

Legal Capacity of Muslim Woman Regarding Marriage in Islamic Law

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Abstract

Muslim man and woman are given complete legal capacity under Islamic law provided that they are sane, have attained their puberty and are prudent. Marriage is a legal contract which possesses high significance and sacredness in Islamic law. Muslim jurists, therefore, provide certain principles and conditions to secure it from defective decisions. Guardianship, in Shari'ah, is the legal authority of a person, who is fully competent to safeguard the rights and interests of another who is incapable of doing it independently due to no or limited legal capacity. According to Hanafi School of law, a mature free Muslim woman has complete legal capacity to enter in to the marriage contract. Guardian's absence in her marriage does not make the marriage contract invalid provided it fulfills other conditions. The principal aim of this paper is to examine legal capacity and guardianship in marriage and to investigate the extent of the guardian's authority to conclude a marriage in the case where he has the right of compulsion and in the case where he does not have it. The paper also emphasizes the significance of presence of guardian for protection of woman's welfare and that it should not restrict woman's legal capacity in marriage.

Keywords: Muslim Woman, Hanafi School of Law, Marriage Contract, Guardianship, Marriage Consent, Legal Capacity

Introduction

The exclusiveness of the Muslim marriage rules has made it an interesting topic for discussion among legal authorities and jurists. A Muslim marriage (*nikāh*) has its rules which had been laid down by the Qur'an and Sunnah of the Prophet (PBUH). It is viewed as an important and sacred union between a man and woman. The Qur'an discusses marriage as follows:

“Among His signs is that He created for you spouses from yourselves so that you might find repose with them. And He has placed between you affection and mercy. In that there are certainly signs for people who reflect.”¹

Qur'an in 4:21 also proclaims marriage as a solemn covenant (*mithāq-i-ghalīz*)²

The Messenger of Allah said that marriage fulfills half of one's religious obligations. Anas b. Malik (may Allah be pleased with him) reported that the Messenger of Allah said:

“Whoever Allah provides with a righteous wife, then Allah has assisted him in half of his religion. Let him fear Allah regarding the second half.”³

Muslim jurists (*fuqahā*) have discussed that marriage is a religious duty and is therefore a moral safeguard and a social necessity. As a religious obligation it should be fulfilled but like all other obligations in Shari'ah, it is enjoined only upon those who are capable of meeting the responsibilities it involved. The principal view among the jurists is that although marriage is a social necessity, but it is not absolutely obligatory for every individual.

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Therefore, they have classified individuals with regard to their marriage legal ability from Shari‘ah perspective.

‘Abdur Raḥīm in *Muhammadan Jurisprudence* writes:

"The Muhammadan jurists regard the institution of marriage as combination of both i.e. the nature of ‘*ibādāt* (devotional act) and *Mu‘āmalāt* (dealings) among men".⁴

Legal capacity of spouses in marriage contract in Shari‘ah

In Islamic Law, man or woman, is a subject of *the Shari‘ah* i.e. (*mukallaf*) under legal obligation. Every living human being is therefore, *mukallaf* regardless of sex, colour, creed, age or mental and physical ability or disability⁵. For fulfilling conditions of the complete legal capacity one must be sane (‘*āqil*), should have attained puberty (*bāligh*), and must have prudence (*rushd*)⁶.

Legal capacity (*ahliyyah*) is essentially the fitness of a person to enter into obligation, that is, to bind and be bound. According to jurists, marriage contract is similar to other financial contracts due to certain commonalities, such as:

1. the integrals of offer and acceptance,
2. the existence of two transacting parties,
3. Just witnesses, and
4. rulings related to contractual conditions⁷.

According to the general rules of contract in Islamic law, the consent of both parties is a precondition without which the contract is null and void.⁸

Guardianship- meaning and significance in marriage:

Guardianship is defined as :

“the legal authority invested in a person fully qualified and competent to safeguard the interest and rights of another who is incapable of doing so independently, that is someone who has limited or no legal capacity. It is authority of a father or near male relative over minor, insane or inexperienced persons who need protection of interests and guardianship”⁹.

Wilāyah (guardianship) in marriage is a kind of protection instituted by Islamic law to secure the interest of a woman's rights at the time of her marriage contract. Islamic law established the principles of guardianship on the basis of compassion, support, and assistance to women.

There are two opinions about marriage of a minor:

First: the opinion of two prominent jurists Abū Bakr al-Aṣamm and Ibn Shubrumah who say that child marriage is not allowed by Shari‘ah¹⁰. They give basis of their view mentioned in the following verses of the Qur’ān:

And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take

according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as accountant¹¹.

Second view is of Ḥanafi, Shāfi'i, Māliki and Ḥanbali jurists on this issue that marriage of minor is lawful provided it is constructed by marriage guardian¹².

The most important difference between male and female children with respect to freedom to marry was a consequence of the rules of emancipation. Whereas a male child was automatically emancipated from his father's jurisdiction upon reaching biological and social maturity, a female was not emancipated from her father's jurisdiction until two additional requirements were satisfied i.e. "entry into her marital home and the testimony of reliable witnesses that she could successfully manage her property"¹³.

The marriage guardian, mostly the father¹⁴, could contract his minor ward in marriage in an exercise of guardianship (*wilāyah*) with the meaning that the girl's consent was not required although it was recommended that she be in agreement.

According to Imam Abū Ḥanīfah:

"the guardian has full authority to marry his minor girl whether she is a virgin or previously married. Ḥanafi School of law however, allows an incumbent at the age of puberty to repudiate a marriage contracted before puberty by guardians other than the father or grandfather. Furthermore, this school of law allows a mature woman to choose her husband and conclude the marriage contract herself".¹⁵

The other schools of Islamic law¹⁶ allowed the authority of guardianship only to the father and in some cases determined the grandfather or father as appointed agent. In case of absence of these guardians, other guardians have to wait until the woman give consent after attainment of puberty. The agreement (*ijāb and qubūl*) by the two parties to the marriage contract, involves the bridegroom and on the other the bride's guardian whom she has authorized to conclude the contract on her behalf thus giving her consent.

Legal Capacity of Woman and marriage consent:

In Muslim law the consent is essential element in marriage negotiations because marriage under Islam is a contract. A Muslim marriage is contracted by means of declaration and consent, both to be expressed in the priorities. The contract of marriage in its essence is a consent on the part of man and woman to cohabit with each other only. A Muslim marriage contracting between two persons possessing the capacity to enter into the contract is valid and binding, if entered into by mutual consent. The parties must understand the nature of the marriage contract and there must be mutual consent otherwise without these elements no contract of marriage can be valid, so free consent in case of adult person, is not only essential for a valid marriage but is absolutely necessary.

Some of the contemporary jurists, such as Sa'id Muṣṭafā, says that:

"unjustified prevention of marriage is a failing in duty rather than an abuse of right; i.e. guardianship is intended to be in the interest of the person to whom it applies. The estimation of this benefit is left to the guardian according to what he sees as the fitness or otherwise of the suitor. He has the right not to give in marriage the person under his guardianship to someone who is not her

equal and the right to object to a marriage and demand separation. The right of the guardian, like any other right, is restricted by the requirement that it be used for the purpose for which it exists”¹⁷.

Views of Jurist regarding Legal capacity of Muslim woman in marriage:

The marriage contract is not exception, however due to its scared character Muslim jurists have tried to provide certain precautions so that marriage institute is secured from defective decisions.

1) Views of Jurists of Shāfi‘i and Māliki Schools of thought:

According to Shāfi‘i and Māliki' schools, the consent of an adult virgin Muslim woman is essential for validity of the contract of marriage but she cannot enter into it on her own behalf without the Guardian (*wali*)¹⁸. The consent of an adult virgin is not sufficient for the completion of the marriage contract; it must be given through the guardian. Thus, as per Shāfi‘i and Māliki' schools, a woman cannot personally consent to the marriage. The guardian (*wali*)'s will and agreement is required by the Shāfi‘i and Māliki schools to complement the recognized capacity of the woman, to understand the nature of the contract, to settle the terms, and to guard the woman from being victimized by a deceitful contract, or from marrying a person morally or socially unfit for her.¹⁹

“A mature married or unmarried woman who attained puberty and the quality of prudence may dispose of her properties with or without consideration of guardian”.

This is the opinion of Shāfi‘i's, Ḥanafi's and of Ibn Ḥanbal, prevalent in Ḥanbali teachings.²⁰ It however is not the case in Maliki School of law. According to it, an unmarried woman has restricted legal capacity until she marries. The basis of this opinion is that her father may always conclude her marriage without her permission and that restrict her full capacity. Even after her marriage a woman, by the jurists of Maliki school of law, still as partially detracted from full capacity due to the acts she performs without consideration, such as issuing guarantees or making gifts are not allowed without the husbands authorization. Somehow, acts of disposition with proper consideration such as selling, buying or letting are allowed with no need for husband's authorization²¹.

2) Views of Ḥanafi School of Law on Legal capacity of woman:

“According to the authoritative opinion of Abū Ḥanīfah and Abū Yūsuf a marriage of a mature woman is concluded without the consent and presence of a matrimonial guardian. This is because she disposes of something which she is exclusively entitled by being sound of mind and age. For this reason she is entitled to dispose of her property. The principle here is that whoever may dispose of his property by his own right may conclude his own marriage”

Imam Abū Ḥanīfah maintained that it is not obligatory for a sane, adult woman to have a guardian. Based on this argument that she is entitled to conduct her own marriage contract whether she was previously married or a virgin and restricted the *wilāyah* exclusively to prepubescent females. On the other hand, he maintained that it is a delegation, not guardianship, for the sane, adult female. A marriage of a mature woman is concluded without the consent of guardian.

The Sunni school of thoughts allow a father and other guardians to contract marriage of their ward. The jurists of these schools however differ among themselves on the binding authority of guardian and the legal status of marriage contracted by him. Muslim Jurists differentiate between two situations.

First, there is no disagreement between the jurists in principle regarding the fact that woman who has previously marriage experience, i.e. (*thaiyyab*) who can choose their new husbands. However they disagree on whether the woman can conclude her marriage by own single will or must her consent be combined with that of her male guardians²².

Among Ḥanafis the capacity of a woman who is adult and sane, to contract herself in marriage is absolute and guardians consent is not substitute for woman consent. However, in Shāfi'i's and Māliki's Law though the consent of adult virgin is same as in Ḥanafis but she cannot contract herself in marriage without the intervention of a *wali*. So, in Shāfi'i's and Māliki's schools the consent of adult virgin is not sufficient for the completion of the marriage contract. It must be through the legal guardian. The consent may be given either in express terms or by implication. In the case of a girl who has once married or who is mature to understand the nature of the marriage contract, the consent is required to be expressive. In the case of virgin girl, the jurists of all schools hold the similar view that smiling or remaining silent may be construed to imply consent.

The Prophet (SAW) has said, a virgin must be consulted in everything regarding herself, and if she is silent, it signifies consent.

‘Āyishah narrated: I said "Oh Allah's messenger, a woman feels shy to give consent in marriage", he said, her consent is expressed by her silence²³.

According to the views of the Ḥanafī jurists, the mature woman is not subject to the consent of the guardian but could contract her own marriage. Woman has full legal capacity to choose her prospective husband, look at him and get to know about him without coercion on the part of her father or other relatives. Therefore, her guardian has the right to object her choice on a man not fulfilling the requirements of suitability (*kufw*).

Imam Yūsuf and Imam Muḥammad both have the view that:

“ any woman who wants to enter her marriage contract, if the partner is according to her status then marriage of both will be done. Only the guardian has the right to raise objection if the husband was not according to her status. If both were agreed and they had the same status then the right of guardian will abrogate”²⁴

Al-Mawwāq quotes the Andalusian jurist, Ibn Lubb, as saying that the requirement of a guardian is only to assure that the (requirement of) *kafā'ah* is met, (which is accomplished) by means of the guardian's judgment.

Basis of Requirement of *Kufw*:

According to the Ḥanafī School of Law, the guardian may object her choice of prospective husband if he does not fulfill the requirements of *Kufw* i.e. the he has no good qualities, or she marry for less than the appropriate dower or it become apparent that her husband will deceive her in regard to his own financial position²⁵. The woman must specify the dower appropriate to a woman of her family and status. Imam Abu Hanifa declares that:

“If she selects a suitable match and does not settle for a reduced dower, then the marriage is valid and allowed.”²⁶

Her consent is essential for the validity of marriage consent. Imam Abū Ḥanīfah ruled that :

“If the woman contracts herself in marriage without a guardian and the groom is of equal social standing (*Kufw*), the contract is permissible”²⁷.

Evidences by the jurists of Hanafi School of Law:

This position of validity held by the Ḥanafi School is based on many evidences, and it would not be possible to explain all of them here with their implications.

1. Allah Most High says:

“When you divorce women, and they fulfil the term of their waiting period (*‘iddah*), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms.”²⁸

In this verse, Allah Most High attributes the conducting of marriage to women which is an indication that they are able to marry themselves without the permission and approval of their guardian. Moreover, the guardians are instructed not to interfere by preventing them from marrying their former husbands.

2. At another place Allah Most High says:

“If any of you dies and leaves widows behind, they shall wait concerning themselves four months and ten days: When they have fulfilled their term (of *‘iddah*), there is no blame on you if they dispose of themselves (marry themselves off) in a just and reasonable manner.”²⁹

In this verse also, there is clear indication that women have full rights of marrying themselves and do not require the approval of their guardian.

3. ‘Abdullah b. ‘Abbas (Allah be pleased with him) narrates that the Messenger of Allah (peace be upon him) said:

“*Ayyim* woman has more rights in managing her own affairs (i.e. marriage etc.) than her guardian, and a virgin’s consent must be sought concerning herself, and her silence implies her consent.”³⁰

In this Ḥadīth, the term *ayyim* means a woman who has no husband (*man lā zawja lahā*) and includes both virgin and non-virgin women. The Messenger of Allah (peace be upon him) is clearly stating that she is more rightful than her guardian in managing her own affairs in terms of marriage and other similar things.

4. ‘Ali b. Abī Ṭālib (Allah be pleased with him) would strongly advise against marrying without the guardian’s approval, but if someone was to go ahead and marry, he would consider their marriage to be valid³¹.

5. As for the Ḥadīths indicating that marriage without the guardian’s approval is completely invalid: “There is no marriage without the (permission of a) guardian”³²

And “Any woman who marries without the permission of her guardian, her marriage is invalid, invalid, invalid”³³, Zafar Ahmad Uthmani states in his encyclopedic work, *I’lāl-Sunan*, that:

“...aḥādīth mentioned above such as her marriage is invalid, in some situations and that situation is when she marries herself off to a person who is not considered a legal match to her. These are to be understood in light of the other aḥādīth that point to the validity of such a marriage. As such, the generality in these two ḥadīths is restricted to pubescent (*non-bālighah*) and slave women, whilst adult and free women are to be excluded from this general ruling due to the evidences favouring the validity of their marriages without the guardian’s approval. There is no complete and blessed marriage without the permission of the guardian but the marriage in of itself is valid provided the woman marries a person who is a legal match to her”.

6. Moreover, the two reporters of these two Hadiths, Sayyeda A’isha and Imam Zuhri (Allah be pleased with them) have both opposed the ruling given in them.

Sayyida ‘Āyishah (Allah be pleased with her) married off Ḥafsah bint Abdurrahmān without the approval of her guardian, whilst Imam Zuhri is reported to have said:

“Any woman who marries herself without her guardian’s approval, her marriage is valid”.

It is an accepted principle that if the reporter of a narration himself or herself contradicts that which is being reported, then his/her reported Ḥadīth should not be taken as its literal meanings, but rather understood in light of the reporter’s action³⁴.

7. All of this, the two Ḥadīths have certain deficiencies from a transmittal (*isnād*) point of view. The above explanation determines that if a woman marries a person who is not considered a legal match to her without the approval of her guardian, then her marriage will be invalid.

Marriage without the guardian’s approval is valid:

This ruling is for all types of women, virgin, non-virgin, widow or divorced. Marrying someone who is a legal match is the guardian’s right as much as it is the right of the woman.

Shaykh Muḥammad Qudri writes:

“...It is the right of a free and legally responsible woman to marry herself without the approval of her guardian, whether she is a virgin or non-virgin. This marriage will stand as valid if the husband whom she married is a legal match to her...”

“...And if she (free and legally responsible woman, whether virgin or non-virgin) married herself off to someone who is not a legal match to her without the explicit approval of her guardian before the marriage contract, then her marriage would be invalid altogether, and the permission given by the guardian later on will be of no consequence (meaning a new marriage contract will have to be performed should the guardian agree later on).”³⁵

For the Ḥanafi jurists, the woman could choose to reject the marriage when she achieved majority on reaching puberty, exercising the option of puberty (*khiyār al-bulūgh*) unless the marriage had been contracted by her father or paternal grandfather.

Guardian is authorize to settle the terms of the marriage contract:

Ḥanafi School of law has the view that an adult woman is always entitled to give her consent without the intervening of Guardian. The Ḥanafi School of law rendered complete consent to woman dependent on her achievement of legal majority (at the onset of puberty).

“when a girl is adult and discreet, no one has a right to be her guardian, but it is nevertheless becoming and proper for her to authorize her father or grandfather to settle the terms of the contract for her. If she has no father or grandfather, it would be well for her to appoint her brother to act on her behalf”.³⁶

Zafar Ahmad Uthmani states:

“We (also) hold the position that a marriage without the approval of the guardian is invalid in some situations, even if the woman is an adult (*bālighah*) or non-virgin/widow(*thayyibah*), such as when she marries herself off to someone who is not her legal match and her guardian does not approve of it”.³⁷

The above mention argument clearly shows that the guardian in marriage has the authority to safeguard the interest of the ward in respect to the same match of the groom for the bride.

Conclusion :

Shari‘ah provides complete legal capacity to women regarding marital issues. According to the juristic opinion by Ḥanafi School of law a minor girl (i.e. who has not passed the age of puberty) cannot conduct her marriage contract due to restricted legal capacity and weakness in her understanding which may not be sufficient for her to make a decisive decision. She has the right to exercise option of puberty. Muslim Jurists have consensus on the opinion that mature Muslim woman, who is a divorcee or a widow, has full legal capacity to perform her marriage contract on her own accord and desire. This is due to the fact that she has experienced marriage and its associated occurrences therefore Shari‘ah allows mature woman to have complete legal capacity. The main disagreement amongst the jurists of different schools of law is regarding the issue of a mature woman who is of sound understanding and intellect, and attains age of puberty and never has been married previously. According to Jurists of Ḥanafi school of law, if a mature woman conducts her marriage without the permission of her guardian to a man who is compatible in legal and social status with her, then she has the complete legal capacity to do so. However concluding her marriage contract with the permission of her guardian by a Muslim woman is the most preferred and an ideal manner because of modesty.

Endnotes:

¹Al-Quran 30:21

²Al-Quran 4:21

³*al-Mu‘jam al-Awsat* hadith no.992

⁴Abdur Rahim. *The Principles of Mohammedan Jurisprudence* (Lahore, 1958) p. 227

⁵Kamali, *Principles of Islamic Jurisprudence* .pp. 236-237

⁶Syed Amir ‘Ali. *Mohammaden Law*. Vol: 2. P 275

- ⁷ Kāsāni, ‘Alāuddin, *Badāi‘ al-Ṣanāi‘*. Vol: 2 p 229
- ⁸ Al-Zarqa. *Al-Madkhal al-fiqhi Al-am*, (1959) vol. 2, p. 295
- ⁹ Hammūdah, Abd al-Ati. *The Family Structure in Islam*, p. 70
- ¹³ Sarakhsi, *al-Mabsūt*. Vol4, p. 193
- ¹¹ Al-Quran 4:6
- ¹² Kāsāni, ‘Alāuddin, *Badāi‘ al-Ṣanāi‘*. Vol 2 p 241.
- ¹³ al-Marghīnānī, *Al-Hidaya -the Guidance*, vol. 1, *Kitāb al-Nikāh*, 491.
- ¹⁴ Hanafi School of law includes a broader range of family guardians in the absence of the closer ones. Her guardian is understood to be the father, if the father is not alive, then the grandfather, then the blood brother, then the uncle (father’s brother), then cousin (father’s brother’s son), then the mother.
- ¹⁵ Siddique, Muhammad Iqbal. *The Family Law of Islam*. (Virginia: Kazi Publications, 1984) p 115
- ¹⁶ Sunni School of law including Shafi, Hanbali and Maliki. Al-Jaziri, Abd al-Rahman, *Kitab al-Fiqh ala al-Madhahib al-Arba’a*, vol.4, pp.21, 22.
- ¹⁷ Al-Said, Al-Said Zustaḥa, *Fi Madalsti’ malHuqzwq al-Zawjiyyahwa ma Tataqayyadbihi fi al-Shari ‘ah al-Islamiyyahwa al-Qanun al-Misri al-Hadith*, pp.172-175.
- ¹⁸ Kasani, Alauddin, *Badai al-Sanai*. (Cairo: Sharakat al-Matbuat al-Islamiyyah) Vol 2. p 229
- ¹⁹ .ibid p. 241
- ²⁰ Ibn Qudama, *al-Mughni*, Beirut: Dar al-Fikr 1985 vol 4, p .512-514,
- ²¹ Ibid. Ibn Qudama, , p.512-514
- ²² Imam Sarkhasi. *Al-mabsut*.p 157
- ²³ Siddiqi, Hamid Abdul,Sahil, *Sahih Muslim*, Vol. 11, p. 715.
- ²⁴ Anwar Muhammad Noor. *Nikkah may walikhasiyat*. (Lahore: Wahdat Foundation 1999) p 155
- ²⁵ Ahmad, Naseem. *Woman in Islam*. (New Dehli: APH Publishing corporation, 2003) p 562
- ²⁶ ibid p. 563
- ²⁷ Masud Muhammad. *Islamic Laws and Women*. (Islamabad: Giant Forum 1996)p 56
- ²⁸ Al-Quran 2:232
- ²⁹ Al-Quran 2: 234
- ³⁰ Sahih Muslim, no: 4121, Abū Dāwūd, no. 2085 and At-Tirmidhi no. 1101
- ³¹ Kanz al-‘Ummāl, no: 4575
- ³² related by Ḥākim and Abū Dāwūd
- ³³ related by Ibn Ḥibbān, Tirmidhi and others, and Tirmidhi considered it to be ḥasan
- ³⁴ Zafar Ahmad Uthmani .*I’lā al-Sunan*. Vol 1, p. 66-68.
- ³⁵ Shaykh Muhammad Qudri Basha .*al-Aḥkām al-Shar’iyyah fi al-Aḥwāl al-Shakhṣiyyah*. P 31-32
- ³⁶ Khan Tauqir. M. *Law of Marriage and Divorce in Islam*. New Delhi: Pentagon Press. p 27
- ³⁷ Zafar Ahmad Uthmani .*I’lā al-Sunan*, Vol 1, p. 69