

## **ELIGIBILITY TO MARRIAGE UNDER ISLAMIC LAW: A STUDY OF SOME JURISDICTIONS IN THE MUSLIM WORLD**

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### ***Abstract***

*The institution of marriage is undoubtedly a universal one. Its theory and practice are however, massively influenced by the religions and cultures of respective communities. Various yardsticks are employed the world over, in the selection of life partners. While in some societies, tribal or class considerations are paramount, in others they are of little significance. One of the yardsticks in the selection of brides is whether the bride falls within some class of people related by blood, marriage or some other considerations. This paper discussed those classes of women prohibited to a man (to marry) in Islamic Law. The writers made their sojourn into the primary sources of the Shari'a (i.e the Quran and Hadith) as well as the views of the classical jurists on the subject. The paper then made specific references to eligibility in marriage under various countries in which Islamic law of personal status is practiced. In particular, Nigeria, Sri Lanka, Pakistan and Morocco were studied. In so doing, it has become clear which country considers sufficient the classical Shari'a position on eligibility in marriage, and which country made an attempt to codify their laws on Islamic Law of Personal Status. It should be noted from the onset that the question of eligibility to marriage had received adequate attention from the Qur'an and Hadith, to such an extent that there is little room for differences of opinion. All the jurists did on this subject was to expound on the intention of the Law-Giver and to give practical examples on the application of laid down rules. This paper also looked at the criminal perspective of engaging in incestuous relationships whether in the pretext of marriage or otherwise.*

## INTRODUCTION

The aim of this paper is to conduct a study of those women that are not eligible for marriage under the Islamic law. The starting point is to have a look at the Qur'an and Hadith, before pointing to juristic opinions. The study will also study some Muslim countries, or countries in which Islamic Law of Personal Status is recognized, with a view to seeing their position on eligibility to marriage.

Allah has created men and women as company for one another, and so that they can procreate and live in peace and tranquility according to the commandments of Allah and the directions of His prophet (1). Allah says In Chapter 30 v 2

*“And among His Signs is this, that He created for you mates from among yourselves that you may dwell in tranquility with them, and He has put love and Mercy between your hearts. Verily in that are signs for those who reflect.”* (2)

Also in Surah Al Nahl verse 72 Allah (S.A.W) says

*“ And Allah has made for you mates of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best; will they then believe in vain things, and be grateful for Allah's favor?”* (3)

In Islam, marriage is a legal contract between two people. A formal, binding contract is considered integral to a religiously valid Islamic law marriage, and outlines the rights and responsibilities of the bride and groom(4). The actual rules governing solemnization of marriage can differ from country to country, based on the school of jurisprudence followed by the country and the codified law (where applicable). (5)

Apart from providing the basis of lawful interactions between males and females through marriage in the Quran in Islam, Abdullah (R.A) reported that when they were young and had no wealth whatsoever, Allah's apostle said: *”O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty. And whoever is not able to marry should fast, as fasting diminishes his sexual power”*. (6)

Not only is marriage considered a legitimate means of guarding one's modesty, it has also been incorporated among the practices of the Prophet (S.A.W) which every Muslim is expected to emulate. It was reported by Anas Ibn Malik (7)

*“A group of three men came to the houses of the wives of the Prophet asking how the Prophet worshipped (Allah). 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?” Then one of them said “I will offer prayers throughout the night forever.” The other said, “I will fast throughout the year and will not break my fast.” The third said “I will keep away from women and will not marry forever” Allah’s Apostle came to them and said “are you the same people who said so-and-so? By Allah I am more submissive to Allah and more afraid of Him than you, yet I fast and break my fast, I do sleep and I also marry woman. So he who does not follow my tradition in religion is not from me (not among my followers).*

A study of the Scripture and the authentic a hadith will reveal that marriage can be obligatory, prohibited, permitted, or disliked based on the circumstances of the individual concerned.

Marriage is obligatory for a man who has the means to easily pay dower and maintain a wife and children and who is healthy and fears that if he does not marry he may commit fornication. It is also compulsory for a woman who has no other means of maintaining herself and fears that her sexual urge may push her into fornication. (8)

Marriage is permitted for a person who can control his sexual desire; who has no wish to have children and who feels that marriage will not keep him away from his devotion to Allah. (9)

Marriage is *Makruh* (disliked) to a man who possesses no sexual desire at all or who has no love for children or who is sure to be slackened in his religious obligations as a result of the marriage. (10)

Marriage is forbidden to a man who does not possess the means to maintain his wife and children or if he suffers from an illness serious to affect his wife and his progeny (11).

A person is eligible if he/she is fit or proper to be chosen; worthy of choice; desirable. A person is eligible if he/she has a right to do or obtain something, having satisfied the appropriate conditions (12).

For the purpose of this paper, eligibility is viewed from the conclave. That is to say, the writer is not going to consider those women that are eligible. The discourse will look only at those women that are not eligible, and consequently forbidden. By reason of relationship, there are certain categories of women that a Muslim man is forbidden to marry. Our discussions will dwell on these categories of women, and how some Muslim countries adopt the divine injunctions on eligibility in marriage. Any woman that falls within the prohibited degree is not eligible for marriage, depending on whether the prohibition is temporary or permanent.

Marital union, being a special variant of the general category of social interaction, is subject to extraordinary control mechanism. In no society is a person completely free to marry

whomever he wishes; the choice is necessarily limited by a number of factors (13), but the scope of such limitation under the Shari'a are provided in the Qur'an and Sunnah.

## **PROHIBITED DEGREES OF MARRIAGE**

Under the Shari'a, marriages between persons standing in a certain relationship to one another are prohibited. These prohibited degrees are either of a permanent or temporary nature (14).

### ***Permanent prohibited degrees***

These are the women that cannot be married by a man under any circumstance. The circumstance of the relationship is usually one in which the subjects have no choice. The women have been enumerated in the Holy Qur'an(15).

*“And marry not women whom your fathers married: - except what is past: it was shameful and odious: - and abominable custom indeed. Prohibited to you (for marriage) are:- your mothers, daughter's sisters, father's sisters, mother's sisters; brother's daughters, sister's daughters, foster-mothers, your step-daughters under your guardianship , born of your wives to whom you have gone in- no prohibition if you have not gone in-(those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time except for what is past; for Allah is Oft-Forgiving, Most Merciful”*

The writer of Risala, a famous treatise in Maliki School of Fiqh summarized the consensus of Muslim jurists on this issue in the following way (16).

*“To all Muslim men, Allah has prohibited the marrying of seven categories of women, due to blood relationship and seven categories of women due to foster relationship and affinity. God –Almighty and Exalted be He- has made unlawful for men to marry their mothers, their daughters, their sisters, their paternal aunts, their maternal aunts, the daughters of their brothers, their nieces, the daughters of their sisters-also nieces. Marriage of these is prohibited due to blood relationship.....*

*The Prophet- Peace and Blessings of God upon him- prohibited, on account of foster relationship, what is prohibited due to blood relationship.*

*An if a man marries a woman, the mere conclusion of the contract without any sexual relations taking place, renders her unlawful as a wife, to his father and his sons, and her mother is also prohibited to him. However, her daughters are not unlawful to him, until he consummates the marriage with the mother or derives some pleasure with her on account of a marriage existing between them, or through his owning her as a slave”.*

The forbidden degrees in Islam constitute three broad categories. i.e.

- i. Consanguineal ( blood relations)
- ii. Affinal (in-laws)
- iii. Lactational (relatives in milk fosterage and through wet nursing). All women prohibited on ground of blood relations are also prohibited on ground of fosterage. Aisha (R.A) reported that while Allah's apostle (S.A.W) was with her, she heard a voice of a man asking permission to enter the house of Hafsa. Aisha added: I said "*O Allah's Apostle! This man is asking permission to enter your house*" The Prophet (S.A.W) said "*I think it's so and so*" naming the foster uncle of Hafsa. Aisha said, "*if so and so*" naming her foster uncle "*were living, could he enter upon me?*" The Prophet (S.A.W) replied "*Yes, foster suckling relations forbid what corresponding birth (blood) forbids*" (17)

The following women are ones that a man cannot marry under any circumstance:

- a. His mother
- b. His step-mother
- c. His grandmother ( including father's mother and all proceeding mothers i.e. great-grandmothers)
- d. His daughter ( including grand- daughters howsoever low)
- e. His sister ( whether full, consanguine or uterine)
- f. His father's sister ( including paternal grandfather's sisters)
- g. His mother's sisters ( including maternal grandmother's sisters)
- h. His brother's daughter
- i. His foster mother
- j. His foster mother's sister
- k. His sister's daughters
- l. His foster brother's/sister's daughter  
Ibn Anas reported that the prophet (S.A.W) had been asked "*wouldn't you marry the daughter of Hamza?*" The Prophet (S.A.W.) answered "*she is the daughter of my foster brother*" (18)
- m. His foster sister
- n. His wife's mother.  
In Muwatta of Imam Malik, Book of marriage, Chapter 9, Hadith 23, it was reported:  
*And Yahya narrated from Malek on the authority of Yahya Ben Sa'id, that he said Zaed Ben Thabet was asked about a man who married a woman, then parted from her before he consummated with her. Is her mother lawful for him? Zaid Ben Thabet said, "No, the mother is prohibited unconditionally. The conditions are applied to foster mother."* (19)
- o. His step-daughter (i.e. daughter by a former husband of a woman he has married if the marriage has been consummated. However, if such marriage was not consummated, there is no prohibition.)
- p. His real son's wife

### ***Temporary prohibited degrees***

These categories of women are prohibited to a man, but the prohibition is not permanent. This prohibition can be removed by change of circumstances. They are as follows:

- a. Two sisters at the same time. A man cannot marry two sisters, whether they are full, consanguine or uterine sisters at the same time. The end of Chapter 4 v 24 quoted above, in which Allah mentions the women prohibited to a man, concludes by saying:  
*“And two sisters in wedlock at one and the same time except for what is past; for Allah is Oft-Forgiving, Most Merciful”*

This temporary prohibition gets removed as soon as the marriage to one is dissolved.

- b. Married women. In chapter 4 v 22-24, Allah mentions the women that are prohibited to a man. Then Chapter 4 v 25 Allah says (20).  
*“ Also (prohibited are) women already married except those whom your right hand possesses, thus has Allah ordained (prohibitions) against you: except for these all others are lawful, provided you seek ( them in marriage) with gifts from your property, desiring chastity, not fornication. Give them their dower for the enjoyment you have of them as a duty; but if, after dower is prescribed, you agree mutually (to vary it), there is no blame on you, and Allah is All-Knowing, All-Wise”*

Despite the fact that a woman is lawful for a man to marry, it is not lawful to entice her with gifts with the sole intention of fulfilling lust, without lawfully contracting a marriage under Islamic Law. The prohibition of marrying an already married woman is removed immediately her marriage is dissolved, and she has completed her period of iddah.

- c. A woman and her paternal and maternal aunt at the same time.  
In his Muwatta, Imam Malik reported a hadith in which the Prophet said (21)  
*“One cannot be married to a woman and her paternal aunt or between a woman and her maternal aunt (at the same time).*

This prohibition is temporary.

- d. A man must not have more than four wives.  
A man must restrict himself to the maximum of four wives. Imam Malik in Muwatta transmitted a hadith to the effect that when Gylan Ibn Salama accepted Islam, he had Ten wives. The Messenger of Allah (peace be upon him) said *“keep four of them and set the others free”* similarly, Abu Daud mentions from Harith *“I accepted Islam and I had eight wives. I mentioned this to the Prophet and he told me to choose four of them”*. (22)
- e. A woman in Iddah period.  
It is forbidden to contract marriage with a woman who is observing her iddah period, either as a result of divorce or death of her husband. However, if the iddah is in

relation to the death of her husband or in respect of divorce in which there is no right of recall (*Talaq bain*) a prospective suitor is allowed to make an indirect statement to the woman to show interest in marrying her. But he must not explicitly state that he intends to marry her. This is the position stated in the Qur'an (23)

*“There is no blame on you if you make an indirect offer of betrothal or hold it in your hearts. Allah knows that you cherish them in your hearts; but do not make a secret contract with them except that you speak to them in terms honorable....”*

But even here, if a woman is having iddah of *Talaq* where (recall) is still possible, A man must not send her even implied words, for she is still considered as a legal wife of her ex-husband (24).

The position of Sharia, especially the views of Maliki School of thought on eligibility in marriage is the applicable law in Nigeria. Nigeria does not have codified laws regulating Islamic Law of Personal Status. The applicable law is contained in The Qur'an, Sunnah and treatises *Muwatta*, *Risala* cited above as applied in the *Shari'a* and Area Courts.

#### THE MARRIAGE AND DIVORCE (MUSLIM) ACT OF SRI LANKA

The Act made provisions with respect to the marriages and divorces of Muslims in Sri Lanka and in particular, with respect to the registration of such marriages and divorces. The Act shall apply only to the marriages and divorces and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims (25).

By section 80 of the Act, a man must not marry the following women:

- a. His daughter or other lineal descendants; or
- b. His mother and other lineal ascendants; or
- c. His sister by the full or the half-blood; or
- d. The daughter of his brother or sister by the full or the half blood, or a descendant from either of them.
- e. The sister by the full or the half-blood of his mother, father or other lineal ascendants;  
or
- f. His wife's mother or grandmother; or
- g. The daughter or granddaughter of his wife by another father; or
- h. His son's grandson's, father's or grandfather's or wife's or widow or divorced wife;  
or
- i. His wife's sister, his wife being then alive(26)

Every Muslim woman of above the age of 12 years cannot enter into any contract of marriage with any man or permit him to have carnal intercourse with her, if she knows him to be:

- a. Her son or other lineal descendant; or
- b. Her father or other lineal ascendant; or
- c. Her brother by the full or the half blood ; or

- d. The son of her brother or sister by the full or the half blood, or a descendant from either of them; or
- e. The brother by the full or the half blood of her father, mother or other lineal ascendant; or
- f. Her husband's father or grandfather or, or
- g. The son or grandson of her husband by another mother
- h. Her daughter's grand-daughter's, mother's, or grandmother's husband with widower or divorced husband (27).

These limitations contained in the Act are considerably wide, but they do not cover prohibitions on ground of fosterage, and temporary prohibitions. However, by Section 80(3), a woman would be held to be prohibited to a man notwithstanding that she is not expressly stated in section 80 of the Act, so long as the prohibition can be found under classical Islamic jurisprudence as contained in the Shafi'i school of Fiqh, which is the applicable school of Fiqh in Sri Lanka.

#### ELIGIBILITY TO MARRIAGE IN PAKISTAN

Prior to the partition of India and Pakistan, matters relating to marriage, divorce, dower, inheritance and succession and family relationship were governed by customary laws as well as by the religious laws modified by customs, subject to certain modifications by legislative enactments(28). The Muslim Personal Law Act was promulgated in 1937 to displace customary practices with regard to Muslims.

In 1962, the West Pakistan Muslim personal Law (Shari'at) Application Act was enacted. The Act was significant in bringing uniformity in the application of Muslim Personal law in matters relating to personal life where the parties are Muslims. Section 2 of the Act abrogates customs and usages but provides that the application of Muslim Personal law is subject to the provisions of any law in force, relating to matters of personal law enumerated in the section (29). The matters covered by the section are succession, guardianship, betrothal, legitimacy, family relations, wills, legacies, religious usages or institutions, Waqf and trust.

The Muslim personal law is applied in courts in accordance to the sect which an individual Muslim litigant belongs. The Muslims in Pakistan are divided into two main sects, Sunni and Shi'a (30).

In Pakistan generally, the following marriages are considered void:

1. Marriages within the prohibited degrees of consanguinity, affinity, fosterage and other prohibited degrees.
2. Marriages of an adult and sane person without his/consent(31)

Moroccan Family Code 2004(32)

The law is divided into Titles and further subdivided into Articles. Under the Code, there are permanent and temporary prohibited degrees (33).



*Permanent impediments are as follows:*

- a. Prohibited degrees of blood kinship relations including a man's ancestors, ascendants and descendants (34).
- b. Forbidden degrees of kinship of marriage including wife's ascendants at the moment the marriage contract is concluded and her descendants if the marriage has been consummated with the mother, as well as lineal paternal wives and direct filial wives at the time of the conclusion of the marriage contract (35).
- c. Impediments to marriage resulting from kinship by breastfeeding are the same as those prohibited through blood kinship. Breast feeding is only an impediment to marriage if it occurred during the first two years of child's life (36).

*Temporary impediments to marriage (37)*

- a. Marriage simultaneously to two sisters to a woman and her paternal or maternal aunt; be the relation one of blood kinship or breastfeeding.
- b. Marriage to more than legally authorized number of wives.
- c. After three successive repudiations, unless the wife's iddah has expired following the lawful conclusion and consummation of the marriage to another man. The remarriage of the thrice repudiated woman to another man annuls the three previous repudiations pronounced by the first repudiating husband. The resumption of marriage with this husband renews his right to repudiate her anew three times.
- d. The marriage of a Muslim woman to non-muslim man, and the marriage of a Muslim man to a non Muslim woman except if she is a Christian or a Jew.
- e. Married woman or a woman who is observing the iddah (waiting period).

Article 400 of the Code states that where the Code is silent on area of Islamic Family law, the Classical Islamic Family law as interpreted by Maliki School of law shall be applied.

#### A GLANCE AT NIGERIA, SRI LANKA, PAKISTAN AND MOROCCO

The Federal Republic of Nigeria recognizes Islamic law as one of the sources of Nigerian law as being applicable to people who profess the Muslim faith. Unlike ethnic customary law, Muslim law is principally in written form. The sources of Muslim law are, among others, the Holy Qur'an, Sunna of the Prophet, consensus of scholars and analogical deductions from the Holy Quran and the practice of the holy Prophet (S.A.W). The version of Muslim law in force in Nigeria is muslim law of the Maliki School(38). Nigeria does not have a codified instrument regulating Islamic personal law. Consequently, the basic rules found in the Qur'an, and Hadith as interpreted by the Maliki School of law, are the main guide in determining eligibility of parties to marriage. It is submitted that all the rules of the holy Qur'an, traditions of the Holy Prophet and the treatises of the Maliki School of law considered in the introductory section of this paper are what determine eligibility of parties to marriage in Nigeria.

The principal enactment regulating Islamic law of personal status in Sri Lanka is the Marriage and Divorce Act. The Act mentioned the classes of women prohibited by blood and marriage. But it does not cover prohibition by fosterage and other temporary prohibitions. The only saving grace is section 80(3) of the Act which incorporates other areas of prohibition as found in the books of Islamic Jurisprudence. It is submitted that Islamic Law of Shafi'I School of law will supplement the omissions in the Act to cover other relationships that are considered impediments under the Shari'a.

In Pakistan, although the West Pakistan Personal Law (Shariat) Application Act recognizes only the principles of Islamic personal law as applying to the affairs of Muslims in Pakistan, neither the Act, nor any other legislation specifically mentioned the levels of impediments to marriage. The only option is to study the Hanafi school of law and find the rulings of muslim jurists on the issue. The writer is of the view that the positions of the Qur'an and Hadith studied above are the applicable principles.

The Moroccan family Code seems to be the most comprehensive enactment dealing with impediments to marriage under Islamic law. The code covers permanent prohibitions i.e blood kinship, marriage and fosterage, as well as all the classes of temporary impediments contained in the Shari'a.

#### CRIMINAL PERSPECTIVE

This section will look at the Sri Lankan and Nigerian laws, with a view to seeing to what extent the two jurisdictions criminalize incestuous relationships. It should be noted from the onset that while incest is a crime under the Shari'a, the punishments for the actions in the legislations under review may not necessarily have been inspired by any conceivable parameter on penal provisions under the Shari'a.

A crime is an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to punishment by that law(39); especially a gross violation of law. To be classified as a crime, the "act of doing something criminal (*actus reus*)" must-with certain exceptions-be accompanied by "intention to do something criminal (*mens rea*)". (40)

#### *Sri Lanka*

By section 80 of the Marriage and Divorce (Muslim) Act, every muslim who enters into any contract purporting or intended to be a contract of marriage, or has attempts to have carnal intercourse with a woman or a man (as applicable) who he/she is prohibited to marry shall be guilty of an offence, and shall be liable on conviction to imprisonment of either description for any period not exceeding three years. It shall be a defense for a woman charged with an offence under the Act to prove that she was at the time of the offence under the coercion of the person having carnal knowledge of her.

The categories of persons whose marriage constitute an offence under the Act are substantially clear. There is little room for speculation as to those who are covered by the section.

### *Penal Code of Northern Nigeria*

The Penal Code law of Northern Nigeria was passed, theoretically, to make sufficient penal provisions for Northern Nigeria that are compatible with the Shari'a, which is the way of life for most of the people living therein.

Section 390 of the Penal Code reads:

*“Whoever being a man, has sexual intercourse with a woman who he knows or has reason to believe to be his daughter, his granddaughter, his mother or any other of his female ascendants or descendants of his sister or daughter of his brother or sister of his paternal or maternal aunt and whoever being a woman voluntarily permits a man who she knows or has reason to believe to be her grandson, her father or any other of her brother male ascendants or descendants, her brother or son, her brother, the son of the brother or sister or paternal or maternal uncle to have sexual intercourse with her shall be punished with imprisonment for terms which may extend to seven years and shall be liable to fine.”*

Let us contrast the Sri Lankan Act and the Northern Nigerian Penal Code. We submit that the following constitute major differences in the scope and application of the law on incest.

- a. While under the Sri Lankan Act, the party must be a Muslim, under the Penal code, it does not matter that the party is not a Muslim. In Northern Nigerian Penal Code, any person who belongs to any tribal indigenous to any part of Africa, or a descendant of such a person.
- b. The Sri Lankan Act makes it an offence to have carnal knowledge of any person who is not eligible for marriage under Islamic law either in the guise of marriage or otherwise. The Northern Nigerian Penal Code does not even envisage incestuous relationship leading to marriage.
- c. The Sri Lankan marriage and Divorce Act recognizes as impeded such specified persons related by blood ties, fosterage, marriage and some other temporary prohibitions. The Northern Nigerian Penal Code looks only at descendants and ascendants of the person in question.
- d. Under the Sri Lankan Act, the punishment for incest is imprisonment which may extend to 3 years while under the Penal Code, the punishment for incest is a term of imprisonment which may extend to 7 years in addition to liability to fine.

## CONCLUSION

This paper studied impediments to marriage under Islamic law. As a preliminary point, the position of the Shari'a regarding marriage had been summarized. The relevant Qur'anic verses and traditions of the Prophet (P.B.U.H) as well as the positions of the scholars have been discussed.

In line with objectives of the research, the author looked at Nigeria, Sri Lanka, Pakistan and Morocco, with a view to seeing the extent to which these countries apply the injunctions of the Shari'a with respect to impediments to marriage.

We have seen that Nigeria and Pakistan do not have a legislation specifying the persons that cannot be married by a man or woman (as the case may be). In this case, the injunctions of the Qur'an, Sunnah and the applicable school of Fiqh will ultimately determine those persons that one cannot marry.

In Sri Lanka and Morocco however, effective and comprehensive legislations specifically mentioning those women that are prohibited to a man can be found. Although the two countries have made adequate provisions on this issue, it is submitted that in cases where the legislations do not cover any particular case, resort must be had to the Qur'an, Sunnah, and the applicable school of Fiqh.

The paper then ends with a study the extent to which Sri Lankan and Northern Nigerian Legislations criminalize incestuous relationships. We have seen that marrying any woman who is specified by the applicable legislation as being among the classes of woman a man must not marry, will constitute a crime under the law.

END NOTES

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