

The A-Z of Love & Mercy

The Fiqh of Marriage and Divorce



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Course objectives

1. Learn all about the *fiqh* of marriage.
2. Learn in detail the rulings of divorce and its intricacies.
3. Learn all about the *‘iddah* and its rulings.
4. Clarify a number of misunderstandings regarding marriage and divorce laws in Islam.
5. Have a good idea about the rulings regarding some of the most important modern issues that plague our society in the matters of marriage and divorce.
6. Appreciate the comprehensive nature of our Sharī‘ah.



The Fiqh of Marriage

Introduction to marriage

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| Linguistic definition | <p>النكاح: الوطء وقيل للتزويج</p> <p><i>Nikāh</i> linguistically means ‘sexual intercourse’ and also ‘marriage contract’.</p> |
| Legal definition | <p>عقد يفيد حل لم يتناه عن كل من الزوجين الآخر في الوطء</p> <p>المشروع</p> <p>A contract entailing permissibility of mutual physical enjoyment.</p> |

The wisdom behind marriage

1. It fulfils the physical desire that is in the very nature of men and women. This physical desire is natural and the fulfilment of it is considered a human and fundamental need by the Sharī‘ah.
2. It is the means to preserve mankind.
3. It fulfils the need of human beings for comfort and mercy from each other.
4. It ensures that every child in each generation has the opportunity to be brought up by a mother and a father.
5. It fulfils the desire of the *ummah* to increase in number.
6. Increase of *īmān*.

Permissibility of Marriage

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| Qur'an | <p>﴿فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنً وَثُلَّةً وَرُبْعَ﴾</p> <p><i>So marry women of your choice: two, three or four. (Sūrat al-Nisā³, 4:3)</i></p> |
| Sunnah | <p>يا مَعْشَرَ الشَّبَابِ مَنْ لَيْتَ طَاعَ نِكَاحٍ لِبَاءِ قُلُوبِهِ زَوْجَ فَلَهُ أَغْضُ الْبَصَرِ، وَأَحْسَنَ الْهَرَجِ، وَمَنْ لَمْ يَسْتَطِعْ فَلَْيَصُمْ فَإِنَّ لِلصَّوْمِ لَهُ وَجَاءٌ</p> <p>‘O young men! Whoever amongst you is able to afford it, then let him get married since it is more protective over the sight and more protective of your chastity. Whoever is not able to, then let him fast, since it will be a shield for him.’ (Agreed Upon)</p> |
| Ijmā^c | <p><i>Ijmā^c is reported by Imām Ibn Qudāmah (رحمه الله) in his Kitāb al-Mughnī (6/446).</i></p> |

The rulings of marriage

According to the vast majority of the scholars of Islam and of the four *madhabs*, may Allah have mercy on them all, the basic ruling regarding marriage is that it is recommended. Shaykh al-Islām Ibn Taymiyyah (رحمه الله) said: ‘To turn away from having a family and children is not from that which Allah and His Messenger (ﷺ) loves, nor is it from the religion of the Prophets. Allah says:

﴿وَلَقَدْ أَرْسَلْنَا رُسُلًا مِّن قَبْلِكَ وَجَعَلْنَا لَهُمْ أَزْوَاجًا وَذُرِّيَّةً﴾

And we sent Messengers from before you and gave them wives and offspring's.

[(*Sūrat al-Ra'ad*, 3:38)]

(Ibn Taymiyyah, *Al-Ikhtiyārāt al-fiqhiyyah*, p. 200)

However, frequently, the scholars also mention the ruling of marriage depending on the situation of an individual. These rulings can be any of the 5 rulings of *aḥkām* – *wājib*, *ḥarām*, *mandūb*, *makrūh* and *mubāh*.

The various *aḥkām* with regards to marriage:

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| Obligatory (<i>wājib</i>) | According to most of the scholars, marriage becomes obligatory when a person fears <i>zinā</i> for himself or herself. (<i>Al-Mughnī</i> , 6/446) |
| Recommended (<i>mandūb</i>) | Marriage is recommended for a person who has the means. This is the basic rule according to majority of the scholars. |
| Disliked (<i>makrūh</i>) | Marriage is disliked if the man or woman <u>fears</u> that he/she: <ul style="list-style-type: none"> • Cannot physically satisfy the partner. • Cannot fulfil their obligations to the partner. |
| Prohibited (<i>ḥarām</i>) | Marriage is prohibited upon either or both the man and woman if: <ul style="list-style-type: none"> • He/ she, with certainty, cannot physically satisfy the partner, unless the partner accepts it. • He/she, with certainty, cannot fulfil certain marital obligations to the partner. • There is a legal reason preventing them from the marriage. |

Choosing the right spouse

The Prophet (ﷺ) said:

تَخَيَّرُوا لِمَنْ تَخْلُقُونَ وَأَنْكِحُوا الْخَيْرَ وَأُولُوا إِلَىٰ هِمٍّ

‘Choose carefully for your progeny and marry the suitable and give in marriage to them.’ (Ibn Mājah (1/633) and others; *ḥasan* according to al-Albānī)

Choosing a wife

The Sharīʿah advises a man to search for a woman who:

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| <p>is righteous</p> | <p>The Sharīʿah advises the man to seek the woman who possesses higher levels of righteousness</p> <p>The Prophet (ﷺ) said:</p> <p>تَنْكِحُ الْمَرْأَةَ لِبَعْضٍ مِنْ دِينِهَا، لِبَعْضٍ مِنْ نَسَبِهَا، لِبَعْضٍ مِنْ مَالِهَا، وَلِبَعْضٍ مِنْ هَيْئَتِهَا</p> <p>A woman is married for four reasons: her wealth, her lineage, her beauty and her religion. So choose the one with religion, may your hands be rubbed in dust!</p> <p>(Reported by al-Bukhārī, no. 5090 and Muslim, 1466)</p> |
| <p>is beautiful (attractive to him)</p> | <p>This is understood from the recommendation of the Sharīʿah to look at the prospective bride before getting married. (<i>Iḥyāʾ ʿUlūm al-Dīn</i>, 2/35).</p> <p>Ibn Ḥajr (رحمه الله) says: ‘We understand from the (above) <i>ḥadīth</i>, a recommendation to marry beautiful women except in the case wherein there is a beautiful woman that is not a righteous woman vs. a righteous woman that is not beautiful. Indeed, if they are similar in religion, then the beautiful one is more worthy of marriage!’ (<i>Fath al-Bārī</i>, 9/134).</p> |

What do you think of the phenomenon in our communities these days wherein the parents only approve of prospective partners from the same direct family, tribe, city

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| <p>is good with children and sensible and careful with money and wealth</p> | <p>The Prophet (ﷺ) said:</p> <p>خَيْرُ نِسَاءٍ رُفِقْنَ لِبِلَالٍ صَالِحِينَ أَعْقَرِي ح: أَسْجَاهُ فُجِي وَلَدَهُ فِي صُغُرِهِ، وَأَرْعَاهُ فُجِي زَوْجَ مَطِي ذَاتِي دَه</p> <p>The best of women to ever ride a camel [i.e. an expression meaning – the best of all women] are the women of Quraysh: she is most protecting and caring for her children in their childhood and the most protective over the wealth of her husband. (Al-Bukhārī, 9/125)</p> |
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Note: The Shāfi‘ī and Ḥanbalī *madhhabs*, may Allah have mercy on all the scholars of Islam, recommend the marrying of women distant in relation or not related as opposed to someone closely related. There is no authentic *ḥadīth* for evidence on this matter other than logical reasoning of scholars. The stronger opinion is that this is a matter that needs to be judged individually.

Choosing a husband

The Shari'ah has laid down certain guidelines in this matter:

- The groom should be upright in religion and character as the Prophet (ﷺ) said:

إِذَا نَكَحْتُمُ امْرَأَةً وَنَسِيتُمْ بَيْنَهُمَا أَحَدًا فَلْيَتَّقِ اللَّهَ وَأَقِمِ وَجْهَكَ لِلدِّينِ حَنِيفًا فِى الْإِسْلَامِ وَكُنْ مِنَ السَّادِقِينَ
فَتَقَى الرِّضْ فَسَادِ عَرِيضٍ

If there comes to you the one pleasing to you in his religion and character then marry to him, if you don't there will be a manifest trial on earth and great corruption. (al-Tirmidhī, 1085)

| Criteria important to you | 1 to 10 |
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Making the proposal

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| Linguistic definition | <p>الخطبة: طي الرجل امرأة للزواج</p> <p>The term '<i>khiṭbah</i>' in Arabic refers to a man seeking a woman for marriage</p> |
| Legal definition | <p>لتماس الرجل لخطاط لكاح من جهة لامخطوبة</p> <p>A man offering a proposal of marriage to a woman or her family.</p> |

? How much negative information can a person mention about the other person?

Important matters regarding the proposal

- It is recommended to seek advice during the proposal period based on the *ḥadīth* of Fāṭimah bint Qays who asked regarding Mu'āwiyah b. Abī Sufyān and Abī Jahm who had both proposed to her. The Prophet told her: 'As for Abū Jahm, then his stick does not leave his shoulders and as for Mu'āwiyah, then he is stingy and does not give money. Rather, marry Usāmah b. Zayd.' (Abī Dāwūd, 6/379–80)
- Imām al-Nawawī said: 'And from them is the consultation during the process of marriage of a person. It is imperative that the one who is consulted not conceal the prospective person's real state. Rather he should mention that which is negative in him with the intention of giving sincere advice.' (*Dalīl al-Falīḥīn* quoting from Imām al-Nawawī, 6/21)
- It is recommended to make *istikhārah*, just as it is reported that Zaynab (رضي الله عنها) made *istikhārah* before marrying Rasūl Allah (ﷺ) (*Sharḥ Ṣaḥīḥ Muslim*, 9/227–28). Then the following verse came down, at which time the Prophet (ﷺ) entered upon her without seeking permission:

﴿فَلَمَّا قَضَىٰ زَيْدٌ مِّنْهَا وَطَرًا زَوَّجْنَاهَا﴾

When Zayd had fulfilled his need from her, we married her to you. (Sūrat al-Aḥzāb, 33:7)

- Imām al-Nawawī (رحمه الله) said: ‘In this (narration of Zaynab’s (رضي الله عنها) *istikhārah*) is a recommendation to make the *istikhārah* for anyone who has any matter concerning him, whether the goodness in the matter is clear or not. It may be that she made *istikhārah* due to her fear that she may fall into some shortcoming in serving him (عليه السلام).’ (Sharḥ Ṣaḥīḥ Muslim, 9/228)

The manner of *istikhārah* is as outlined in the Sunnah:

To pray two *rak‘ah* prayer (according to a narration – from other than the obligatory prayers) then to make the following *du‘ā‘*:

Is it a condition to see a dream indicating to you the way forward?

اللهم لي أنت خير لكسب لئلا أكون، ولأنت خير لكسب لئلا أكون، ولأنت خير لكسب لئلا أكون،
فلأنت خير لكسب لئلا أكون، ولأنت خير لكسب لئلا أكون، ولأنت خير لكسب لئلا أكون،
أن هذا الأمر - خير لي في ديني وداري وأهلي وأمتي وأرضي وأهلي وأمتي
لي ويسر لي مشياري في ديني وأهلي وأمتي وأرضي وأهلي وأمتي وأرضي وأهلي وأمتي
ومعالي وعاجل أمري وأهلي وأمتي وأرضي وأهلي وأمتي وأرضي وأهلي وأمتي
الخير حيث كان ثم أرني به قايلاً: ويسمي حاجته

O Allah, I seek Your help in finding the best course of action (in this matter) by invoking Your knowledge; I ask You to empower me, and I beseech Your favour. You alone have the absolute power, while I have no power. You alone know it all, while I do not. You are the One who knows the hidden mysteries. O Allah, if You know this thing (I am embarking on) [here mention your case] is good for me in my religion, worldly life, and my ultimate destiny, then facilitate it for me, and then bless me in my action. If, on the other hand, You know this thing is detrimental for me in my religion, worldly life, and ultimate destiny, turn it away from me, and turn me away from it, and decree what is good for me, wherever it may be, and make me content with it. (Based on the *ḥadīth* reported by Al-Bukhārī, Abū Dāwūd, al-Nasāʾī and others.)

A woman may present her proposal to a righteous man.

A *ḥadīth* reported by Anas (رضي الله عنه) states:

جاءت امرأة إلى رسول الله صلى الله عليه وسلم عرضت عليه نفسها فقالت: يا رسول الله، ألتبى حاج فقل تسبنت لئس: ما قل مجيء، ولس وئاهق! لئس: هي خير منك، رغبتي للنبي صلى الله عليه وسلم فعررت عليه ففسها

A woman came to the Messenger of Allah (ﷺ) presenting herself to him and said: O Messenger of Allah, do you have any need that I can fulfil [T: in marriage]? So the daughter of Anas said: How lowly is her sense of shame! O how demeaning! Anas replied: She is better than you. She desired to marry the Prophet (ﷺ) and presented herself to him. (Al-Bukhārī, see *Fatḥ al-Bārī*, 9/173 and Ibn Mājah, 1/645)

Ibn Ḥajr (رحمه الله) said: ‘In these two reports is an indication as to the permissibility of the woman presenting herself to a man and making a clear proposal to marry him. There is no shame or reproach for her in this. It also shows that the one who had the woman present herself to him may either agree or disagree; however, it is recommended for him to not verbally disagree in front of her. To remain silent is enough of an indication for the woman to understand his response and better mannered than to respond verbally in the negative.’ (*Fatḥ al-Bārī*, 9/175)

Or she could also approach by informing the family of the groom or informing her own family of her interest in him. This is the manner that Khadijah (رضي الله عنها) took when proposing to Rasūl Allah (ﷺ).

This is different to the story of another woman who ‘gifted’ herself to the Prophet (ﷺ) and the Prophet didn’t want to marry her. This second report is also in al-Bukhārī, after this report.

Looking at the prospective bride

It is recommended for the man to look at the woman and for the woman to look at the man based on the advice of Rasūl Allah (ﷺ) to Mughīrah b. Shu‘bah (رضي الله عنه) since it creates interest and is stronger in establishing love and desire between the two. The man can look for a woman with features that he desires and vice versa.

Ibn al-Jawzī (رحمه الله) said: ‘It is recommended for the one who wants to give his daughter in marriage, to search for a young man who is handsome and manly and not marry her off to an unsightly weakling!’ (*Kashshāf al-Qanā‘*, 3/5)

- It is permissible that the man sees from the woman what is apparent from her, preferably with her knowledge. It is also permissible to look at her without her knowledge, however he should never be alone with her.
- A woman can also see what she wants from the man according to the norms, even though the face may be the most important consideration.

| Important questions to ask a potential spouse: | |
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