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◆ CHAPTER 10: ◆

**MARRIAGE  
& DIVORCE**

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## Chapter 10

### Marriage and Divorce

In Islamic terminology, the Arabic word *nikah* means a contract that permits an intimate, sexual relationship between man and wife in the legitimate way.<sup>433</sup>

Marriage is endorsed in the Qur'an, the Sunnah and the unanimity of scholars. Numerous Qur'anic verses confirm that it is lawful, such as: 'then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one.' (4: 3). 'Marry the single from among you as well as such of your male and female slaves as are virtuous' (24: 32). Many authentic *hadiths* encourage marriage: Ibn Mas'ud reports that the Prophet (peace be upon him) said: 'Young men, whoever of you can afford marriage should get married. It helps you lower your gaze and maintain your chastity. Those of you who cannot afford it may resort to voluntary fasting, for fasting serves as protection [from sin].'<sup>434</sup> Ma'qil ibn Yassar reports that the Prophet (peace be upon him) said: 'Marry a woman who is loving and can give you children. I shall be taking pride in your numbers on the Day of Judgement.'<sup>435</sup> All Muslims agree that marriage is lawful.

<sup>433</sup> Al-Shawkani, *Fath al-Qadir*, vol. 2, p. 339; al-Dardir, *Al-Sharh al-Saghir*, vol. 2, p. 332; al-Khatib al-Shirbini, *Mughni al-Muhtaj*, vol. 3, p. 123; Ibn Qudamah, *Al-Mughni*, vol. 6, p. 445.

<sup>434</sup> Related by al-Bukhari, *hadith* No. 5,066; Muslim, *hadith* No. 1,400.

<sup>435</sup> Related by Abu Dawud, *hadith* No. 2,050; al-Nassa'i, *hadith* No. 3,227; Ibn Hibban, *hadith* No. 4,056; al-Hakim, vol. 2, p. 176.



## Reasons marriage is lawful

Allah has made marriage lawful for a number of good purposes, including:

1. Maintaining one's chastity.
2. The establishment of a congenial relationship between man and wife that gives them both comfort and a settled home.
3. Maintaining proper lineage between parents and offspring, and close relationships with relatives and in-laws.
4. The continuity of the human race, and the steady increase of the Muslim population so that they may advocate the divine faith.
5. Safeguarding morality, so that people do not sink into adulterous relationships.

## The marriage proposal

A proposal is a statement by a man making clear that he wishes to marry a certain woman and informing her guardian of his wishes.<sup>436</sup>

Certain rules apply in the case of engagement, including:

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<sup>436</sup> Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 9, p. 6,492.



1. When a proposal is accepted, even implicitly, no other man may make a proposal of marriage to the same woman if he is aware of the first proposal. The Prophet (peace be upon him) says: ‘Let no man make a proposal when his brother has made one until the first one has either married the woman or abandoned his proposal.’<sup>437</sup> To make another proposal is to undermine the first arrangement and to create ill-feelings.
2. It is forbidden to make a direct expression of one’s desire to a widowed woman while she is in her waiting period. Allah says: ‘You will incur no sin if you give a hint of a marriage offer to [widowed] women’ (2: 235). What the verse tells us is that a hint is permissible. A man may say to her, for example, ‘I hope that Allah will facilitate for me a marriage to a good woman’, or ‘I am hoping to get married’. Giving such a hint incurs no sin, which means that making a direct expression of intention is unlawful. If the woman is divorced and observing her waiting period and her divorce is revocable even a hint is not permissible, because the same rules apply to her as apply to married women.
3. Anyone who is asked about the character of a man making a proposal of marriage, or a woman to whom a proposal is made or considered, should state honestly their good and negative points. This is not considered backbiting; rather, it counts as honest advice which is mandatory to give.
4. A proposal is no more than an expression of desire and a promise of marriage; it cannot count as a marriage.

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<sup>437</sup> Related by al-Bukhari, *hadith* No. 5,144.

Therefore, each party is still considered a stranger to the other and the relevant rules apply to them.

## Conditions for marriage

The following conditions must be met in any marriage:

1. Each of the two spouses must be identified in person. Marriage to an unidentified person cannot be valid, as in the case of the parent saying to the groom: ‘I give you my daughter in marriage’, if he has more than one daughter, or he may say to the groom’s father: ‘I give her to your son in marriage’, if the other has more than one son. Each spouse must be identified either by name or status, such as saying, ‘I give you my eldest daughter’.
2. Marriage by compulsion is not valid, and each of the two spouses must agree to the marriage. Abu Hurayrah reports that the Prophet (peace be upon him) said: ‘A previously married woman cannot be given in marriage unless she has been consulted, and a virgin cannot be given in marriage unless she has given permission.’<sup>438</sup>
3. The presence of the woman’s guardian. No one can give a woman in marriage except her guardian, because the Prophet (peace be upon him) says: ‘No marriage is valid without the presence of the guardian.’<sup>439</sup> The guardian must be an adult, sane, free man and of the same religion as the girl, but probity is not a condition in this case

<sup>438</sup> Related by al-Bukhari, *hadith* No. 5,136; Muslim, *hadith* No. 1,419.

<sup>439</sup> Related by Ahmad, *hadith* No. 19,518; al-Tirmidhi, *hadith* No. 1,101; Abu Dawud, *hadith* No. 2,085; Ibn Majah, *hadith* No. 1,881; al-Hakim, vol. 2, p. 184; Ibn Hibban, *hadith* Nos. 4,077 and 4,090.



because the lack of probity does not deprive a father or guardian of the competence to give the woman in marriage, unless such lack is excessive.

4. The presence of witnesses. No marriage is valid without the presence of two adult Muslim men of integrity. The Prophet (peace be upon him) says: ‘No marriage is valid without the presence of the guardian and two sound witnesses. Anything else is invalid.’ Al-Tirmidhi said: ‘The standard practice of the scholars among the Prophet’s (peace be upon him) Companions and their successors is that no marriage is valid without the presence of witnesses...’ Needless to say, the condition requiring witnesses is to guard against any dispute, particularly with regard to the acknowledgement of children.
5. The absence of any reasons that preclude the marriage, such as the prospective spouses having been breast-fed by one woman, or the presence of another marital relation, or following a different religion, or other reasons such as either of them being at the time in the state of *Ihram* in pilgrimage or [*umrah*].

## Essentials for marriage

Marriage cannot take place without the following essentials:<sup>440</sup>

1. The two parties, i.e. the prospective husband and wife, who should be free of any reason that precludes the marriage, which will be outlined shortly.

<sup>440</sup> Al-Bahuti, *Kashshaf al-Qina* [, vol. 5, p. 36.



2. Commitment: This is where the woman's guardian, or whoever is acting for her, makes clear that he is giving her in marriage.
3. Acceptance: This is what the husband or his attorney says: 'I accept this marriage', or 'I agree to this marriage.'

The commitment must precede the acceptance.

## The dowry

**Definition:** The Arabic term *sadaq*, i.e. dowry, is derived from a root that means 'truth', but in an Islamic context it refers to the money the groom must pay to his bride in connection with the marriage contract.<sup>441</sup> It is required according to the Qur'an, the Sunnah and the unanimity of scholars.

**Ruling:** The husband must pay the dowry to his wife once the contract has been made, and it cannot be written off. This is clear from the Qur'an, as Allah says: 'And give the women [upon marriage] their [bridal] gifts graciously.' (4: 4) and 'To those with whom you seek to enjoy marriage, you shall give the dowers due to them' (4: 24). Sahl ibn Sa [d reports: 'A woman came to the Prophet (peace be upon him) and said that she had made herself a gift to Allah and His messenger. The Prophet (peace be upon him) said: "I have no need for wives." A man said to him: "Marry her to me." The Prophet (peace be upon

<sup>441</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 301.

him) told him: “Give her some clothes in dowry.”<sup>442</sup> All Muslims agree that a dowry is both legitimate and required for marriage.<sup>443</sup>

## **Marital rights**

A valid marriage contract creates many rights for both husband and wife. These are:

### **One: the wife’s rights**

A wife has certain financial rights, such as the dowry and being looked after, and other rights, such as fairness, fine companionship, kindly treatment, etc. We may outline these as follows:

1. The dowry. This is mandatory, not something optional.
2. Being looked after: Which includes her food, clothes, medical care and home. All these must be provided by every husband to his wife.
3. Sexual intercourse: This is part of what is due to her in marriage, so that she may not fall to temptation.
4. Proper companionship and kind treatment: Allah orders: ‘And live with them in kindness’ (4: 19).
5. Fairness: If one has more than one wife, the husband should be fair in the treatment between one’s wives in the

<sup>442</sup> Related by al-Bukhari, *hadith* No. 5,029; Muslim, *hadith* No. 1,425.

<sup>443</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 301.

standard of living provided to them and in dividing his time equitably between them.

## **Two: the husband's rights**

1. Wives should always keep their husband's secrets, revealing them to no one. Allah says: 'So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard.' (4: 34).
2. Obeying the husband in a fair manner, so that family life continues properly. The husband may not ask his wife anything that is not permissible in Islam. If he asks her to do what Islam prohibits, then the principle that applies here is: 'No creature may be obeyed in what constitutes disobedience of the Creator.'
3. Giving him his sexual pleasure if he desires her, unless there is a valid reason. The Prophet (peace be upon him) said: 'If a man calls his wife to his bed and she refuses, and he sleeps feeling angry with her, the angels will curse her until morning.'<sup>444</sup>
4. Taking care of the family home, his property and their children.
5. Kindly treatment and good manners.

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<sup>444</sup> Related by al-Bukhari, *hadith* No. 3,237; Muslim, *hadith* No. 1,436.



## Dissolution of the marriage at the wife's request

### Definition and status

The Arabic term *khul* [ refers in Islamic law to the dissolution of the marriage in specific words and in return for compensation paid by the wife to her husband.

This is lawful in Islamic law, as Allah says: ‘If you have cause to fear that they would not be able to keep within the bounds set by Allah, it shall be no offence for either of them if she gives up whatever she may in order to free herself’ (2: 229). Ibn [Abbas reports: ‘Thabit ibn Qays’s wife said to the Prophet (peace be upon him): “O Messenger of Allah, I do not blame Thaabit ibn Qays for any defect in his character or his religious commitment, but I would hate to commit an act of disbelief now that I am a Muslim.” The Prophet (peace be upon him) asked her: “Will you give him back his garden?” She said: “Yes.” The Prophet (peace be upon him) said (to Thabit): “Take your garden back and divorce her once.”’<sup>445</sup>

The *khul* [ is a dissolution of the marriage in return for compensation paid by the wife, repaying him the dowry he gave her, as in the quoted *hadith* when Thabit’s wife gave back the garden that she had received in dowry. It is permissible to agree a compensation that is less or more than the original dowry, according to the majority of scholars, but some scholars

<sup>445</sup> Related by al-Bukhari, *hadith* No. 5,273. The garden at issue was the dowry Thabit gave his wife. Hence, he was entitled to get it back as she was the one to desire the termination of their marriage.

maintain that it may not be in excess of the original dowry. The *khul'* is considered like a final divorce, in the sense that the husband may not revoke it and reinstate the marriage during the waiting period. He may, however, re-marry her during her waiting period, but this will be a new marriage with a new marriage contract, and with her full agreement. The waiting period in the case of *khul'* lasts until the woman has completed one menstruation period.

## Divorce

### Definition and status

Divorce, or *talaq* in Arabic, means the dissolution of the marital bond.

Allah has put in place a complete system of rulings and practices, requiring both man and wife to heed them and to maintain an amicable relationship so that their marriage lasts for life. However, one or both of them may not heed these, which may lead to a strained relationship. If this is aggravated, reconciliation may become hard to achieve. Hence, it is necessary to put in place rules and regulations for the termination of the marriage in a way that safeguards the rights of both man and wife.<sup>446</sup>

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<sup>446</sup> Ibn Qudamah, *Al-Mughni*, vol. 7, p. 66.

## Formulae for divorce

Divorce may be effected when the husband says certain words. These are of two types:<sup>447</sup>

1. Clear and unambiguous phrases: These are the words that mean divorce and cannot be interpreted in any other way. They include the word divorce in various expressions that use the past tense or use certain adjectives, such as: ‘I have divorced you,’ or ‘You are divorced’, or ‘You are now a divorcee’. All these formulae indicate that the divorce has taken place. This does not apply to the use of the present, future or imperative forms, such as ‘You will be divorced’, or ‘Get divorced’.
2. Ambiguous phrases: Which may mean divorce but may have different meanings, such as the husband saying to his wife: ‘You are free’, or ‘Go to your family’, or ‘I have nothing to do with you’.

The difference between the two types is that when clear phrases are used, the divorce takes place even though the husband has not given his wife notice of his intention. It takes effect whether these phrases are said seriously or in jest. The Prophet (peace be upon him) says: ‘Three statements are taken seriously, whether they are said in seriousness or in jest: marriage, divorce and the reinstatement of marriage (after divorce).’ In the case of using ambiguous formulae, divorce takes effect only if the husband intends it as he says these words. The reason is that such formulae have more than one meaning. Therefore, it is his

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<sup>447</sup> Ibid., p. 98.



intention that determines whether he meant divorce or something else.<sup>448</sup>

## Types of divorce

1. The *Sunnah* divorce, which follows the proper course permitted under Islamic law and in accordance with its provisions. This applies to the number of divorces and the time when it is done. According to the Sunnah, when divorce becomes inevitable the husband divorces his wife, saying the word of divorce once only when she is not in her menstrual period and provided that no sexual intercourse has taken place after her last period. He leaves the matter at that and does not add a second divorce throughout her waiting period. Allah says: ‘Prophet (peace be upon him)! When you<sup>449</sup> divorce women, divorce them with a view to their prescribed waiting period, and reckon the period accurately’ (65: 1). The expression, ‘with a view to their prescribed waiting period’, means the time when they can start their waiting period which is after the menstrual cycle has finished. The menstrual period is not reckoned as part of this period. In explaining this Qur’anic statement, Ibn [Umar, Ibn [Abbas and other scholars said: ‘It indicates a time of cleanliness from menstruation without having had an intercourse.’<sup>450</sup>
2. The *Bid[ah* divorce follows an improper way that Allah has forbidden. This also applies to the number of divorces

<sup>448</sup> Related by Abu Dawud, *hadith* No. 2,194; al-Tirmidhi, *hadith* No. 1,184; Ibn Majah, *hadith* No. 2,039.

<sup>449</sup> The plural form is used here indicating that the address is to the Muslim community as a whole.

<sup>450</sup> Ibn Kathir, *Tafsir al-Qur’an al-‘Azim*, vol. 8, p.143.

and the time when it is done. The *Bid[ah* divorce occurs when a husband divorces his wife three times, pronouncing them all at the same time, or separately in the same period when she is free of menstruation, or when she is in menstruation or having postnatal bleeding, or after having had sexual intercourse with her and before she has her next menstrual period and she is not confirmed to be pregnant. All these situations are included under the *Bid[ah* divorce, which is clearly forbidden in Islam. Anyone who resorts to any of these incurs a sin. All scholars agree that the *Bid[ah* divorce is strictly forbidden and whoever does it commits a sin.

‘There is no disagreement that this type of divorce is contrary to what Allah has made lawful in His book, the Qur’an, and what the Prophet (peace be upon him) made clear in the *hadith* concerning Ibn [Umar. Whatever is contrary to what Allah and His messenger have legislated is unacceptable, as made clear in a *hadith* reported by [A’ishah quoting the Prophet (peace be upon him): “Every action that is contrary to this matter of ours is rejected.” (Related by al-Bukhari and Muslim).

‘Whoever claims that this deviation constitutes a valid divorce, and that this action, which is contrary to what the Prophet (peace be upon him) has explained, commits the perpetrator to it, must produce evidence in support of this claim.



‘The early scholars that considered the *Bid [ah* divorce invalid include [Abdullah ibn Ma [mar, Sa [id ibn al-Musayyib and Tawus, a disciple of Ibn [Abbas. It is also the view of Khallas ibn [Amr and Abu Qulabah, both of whom were leading scholars of the generation following that of the Prophet’s (peace be upon him) Companions. This is also the view of Ibn [Aqil, a leading scholar of the Hanbali school of *Fiqh* [...] the Zahiriyyah school of *Fiqh* and Ibn Taymiyyah. It is also one view endorsed by the Hanbali school.’<sup>451</sup>

The *hadith* referring to Ibn [Umar’s case mentions that he divorced his wife during the Prophet’s (peace be upon him) lifetime at a time when she was in her period. His father, [Umar ibn al-Khattab asked the Prophet (peace be upon him) about this and he said to [Umar: ‘Tell him to take her back and retain her until she is clean from menses, and then she has her next period and completes it. Then when she is clean from menses he has the choice either to hold on to her as his wife or to divorce her. This is the time when she can start her waiting period and the one which Allah has ordered to be the start of the divorce.’

## Suspension of marriage

The Arabic word *ila*’ has no equivalent in English and many other languages, but it signifies a sort of suspension of the

<sup>451</sup> Sabiq, *Fiqh al-Sunnah*, vol. 2, p. 264.



marriage. In Islamic terminology, it refers to a case in which a man makes an oath by Allah or by one of His attributes that he would not have a sexual intercourse with his wife forever, or for a period of more than four months.<sup>452</sup>

*Ila'* is forbidden in Islam because it represents an oath to abandon a duty, which is helping his wife to maintain her chastity. If a man swears not to have sexual intercourse with his wife forever, or for more than four months, and he then has sexual intercourse with her and atones for his oath within the four months, then he has ended the situation of *ila'* and Allah may forgive him. If the four months have lapsed and he continues to take the same attitude, despite his wife's objection, the case is put to a judge who will order him to take one of two options: 1) To consider his oath as invalid, atone for it and resume the full marital relationship with his wife; or 2) to divorce his wife. If he refuses to take either one of the two options, the judge will dissolve the marriage.<sup>453</sup>

## Making one's wife forbidden for one

The Arabic term *Zihar* means that a man tells his wife that she is to him like a relative of his whom he cannot marry, or as a part of such relative. He may say to her something like, 'You are to me like my mother's back.'<sup>454</sup>

<sup>452</sup> Al-Bahuti, *Kashshaf al-Qina'*, vol. 5, p. 406.

<sup>453</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 320.

<sup>454</sup> Al-Shawkani, *Fath al-Qadir*, vol. 3, p. 225.

*Zihar* is strictly forbidden in Islam. Allah mentions it in the Qur'an and describes it as 'iniquitous and false' (58: 2). If a husband commits this sin and makes such a statement to his wife then all sexual matters, including kissing and foreplay, are forbidden for them until the man has atoned for his iniquitous falsehood. This is based on the Qur'anic verses that outline the recompense required in these cases: 'Those who separate themselves from their wives by saying, "You are as unlawful to me as my mother," and then go back on what they have said, must atone by freeing a slave before the couple may resume their full marital relation [...] However, he who does not have the means shall fast instead for two consecutive months before the couple may resume their full marital relation; and he who is unable to do it shall feed 60 needy people' (58: 3–4). The Prophet (peace be upon him) said to one of his Companions who said such a vow: 'Do not come near her until you have done what Allah has ordered you to do.'<sup>455</sup>

### **Atonement for *Zihar***

As is clear from the above-quoted verses, the atonement for *Zihar* takes different forms which are in the following order:

- 1) The freeing of a male or female slave who is a believer and who is without defects;
- 2) If he cannot find such a slave, or cannot find the money to buy such a slave if available, then he must fast for two consecutive lunar months. This consecutive fast cannot be

<sup>455</sup> Related by al-Tirmidhi, *hadith* No. 1,200.

interrupted except by obligatory fasting, such as the fast of Ramadan, or by obligatory non-fasting such as the day of the Eid and the four days of Eid al-Adha, or by illness or travel;

- 3) In the case of one being physically unable to fast, the feeding of 60 needy people.

The Prophet (peace be upon him) ordered Salamah ibn Sakhr, who said *zihar* to his wife, to free a slave, and if he cannot find one to fast two consecutive months, and if he cannot then to feed 60 needy people.

A person who says this to his wife and yet has sexual intercourse with his wife before he has completed the atonement, his deed constitutes a grave sin. Nevertheless, he only has to do one atonement, and his wife remains unlawful to him until he has completed the atonement.<sup>456</sup>

## The waiting period and its purpose

**Definition:** The [*iddah*] is an Arabic word which refers to a specific period, caused by divorce or her husband's death, during which a woman should wait by herself as an act of worship, or to ensure that she is not pregnant, or in mourning for her husband.<sup>457</sup> It is valid according to the Qur'an, the Sunnah and the unanimity of scholars.

<sup>456</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 321.

<sup>457</sup> Ibn Qudamah, *Al-Mughni*, vol. 7, p. 448.





In the Qur'an, Allah says: 'Divorced women shall wait, by themselves, for three monthly courses' (2: 228). 'As for those of your women who are beyond the age of monthly courses, as well as for those who do not have any courses, their waiting period, if you have any doubt, is three months. As for those who are with child, their waiting term shall end when they deliver their burden' (65: 4). 'Those of you who die leaving wives behind, their wives shall wait, by themselves, for four months and 10 days' (2: 234).

Al-Miswar ibn Makhramah, a Companion of the Prophet (peace be upon him), says that 'Sabi[ah al-Aslamiyyah became a widow, and a few days later, she gave birth to her child. She went to the Prophet (peace be upon him) to ask permission to get married. The permission was granted and she got married.'<sup>458</sup> Other *hadiths* confirm this.

The waiting period is required to ensure that the woman is not pregnant, so that parenthood of the child cannot be confused. On the other hand, in cases of divorce it allows the husband to reconsider his action if the divorce is revocable. When he has thought carefully about the matter he may consider the reinstatement of his marriage. Thus, it serves as a cooling off period and safeguards the rights of the child in case the woman is pregnant.

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<sup>458</sup> Related by al-Bukhari, *hadith* No. 5,320.

## Types of waiting period

The waiting period is of two types:

1. After her husband's death: A woman whose husband has died must observe a waiting period. If she is pregnant, her waiting period lasts until she has given birth, even if the birth takes place within an hour of the husband's death. Allah says: 'As for those who are with child, their waiting term shall end when they deliver their burden' (65: 4). This is confirmed by the above-quoted *hadith* concerning Sabi [ah al-Aslamiyyah.

If the widow is not pregnant her waiting period is four months and 10 days, whether the marriage has been consummated or not. The following verse applies to all women who lose their husbands and are not pregnant: 'Those of you who die leaving wives behind, their wives shall wait, by themselves, for four months and ten days' (2: 234).

2. After divorce: When a marriage is terminated by divorce or a judge's order, the woman must observe a waiting period. If she is pregnant, her waiting period lasts until she has given birth. Allah says: 'As for those who are with child, their waiting term shall end when they deliver their burden' (65: 4). If she is not pregnant, her waiting period lasts until she has completed three periods of cleanliness from menstruation after the termination of the marriage.

Allah says: ‘Divorced women shall wait, by themselves, for three monthly courses. It is unlawful for them to conceal what Allah might have created in their wombs, if they believe in Allah and the Last Day’ (2: 228). If the woman does not go through the menstrual cycle, either because of some condition or because she is past-menopause, her waiting period is three months. Allah says: ‘As for those of your women who are beyond the age of monthly courses, as well as for those who do not have any courses, their waiting period, if you have any doubt, is three months’ (65: 4).

If a man divorces his wife before their marriage has been consummated, i.e. without having sexual intercourse, she does not have to observe any waiting period. Allah says: ‘Believers! If you marry believing women and then divorce them before the marriage is consummated, you have no reason to expect them to observe a waiting period. Hence, provide well for them and release them in a becoming manner’ (33: 49).

## **Breastfeeding**

Breastfeeding that affects marriages refers to the feeding of a child of less than two years of age on the breast of a woman other than his natural mother, after the woman has given birth.<sup>459</sup>

<sup>459</sup> Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 10, p. 7,373.



**Ruling:** Breastfeeding creates a relationship between the woman and the child that is equivalent to that of his mother, in respect of prohibiting marriages and permission of being alone together.<sup>460</sup> This ruling relies on the Qur'an, the Sunnah and the unanimity of scholars. The Qur'anic verse that lists the women a man is forbidden to marry includes in the list: 'Your mothers who have given suckle to you, your suckling sisters' (4: 23). [A'ishah reports that the Prophet (peace be upon him) said: 'Breastfeeding prohibits (marriages) just as birth prohibits.'<sup>461</sup> Moreover, all Muslim scholars agree that breastfeeding forbids marriages like the blood relationship.<sup>462</sup>

**Conditions:**<sup>463</sup> Two conditions must be fulfilled for breastfeeding to have its effect of creating a family relation and prohibit marriages:

- 1) The breastfeeding must take place before the child has completed two years of age. If it takes place after that, it has no effect. Allah says: 'Mothers may breastfeed their children for two whole years; [that is] for those who wish to complete the suckling' (2: 233). 'And his weaning takes place within two years' (31: 14). Umm Salamah, the Prophet's (peace be upon him) wife, reported that he said: 'No breastfeeding causes prohibition of marriages unless it is on the breast, reaches the bowels, and is before

<sup>460</sup> Al-Bahuti, *Kashshaf al-Qina* [ ], vol. 5, p. 155.

<sup>461</sup> Related by al-Bukhari, *hadith* No. 2,646; Muslim, *hadith* No. 1,444.

<sup>462</sup> Ibn Qudamah, *Al-Mughni*, vol. 7, p. 537.

<sup>463</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 332.

weaning.’<sup>464</sup> This means that for breastfeeding to take effect, it must feed and nourish the child, stopping its hunger and helping its growth.

- 2) It is clear that the breastfeeding that initiates the relationship prohibiting certain marriages is general. The condition is fulfilled when the child has been given a full-feed on the breast of a woman other than its mother. The child must let go of her breast by himself, without anything happening to make the child do so. If the child takes only a suck or two, this has no effect, because it is less than a full feed and does not give proper nourishment. [A’ishah quotes the Prophet (peace be upon him) as saying: “A suck or two do not prohibit marriages.”] (Related by Muslim and in the four authentic anthologies).

‘Scholars have several views on this point which we may sum up as follows:

- All breastfeeding, whether little or plentiful has the same effect concerning future marriages, as the relevant verse speaks of breastfeeding in general.
- Prohibition of future marriages takes effect only when the child has had five separate feeds.
- The prohibition is confirmed by the child taking three feeds or more.’<sup>465</sup>

The relationship that is created by breastfeeding entails two rulings: one causing prohibitions and another causing

<sup>464</sup> Related by al-Tirmidhi, *hadith* No. 1,152; Ibn Hibban, *hadith* No. 4,224.

<sup>465</sup> Sabiq, *Fiqh al-Sunnah*, vol. 2, pp. 75–76.



permissibility. With regard to the first ruling, breastfeeding prohibits marriages in the same way as a blood relationship. Thus, the breastfeeding woman becomes a mother of the child she breastfeeds. Her mother is its grandmother and her sisters are its aunts. Likewise, her daughters and granddaughters are its sisters and nieces. Her husband is its father and her husband's sisters are its paternal aunts. All these are forbidden to the child to marry when he grows up. Her sons and grandsons are its brothers and nephews. If the breastfed child is a girl, she cannot marry these when she grows up. With regard to permissibility, all that is permissible to a man through his relationship with his natural mother is also permissible to him through his relationship with his breastfeeding mother. [A'ishah reports that the Prophet (peace be upon him) said: 'Breastfeeding prohibits (marriages) just as birth prohibits.'

### **Confirmation of breastfeeding**

The testimony of one woman who is well known to be a woman of integrity is sufficient to prove breastfeeding and make it effective, whether she confirms that she or another woman was the one who breastfed the child and provided that she makes clear that the breastfeeding took place when the child was less than two years of age. [Uqbah ibn al-Harith said: 'I married a woman, but another woman came to us and said that she breastfed both of us. I went to the Prophet (peace be upon him) and told him. He said: "How could you (continue with this marriage) when this has been said? Leave her."'"]<sup>466</sup> This is a

<sup>466</sup> Related by al-Bukhari, *hadith* No. 2,660.



testimony about things that are normally done in private. Therefore, the testimony of one woman is sufficient, as it is the case with witnesses of childbirth.<sup>467</sup>

## Child custody

**Definition:** Child custody means, according to Islamic law, taking care of a child when it cannot look after itself, and to bring the child up, looking after it physically and mentally, protecting it against anything that could cause it harm.<sup>468</sup>

**Ruling:** Custody is obligatory to be taken by the adult if he or she is the only one to take it, or if there are more than one but the child accepts only one of them. It is obligatory because the child might come to harm or die if no one takes custody of it and to ensure its wellbeing. When there are several potential custodians it becomes a collective duty, which means that when one of them takes it the others are not accountable. Custody is given to either women or men who qualify, but women are always given priority because they are kinder to children, and better carers.

A child is in the custody of its parents, providing their marriage remains in force. If they are divorced the child's custody is given to the mother, unless she gets married to someone who is unrelated to the child. A woman complained to the Prophet

<sup>467</sup> Ibn Qudamah, *Al-Mughni*, vol. 7, p. 558.

<sup>468</sup> Al-Bahuti, *Kashshaf al-Qina* [, vol. 5, p. 765.

(peace be upon him) that her ex-husband wanted to take her child away from her. The Prophet (peace be upon him) said to her: ‘You have the right to the child ahead of him, unless you get married.’<sup>469</sup>

When someone is given custody of a child, it becomes the responsibility of that person to protect the child against anything that causes it harm until it grows up. The custodian has to look after the child’s feeding, nourishment, internal and external cleanliness, sleep, play and all its needs and requirements.<sup>470</sup>

### Conditions applicable to the custodian

1. Being a Muslim: An unbeliever cannot be given the custody of a Muslim child, because the custodian may then bring the child up as an unbeliever.
2. Being a sane adult: Custody cannot be given to a young or insane or feeble-minded person because such people cannot manage their own affairs, let alone look after a young child.
3. Integrity, honesty and chastity: Custody cannot be given to someone who is known to be unworthy of trust, or one who is of loose morality. Such people cannot be trusted with the welfare of a young child. However, this condition is controversial. Ibn al-Qayyim discusses this at length: ‘It is right to say that integrity and honesty cannot be a condition for someone to take custody of a child, despite

<sup>469</sup> Related by Ahmad, *hadith* No. 6,707; Abu Dawud, *hadith* No. 2,276; al-Hakim, vol. 2, p. 225.

<sup>470</sup> Al-Nadawi, *Al-Fiqh al-Muyassar*, p. 334.

the fact that scholars of the Hanbali and al-Shafi'i schools of *Fiqh*, as well as other scholars, consider it so. To make it a condition is very difficult to justify. Had it been so, most children would be lost, and the community would face immense difficulties. Ever since the early days of Islam, the children of transgressor parents are brought up by them, with no one objecting to them, although they are the majority of people. When was a child ever taken away from his parents, or from one of them, on the grounds of their transgression?'

4. Physical and financial ability to look after the child: Child custody cannot be given to an elderly person who cannot take care of the child, or to someone with a disability such as being deaf and dumb.
5. The custodian must be a person of good common sense: One who is a spendthrift cannot be given custody, so that he or she would not squander the child's property.

All these conditions apply to both men and women. An additional condition applies to women which is that the woman to be given custody must not be married to someone who is totally unrelated to the child. The Prophet (peace be upon him) said to a child's mother: 'You have the right to the child, ahead of him (i.e. the child's father), unless you get married.' Custody becomes void if any of the conditions required is not met, or if any of the reasons precluding it applies.





## **Rulings applicable to custody**

In the first place, the child's mother takes custody. The mother's relatives always have a stronger claim to it than the father's relatives. On this basis, the order of those entitled to it is as follows: the child's mother, but when there is a factor that prevents her taking custody, such as failing to meet its conditions, then the child's custody is transferred to her mother, then her grandmother, then the child's father's mother, then to the child's full sister, then to its sister on its mother's side, then to its sister on its father's side. If the child has no women relatives among these to take custody, or if there are relatives but do not qualify for custody, then custody is given to close relatives according to the line of inheritance: its father, then its grandfather of any level, then its full brother, then its half-brother on their father's side.

Payment for custody is treated in the same way as payment for breastfeeding the child. The mother is not entitled to any payment when she is still married, or when she is in her waiting period after divorce, because in these cases she is entitled to being looked after. When her waiting period is over, she is entitled to payment for custody of the child. Whoever else takes custody is entitled to payment from the first day. The child's father is responsible for payment for the child's custody, just as he is responsible for payment for its breastfeeding. Moreover, the father should pay for the rental of accommodation and its furnishing if the mother does not own any home of her own where she can look after the child. Furthermore, the father

should pay for the child's essential needs, such as food, clothes, healthcare, etc. The payment for custody is payable from the first day of the woman taking custody. If it is not paid it remains as a debt owed by the father, and it cannot be redeemed except through payment or if the woman in custody willingly forgoes it.

## **Duration**

The period of custody comes to an end when the child is no longer in need of women's care, and attains an age when it can look after itself, managing to eat, dress and clean itself without help. Needless to say, there is no fixed age for this. The important thing is that the child shows such independence and the ability to look after itself. However, many scholars are of the view that custody comes to an end when a boy reaches seven years of age or a girl reaches nine years.

## **When custody is over**

When the term of custody is over, if the child's father and custodian agree to the child staying with either of them, their agreement is endorsed. If they do not come to an agreement, then the child is given the choice. Whoever of them is chosen by the child has the stronger claim. A woman complained to the Prophet (peace be upon him) that her former husband wanted to take their child from her. The Prophet (peace be upon him) said to the child: 'This is your father and this is your





mother. Take either one's hand.' The child took his mother's hand, and she took him away. (Related by Abu Dawud).

All scholars are in agreement that there is no rigid rule on which parent has an absolute right to the child. Indeed, a parent who is known to be negligent of his duties cannot be given priority over the one who takes good care of the child. What is important in all this is the interests of the child and who takes better care of it. Ibn al-Qayyim said:

To whomever we give priority, whether on grounds of the child's choice, or drawing lots, or on personal basis, we only give priority when the child's interests are fulfilled in that way. If the mother is the better carer and she is more mindful of the child's needs, she is placed ahead of the father. In this case, we pay no heed to whose lot is drawn, or to the child's choice, as the child's choice is based on where more fun is available. If the child chooses the parent who is likely to provide more fun, the choice is discounted. The child is given to the parent who takes better care of it. Islamic law does not approve of anything else [...] If the mother ensures that the child goes to school and learns, while the child prefers to play with its mates and the father facilitates this, the mother has more claim to the child, without going to the process of choice or drawing lots. The reverse is also valid. The same applies in any situation when one parent defaults on what Allah commands with regard to the child while the other parent observes these. The latter is given priority [...] Our



teacher, Ibn Taymiyyah, said: ‘If either parent neglects educating the child and the duties Allah has imposed on him, that parent is disobedient of Allah and has no authority over the child. Indeed, anyone who is neglectful of his duties towards the child has no authority. That person is either removed from being the child’s guardian and the guardianship is given to someone else who will fulfil his duties, or he is given an assistant to fulfil these duties. What is important is to obey Allah and His messenger in ensuring the child’s good upbringing, as far as this is possible.’<sup>471</sup>

## Maintenance

In Islamic usage, the Arabic term *nafaqah*, which is translated as ‘maintenance’ means to provide for whoever one supports in food, clothes, residence and other needs.<sup>472</sup>

It is an incumbent duty on the husband to look after his wife, providing her with what she needs of food, residence, service and healthcare. He must provide all this even though his wife may be rich and have an income. This duty is made clear in the Qur’an, the Sunnah and the unanimity of scholars. Allah says: ‘Let them dwell wherever you dwell, according to your means, and do not harass them so as to make their lives a misery’ (65: 6). A companion of the Prophet (peace be upon him) asked him:

<sup>471</sup> Sabiq, *Fiqh al-Sunnah*, vol. 2, pp. 342–51.

<sup>472</sup> Ibn [Abidin, *Al-Durr al-Mukhtar*, vol. 2, p. 886; al-Khatib al-Shirbini, *Mughni al-Muhtaj*, vol. 3, p. 425.

‘To what is a man’s wife entitled as her right?’ The Prophet (peace be upon him) said: ‘You feed her as you feed yourself, give her clothes as you have. Do not hit her face, and do not abuse her verbally. You may not boycott her except at home.’ Scholars are unanimous that a wife is entitled to full maintenance by her husband, but they state certain conditions, such as that the marriage should be valid and that the woman must fulfil her marital duties, helping her husband maintain his chastity. However, the Zahiriyah scholars say that a wife is entitled to full maintenance for merely being married, and once a woman is married to a man she is entitled to being fully looked after. Ibn Hazm said: ‘A man must support his wife once the marriage contract is made, whether he asks for the consummation of the marriage or not, and even if she is still very young, rebellious or not, rich or poor, has a father or is an orphan, virgin or not, free or slave. He supports her according to his means.’<sup>473</sup> There is no specified level of the amount of maintenance; it depends on the husband’s circumstances and whether he is rich, poor or of adequate means. If the husband refuses to pay his wife’s maintenance it becomes a debt owed by him, and this debt cannot be written off. It must be repaid unless the wife willingly forgoes it.

A woman observing a waiting period after a revocable divorce, and one observing a waiting period while she is pregnant, is entitled to full maintenance throughout her waiting period.

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<sup>473</sup> Ibn Hazm, *Al-Muhalla*, vol. 10.



Scholars have different views on the maintenance entitlement of a divorced woman whose divorce cannot be revoked.<sup>474</sup>

Maintenance of parents who are poor is a duty incumbent on their son when he has the means to support them. Parents may take a portion of their son's money, whether the son gives them leave to do so or not. Al-Shafi'i, Malik and Abu Hanifah agree that parents may only take what they need of their son's money. Imam Ahmad says that parents may take whatever they want of their son's money, whether they are in need or not.

Just as support for a poor parent is obligatory to a son who has adequate means, it is incumbent on a parent who has the means to support his son who is poor. Imam Ahmad says that if a son is of age and has no income, he is entitled to be supported by his father.

Support for poor relatives by their richer relations is a subject of much controversy between scholars. Some say that it is only due as a matter of kindness to relatives. The al-Shafi'i school of *Fiqh* say that such support is incumbent on a rich person to his father and ancestors of any level, and to children and offspring of any level, but it is not a duty beyond these. The Maliki school of *Fiqh* say that maintenance is due to father, mother, son and daughter only. It is not a duty to support grandparents or grandchildren. If parents or children are of a different religion, it is still due. The Hanbali school of *Fiqh* consider maintenance a duty incumbent on a relative who is in

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<sup>474</sup> Sabiq, *Fiqh al-Sunnah*, vol. 2, pp. 169–80.





means to his poor relatives whom he would be entitled to inherit, if they are in means. They thus attach it to the rights of inheritance. Where a person may inherit, he is also duty bound to give support. Thus they make gain commensurate with liability. Such rights are counterbalanced by similar duties.

It is also a duty to look after one's animals, giving them enough food and drink to live comfortably. If he refrains to do so, the ruler compels him to either maintain or sell or slaughter them. If he continues to refuse to fulfil his responsibility, the ruler takes the necessary action. The Prophet (peace be upon him) says: 'A woman was punished on account of imprisoning a cat until she died. As a result, she enters hell. Having restricted the cat, she did not give her food, nor did she let her loose to eat of what the earth offers.' He also says: 'A man was walking along his way when he was extremely thirsty. He came up to a well and he went down to drink. When he came up, he found a dog panting. The dog appeared very thirsty, licking the sand. The man thought: "This dog is as thirsty as I was a short while ago." He therefore went down the well again, filled his shoe with water, held it in his mouth, went back up and gave the water to the dog to drink. Allah was pleased with him and He forgave him his sins.' The Prophet's (peace be upon him) Companions said: 'O Messenger of Allah, will we be rewarded for what we do to our animals?' He said: 'You have a reward for everything you do for a living creature.'



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Translated by

**Adil Salahi**

Edited by

**Dr. Assim Lugman Alhakeem**

**Dr. Ali Bahaeldin Shehata**

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