut'a.** Any kind of marriage with a stipulated time limit.
- **Nikaah At-Tahleel.** A woman who has been divorced three times and wishes to return to her first husband marries a man on the condition that he divorce her. If this is discovered or if this is her intention, the first husband still does not become lawful for her in spite of this marriage.

Conditions for the Soundness of a Marriage Contract

There are ten conditions in this category. Some are agreed upon by virtually all the scholars while others are the subject of some disagreement.

1. **The woman is permissible to the man.**
That she is not one of those forbidden to him by relation, nursing or other existing and conflicting marriage. Some would consider this one of the arkaan (pillars) or one of the conditions for initiating the contract. In any case, this condition must definitely be met.
2. **The offer and acceptance is of a permanent nature and not temporary.**
All forms of temporary marriage are forbidden in Islam. If anything stated in the offer and acceptance indicates a temporary nature, the marriage is not valid.
3. **Two non-discredited witnesses.**
There is some difference of opinion on this issue, but in the final analysis, the hadith is clear.
Ibn Taymiyyah mentioned four existing opinions on this issue:
(1) The marriage must be announced and made public, regardless of whether the contract was actually witnessed or not. This was the opinion of Malik as well as the scholars of hadith, the Dhaahiris and one opinion reported from Ahmad ibn Hanbal.
(2) It is obligatory to have witnesses, regardless of whether the marriage contract is made public or not. This was the view of Abu Hanifah, Ash-Shafi'iy and another opinion reported from Ahmad ibn Hanbal.
(3) Both witnesses and a public announcement are necessary. This is a third narration from Ahmad ibn Hanbal.
(4) Either one of the two is necessary. This is a fourth narration from Ahmad ibn Hanbal.

Ibn Taymiyyah himself felt that the second opinion (only witnesses

required) is weak. He claimed that there was no authentic source for it and that it was not widely known among the Muslims. Instead, what is required is the public pronouncement, letting the people know that the parties got married. He says that if a marriage takes place without witnesses or public announcement it is definitely invalid, if it takes place with witnesses but no announcement it is questionable and if it takes place with both it is definitely valid.

The portion of Ibn Taymiyyah's opinion which finds the witnesses NOT a requirement must be rejected, because the hadith on this subject has been found to be sahih:

"No marriage except with a guardian and two non-discredited witnesses."

So the bottom line here is that BOTH the witnesses AND the public announcement are required. In fact, regarding public announcement, the Maliki school says that if the other parties ask the witnesses to keep it silent that the marriage is not valid and the two are to be separated - PERMANENTLY! The Hanbali school holds that such a marriage is not invalid although it is disliked to do so. The witnesses must be two adult and sane Muslim men whose testimony has not been previously discredited.

4. **Both parties to the contract and the bride have willingly accepted the marriage.**

The Hanafis say that this is not a condition, but their position is unacceptable and rejected because of ample evidence from the Qur'an and the Sunnah to the contrary. In the jahiliya, Arabs used to "inherit" (i.e., forcibly marry) their brothers wives if they died. Allah forbade this saying:

O, you who believe, it is not lawful for you to inherit women against their will... (An-Nisaa: 19)

There are also two sound and very clear hadith on this matter:

"A previously married woman cannot be married until her order is sought and a virgin cannot be married until her permission is sought. They said: How does she give permission? He (sallallahu alaihi wasallam) said: If she keeps quiet." (Bukhari & Muslim)

"From Ibn Abbas that a virgin girl came to the Prophet (sallallahu alaihi wasallam) and mentioned that her father had married her against her will and so the Prophet (sallallahu alaihi wasallam) gave her the choice." (Abu Daud & others)

Many early scholars allowed this in only one case: a father or grandfather marrying a girl below the age of puberty without her consent. According to them, she has no right to refuse the marriage upon becoming mature. This position is clearly unacceptable and rejected based on the above verse and ahadith.

5. **The bride and groom are specifically identified and known.**

6. **Neither of the two contracting parties are in a state of ihraam.**

7. **The marriage must be with a dowry (mahr).**
It does not have to be exactly specified nor does it have to change hands, but it has to be there.
8. **The parties and witnesses are not bound to keep it quiet.**
It is not allowed to make attempts to keep a marriage a secret. The universal custom of the Arabs before Islam was to have marriages very publicly where all around became aware of its existence. Islam confirmed this practice and it is the only acceptable way of marrying.
9. **No party is on his/her deathbed.**
The "parties" intended here are the bride and the groom. This is because of possible injury to the heirs because of another person becoming entitled to inheritance.
10. **The presence of the guardian or representative (wali) of the woman.**
The wali is a Muslim man charged with marrying the one under his charge to a man who will be good for her. There is no disagreement that the first wali is her natural father if he is Muslim and that the last in line is the ruler. Between those two, there is some disagreement about the order but agreement that they come from the girl's fathers relatives - no one from her mother's side enters into the picture. The order, according to many is: father, paternal grandfather, son, grandson, full brother, paternal half-brother, paternal uncle. The wali is an absolute requirement for a marriage, and any marriage done without him is null and void according to the following hadith:

"No marriage except with a guardian and the ruler is the guardian of she who has no guardian." (Abu Daud & others)

"If any woman marries without the permission of her guardian, then her marriage is void, then her marriage is void, then her marriage is void." (Abu Daud & others)

It is the job of the wali to marry her to the best possible husband. He must not be guided by his desires nor by her desires. If the person is acceptable in both his religion and his character and appropriate to her in some other way discussed by the scholars, then he must facilitate the marriage and not refuse it for his own desires or biases. If the conditions are not right, then he must refuse the marriage, even if both the woman under his charge and the man desire it. This is a grave trust and he must do his best to fulfill it properly and not bring harm to the woman and/or to society. Allah said:

O, you who believe, do not commit treachery against Allah and against the Prophet nor betray your trusts though you know. (Al-Anfaal:27)

What about the case where the wali refuses someone on a non-Islamic basis? As was stated earlier, it is the job of the wali to act in the best interest of the woman according to the standards established by Islam. If a qualified person asks to marry the woman and he turns him down, then he is not doing his job. In such a case, the woman can complain to the judge or ruler and have her wali "fired" (removed). The scholars then differ as to who becomes her new wali, the next male relative in line or the ruler.

The wali must be the same religion as the woman. A non-Muslim father cannot be the wali for his Muslim daughter.

A Rejected Opinion of the Hanafi School

In the Hanafi school of thought there is an opinion that the wali is not a requirement for the validity of the marriage. They even claim to have an argument from Aisha, the one who narrated the hadith:

"No marriage except with a guardian and the ruler is the guardian of she who has no guardian." Abu Daud & others (sahih)

They say that: "Aisha married the daughter of her brother, Hafsa bint Abdul Rahman while Abdul Rahman was gone to Sham. When Abdul Rahman returned he was upset but he did not wish to undo what Aisha had done so he left his daughter with her groom, Al-Mundhir ibn Az-Zuhair."

Other scholars responded to their argument: It seems from other narrations of the same incident that Aisha simply set up the arrangement but did not actually perform the marriage. Also, it was Aisha herself who said that "Women cannot perform marriages." In this way, she did not contradict what she herself narrated from the Prophet (sallallahu alaihi wasallam).

Being Serious is NOT a Condition for the Soundness of a Marriage Contract

Note that marriage is not a laughing matter and is very serious. Therefore, the mere words make the marriage happen and intention is not required. Also, as we have seen, there is no khiyaar al-majlis (a choice to back out until the sitting is concluded and the parties part ways) in marriage as there is in sales and other contracts. The Prophet (sallallahu alaihi wasallam) said:

"Three things which when serious are serious and when vain are serious: marriage, divorce and returning (to one's wife after a divorce)." (Ahmad & others (sahih))

Conditions for the Execution of a Marriage Contract

- The bride and groom must be legally capable for such a marriage, i.e., sane, conscious, past the age of puberty, etc. The contract can take place earlier than this, but the execution must wait until the time that they can actually enter into the marriage relationship.
- The wali who performed the marriage was not a more distant wali while a closer one was alive and reachable. For example, if the woman's uncle married her to someone, the marriage would not be valid unless and until the woman's father's consent was verified. In such a case, the contract could be executed.

Civil Marriages in Countries Which Do Not Apply the Shari'a

In the light of what has been discussed, a very important question arises for Muslims living in lands where the Shari'a is not the law of the land. For Muslims who marry in such situations under the "auspices" of such governments, it will

often involve serious flaws in both the execution and the legal effects of the non-Islamic marriage contract. For example:

- No proper wali. Many such secular laws may not require the woman to have a wali at all or the one appointed may not be the rightful one in the Shari'a.
- The secular law may not require two witnesses,
- Witnesses may be required but not qualified such as non-Muslim witnesses.
- The marriage establishes various property rights, inheritance rights etc. both during and after the marriage for which Allah sent no authority.
- The civil marriage may cause additional marriages by the husband to be a crime punishable by a prison sentence.

Because of these and other issues, a secular marriage contract is not sufficient for two Muslims to be considered married Islamically. In fact, they should be avoided if possible. In any case, it is the Islamic marriage with its prerequisites and conditions which makes the two married before Allah. Whether or not a civil marriage should also be undertaken is a case of weighing the harms and benefits involved.

Regarding these "marriages", the following important points should be noted:

- If such a marriage was entered into by non-Muslims who later became Muslim, they are considered married and there is not need whatsoever to have another marriage contract.
- If they were Muslim but married in a secular manner out of extreme ignorance, it would be best for them to redo the marriage. However, the first marriage could be considered valid and any children resulting from it would be both of their children Islamically.
- If two Muslims marry in such a manner knowingly, for example to circumvent the objections of her wali, then the marriage is null and void and they are committing fornication.