

MARRIAGE IN ISLAMIC LAW AND THE CASE OF AHMAD SANI [YERIMAN BAKURA]

By

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Introduction:

Marriage in Islamic Law is a sacred contract which involves a man and a woman who would themselves benefit from the union as well as benefit the community in several aspects. It is probably for this reason that several laws are being formulated to safeguard the union. Several countries have fixed an age for which persons are allowed to get married. However, the marriageable age in Islamic law tends to bring about so many dialogues on the issue. Most often than not, child marriage is attributed to the religion of Islam.

Child marriage connotes the legal union between parties who are children. The parties referred here could be in two fold. The first is in respect of two parties who are children or are within the same level of awareness whose marriages have either been arranged by their parents, guardians or on their own volition. The second refers to marriage between a child (mostly a female) and a major (older person). Though this article may not discriminate between the two, it may lean closer to the second aspect as it is the one that may cause uproar. Islam has been put in the limelight with respect to child marriages and every so often Muslims have been labeled as pedophiles.

The bone of contention has been the marriage of the Prophet of Islam Muhammad (S.A.W) to Aisha bint Abu Bakr (R.A) who was reported to have been six years of age but only joined the Prophet's household at the age of nine. Most recently the uproar has increased as reports of Sen. Ahmad Sani's (Yeriman Bakura) marriage to a thirteen year old Egyptian girl has caused many to question the actual position of Early marriage in Islam and the philosophy behind it.

It is therefore the aim of this article to point out the true position of marriageable age in Islamic. After understanding what marriage is and its

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purpose, the stand of child marriage is equally intended to be visited and thereafter a reference to the case of Senator Ahmad Sani (Yerima Bakura) and the arguments accompanying it will be discussed.

1.2 Marriage in Islamic Law

Marriage in Arabic is termed '*Nikah*'¹ meaning contract. The Holy Qur'an equally referred to it as '*Mithaqan Ghaliza*'² meaning a strong covenant. Simply put, marriage is a contract between a man and a woman giving rise to rights and obligations.

It was narrated by Anas (may Allah be pleased with him) that the Messenger of Allah (S.A.W) said "when a man marries, he has fulfilled half of his religion, so let him fear Allah regarding the remaining half"³. The Prophet (S.A.W) was also reported to have said

O you young people, he who amongst you that is capable of supporting a wife should marry, because it covers the eye and protects the *farj* (reproductive organ), but those who are incapable should delve into fasting for it protects⁴

The general purpose of marriage is that the sexes can provide company to one another, love to one another, procreate children and live in peace and tranquility to the commandments of Allah⁵. Marriage serves as a means to emotional and sexual gratification as a means of reducing tension. It is also a form of *ibada* because it is an act obeying Allah (S.W.A) and His messenger⁶.

A marriage becomes valid only with a guardian, legality of marriage between the couples, formal statement of offer and acceptance⁷, witnesses and dowry⁸. A Guardian (*waliy*) according to some scholars⁹ has the right

¹ Quran 33:49

² Quran 4:21

³ Quoted in Doi A.I, Basis of Sharia, Gaskiya Corporation, Zaria, (1981) p169

⁴ Bukhari, Sahih Bukhari Chapter 2, Hadith 10

⁵ Available <http://www.Jannah.org/sisters/marr.html> (visited 29th May 2010 at 1:22am)

⁶ *ibid*

⁷ Ambali M.A., The Practice of Muslim Family Law in Nigeria (2nd ed) Tamaza Publishing Company Ltd, (2003), Zaria, pg 147

⁸ Hussain J., Islamic Law and Society: An Introduction, The Federation Press (1999) Australia, pg 61

to decide whom his ward should marry with or without her consent; this right is termed the power of *Ijbar*¹⁰. This power is exercisable only by a biological father on his daughter who must either be one of the following:

- a. A virgin daughter that has never married and it does not matter whether she loses her virginity as a result of extra marital relationship¹¹;
- b. A daughter who has ceased to be a virgin as a result of a valid marriage but there had been separation as a result of death or divorce before she attained the age of maturity¹²;
- c. A daughter, virgin or otherwise who is of unsound mind¹³;
- d. A virgin whose marriage is contracted, dissolved and still remains a minor while she has not spent up to a year in the matrimonial home.¹⁴

Though a guardian has the power of *ijbar*, he is expected to exercise such power for the benefit of the daughter and not otherwise. Thus the power is meant to be a shield rather than a sword. This is the view of the *Maliki* school of thought. Other Islamic scholars tend to lean towards the fact that the consent of parties is necessary for the validity of marriage, arguing that during the time of the Prophet (S.A.W), he said:

“A widow and the divorced woman shall not be married until her order is ordained and the virgin shall not be married until her consent is obtained”¹⁵

In another narration, the Prophet (S.A.W) gave a virgin girl the right to repudiate or confirm her marriage when she came to him and said that her father had married her against her wish.¹⁶

It can also be inferred that consent is necessary from the following verses of the Holy Quran, thus:

And when you divorce women and they have come to the end of their waiting period, hinder them not from marrying other

⁹ This is the opinion of Imam Malik see Ambali M. A. Op Cit p 47

¹⁰ Ambali *op cit* at p147.

¹¹ *ibid*

¹² *ibid*

¹³ *ibid*

¹⁴ *Ibid*

¹⁵ Quoted by Doi. A.I., Sharia the Islamic Law. Taha Publishers, London.[1984], p 123

¹⁶ *Ibid*

men if they have agreed with each other in a fair manner¹⁷

The Holy Quran also provides "O you who believe, it is not lawful for you to inherit women against their will"¹⁸

1.3 Marriageable Age in Islamic Law

There is actually no specific mention of a minimum or base age in the Holy Quran. What is most relied on is the conduct of the Prophet (S.A.W) which practice is mostly emulated as justification for the permissibility of child marriage. The marriage between the Prophet (S.A.W) and Aisha bint Abubakar (R.A) took place when she was six but was taken to live with him at the age of nine.¹⁹

However, there is sharp division between the conservative orthodox and the pragmatic *modernist* on the age of marriage²⁰. Thus relying on the authority of the age of adulthood which provides

"And try the orphans (as regards their intelligence) until they reach the age of marriage..."²¹

The pragmatist opined that adulthood is synonymous with the age of marriage hence the age of marriage is the age of maturity. In other words, the age of marriage is ripe when a child experiences 'wet dreams' in the case of a male child and monthly courses in the case of a female child. Thus the attainment of adulthood may vary due to different circumstances, be it the environment, climatic condition, nutrition, adequate or insufficient medical care and sometimes the physical uniqueness of the child's body and other factors.²² Also with reference to marriage of minors, a verse of the Holy Quran which talks about the waiting period of divorced women who have not yet started their courses is relied upon. Thus:

"And those of your women as have passed the age of monthly courses, for them the

¹⁷ Holy Quran 2:232

¹⁸ Holy Quran 4:19

¹⁹ Bukhari, Sahih al-Bukhari, Book 7, vol 62, Hadith 6.

²⁰ Ambali., *Op cit* p156

²¹ Quran 4:6

²² Ambali M. A. *Op Cit* p156

iddah (prescribed period) if you have doubt (about their period) is three month ;and for those who have no courses their iddah [waiting period] is three months likewise, except in case of death]....”²³

Ambali quoted the opinion of Ali on the above verse thus:

Support is sometimes sought for marriage of minors from the verse which speaks of women not having courses as being divorced (Quran 65:4). But it is wrong to identify women who have not had their courses with minors, for there may be cases in which a woman reaches the age of majority though she has not had her courses and it is with such exceptional cases that this verse deals²⁴

On the other hand, the conservative orthodox jurists opined that there is nothing like minimum or maximum age of marriage, this position is based on Qur'an 65:4 (supra) . Ibn Kathir commenting on this verse opined that ‘...those who have no courses’ as stated in the verse refer to immature females²⁵. Al-Khawarizimiy equally stated that those who have not experienced menstruation are the small ones²⁶ .

According to Hanafi School, the marriage of a minor boy or girl is lawful whether the minor girl is a virgin or *thayyibah* provided the guardian is one of the *asaba* (relation from the father's side)²⁷ . Imam Malik also recognizes such marriage only when the guardian is a father²⁸ . Imam Shafi'i recognizes such marriage only when the guardian is a father or a grandfather²⁹ .

²³ Holy Qur'an 65:4

²⁴ Ambali., *Op cit* p 156

²⁵ Ibn Kathir ,Tafsiratul Qur'an al azim, vol 4 p.121

²⁶ Al- Khawarizimiy,al-kash-shaf,vol 4, p.121

²⁷ Doi, *Op cit* p.142(note 3)

²⁸ *ibid*

²⁹ *ibid*

On the basis of the above authorities, it is submitted that just like in Christianity and Judaism,³⁰ Islamic law does not fix any particular age for marriage. Therefore Islamic law does not disapprove child marriage so long as the procedure set out by Islam is abided by in the contract³¹. It is only desirable that parties should have reached puberty before they commence marital relations. It is now the consensus among scholars that the attainment of puberty should be used as the minimum age but as mentioned earlier this may vary due to certain factors. However in the absence of evidence, the minimum age was set by Hanafi school at nine years for females and twelve years for males³². A more modern view is that puberty is deemed to have been attained at the age of fifteen years for both sexes.³³

Another consideration which may serve as guidance is the health of the child. One of the major reasons of the attack on child marriage is the problem of child birth and child bearing which may cause complications known as Vesico –Vaginal Fistula(VVF). A condition caused by giving birth when the cervix is not well developed. This condition is not limited to minors, thus, women of older age whose cervix is not well developed may have such complications also. If there is also evidence to prove that consummation of marriage may cause harm to the bride be it a child or a mature woman, this would be unlawful for the husband because she is not fit and there is certainty of harm, and harm is unlawful in Islamic Law³⁴.

It is not out of place to assume that marriage of minors is frowned at because that will hinder her educational pursuit. Islamic Law has taken the issue of education especially of the girl child paramount because it serves as foundation for the society and that girl child is the mother of tomorrow.³⁵ It was reported by Malik Ibn Huwairith that a group of young men came and stayed close to the prophet in order to acquire knowledge when it was time for them to live, the Prophet (S.A.W) said to them

³⁰ Habib A.G., Marriage, Islam and Child's Right Act available at <http://alafriac.com/stores/20/005240966.html> (visited 3rd June 2010) The 13th edition catholic Encyclopedia provided that marry was married to Joseph[90 years old] at the age of 12. Under the Jews law Talmudic law stated that a girl of three years and one day can betrothed, subject to her fathers approval. Available at www.answering-christianity.com.

³¹ Ambali., *op cit* p.156

³² Hussaini., *Op cit* p.62

³³ *ibid*

³⁴ Rif'at U.M., The Laws of Marriage in Islam, Dar al-taqwa, London (1995) p 87

³⁵ Gunda, J.T., Girl Child Education: The Islamic perspective. A journal of Sharia Law Students Association, University of Maiduguri, Vol 1, No IV and V, Maiduguri. (1996) p 48

“Return home to your wives and children, and stay with them, teach them (what you have learnt) and ask them to act upon them”³⁶

1.4 The case of Ahmad Sani (Yeriman Bakura).

Recent events which seemed to have caused the major uproar on child marriages is the marriage of Ahmed Sani [Yeriman Bakura] (former elected civilian governor of Zamfara state and now a Senator), to an Egyptian girl who is suspected to be of thirteen years of age. The prevailing argument is that his act violated the right of the bride under the Child's Rights Act. Section 21 of the Act which provides as follows:

“No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever”

Clearly from the foregoing it can be seen that there are conflicting positions between Islam and the Child's Right's Act considering what has been discussed earlier. As Islam provides no specific minimum age of marriage but rather more of guides as to what is most suitable in such circumstances. It gives its followers the capacity to choose from the ages so long as it follows reasonability and the dictates of the Shari'a, with consideration to the attainment of puberty. It is also the case that the minimum age of marriage in Egypt is eighteen for males and sixteen for females.³⁷

The arguments raised in favor of the Senator is that Section 21 of the Child's Right's Act is not only at variance with prophetic tradition but also unconstitutional³⁸. As section 38 of the 1999 Constitution provides:

“Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief, and freedom (either alone or in

³⁶ Bukhari, M. Sahih Bukhari, kitab al-akhan

³⁷ Available at <http://www.law.emory.edu/ifl/legal/egypt.htm> (visited on 13/07/2010, 10:11pm)

³⁸ Mukhtar A.U, Child's Right Act is unconstitutional, available at <http://www.news.dailytrust.com/index.php?option=comcontents&view=article&id=child-rights-act-is-unconstitutional-i&catid=49:opinion&itemid=200>

community with others and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance”.

Still in line with laws which are at variance with prophetic tradition, the Northern Nigerian Penal Code³⁹ provides that a person is said to commit rape if he has carnal knowledge of a girl with or without her consent, when she is less than fourteen years of age or is of unsound mind. It further provides that sexual intercourse between a man and his wife is not rape if she has attained puberty.⁴⁰ It may therefore follow that, a man who has non-consensual sex with his wife who has not attained puberty may be guilty of rape within the wordings and simple interpretation of section 282[2] of the Penal Code.⁴¹ However, to the best of our knowledge there is no judicial interpretation on the provision of the section.

Having in mind that the constitution is the supreme law of the land and any law which goes contrary to it is null and void to the extent of its inconsistency. The constitution having provided for freedom of religion, its teachings, practice and observance has supposedly paved a way for the followers of Islam to conduct their religion without any interference thus it is the Section of the Child's Right Act which opts to create a problem⁴².

Thus it is submitted that it is the Section that is inconsistent with the provisions of section 38 of the Constitution and therefore rendered null and void to the extent of its inconsistency.

At this juncture it is pertinent to inquire as to the main purpose of the uproar on early marriage specifically aimed at Islam. One may wonder if it is the contractual union with the legal rights and obligations which is the cause for much concern or the marital (sexual) relationship involved which is perceived to be detrimental to the bride possibly because of the perceived inexperience or immaturity. With respect to the former as already explained

³⁹ Section 282 (1)(e)

⁴⁰ Sec 282[2] Penal Code of Northern Nigeria

⁴¹ Atidoga D.F. The Jurisprudence of The Criminalisation Of Spousal Rape: Nigerian and English Law in Perspective, in EBSU Journal of International Law and Juridical Review Vol 1 2010

⁴² This does not mean that the researchers believe that all aspect of Islamic law in terms of practice, teachings and observance have been fully granted by the Constitution. It is only with respect to its comparison to the Section in the Child's Rights Act that such opinion is made

earlier it is the duty of a guardian to safeguard the rights of a ward and to find or accept a suitable husband who would protect and provide for the ward in accordance with the dictates of the Shari'a. It is sometimes the case that certain brides may fall in the hands of unscrupulous men but this is a situation which arises as a result of conducts not in any way attributable to the rules of Islam. With respect to the latter, mental or physical inexperience or immaturity of the Child are mostly the arguments. It can be said that people have different physiques and girls depending on the maturity of their body, may be able to withstand what others can not. For instance, there have been reports of mothers whose ages range from eight to eleven years⁴³. It could also be the case that women whose ages would give a presumption of child bearing would actually not be able to withstand it, as their physique may be relatively small. Fixing an age for marriage therefore becomes ambiguous. Islam does not ignore the physical health of the child, thus, where it can be certainly proved that harm may be inflicted then it is unlawful.⁴⁴ Furthermore, suffice it to say that different western countries in the world have fixed age of consent which is the minimum age a girl or boy may engage in sexual relations not necessarily within wedlock, ranging from the ages of twelve to twenty one⁴⁵. In fact some ages of consent prescribed are below the age set out for age of marriage. This causes one to wonder if promiscuity is better appreciated and promoted rather than the confinements of a marriage relationship. Some children as young as nine begin to develop a mental understanding of what sexual relations are and some experience yearnings to the extent of actually going out to explore and experiment.⁴⁶ This unfortunately indulges the child to experiment with different partners of different ages who might have had many sexual experiences with different partners, thus, exposing the child to sexually transmitted diseases. This brings us back to the question of what the uproar is all about.

⁴³ A 10 year old girl in 2006 in Belgium gave birth after having relations with a 13 year old boy who attended same school with her. Hilda Trujillo a girl of 9 years gave birth to a girl weighing 2.7kg in Lima, Peru on December 1957. Also an eight year old girl gave birth in Huanuco, Peru on December 2006. Available at <http://en.wikipedia.org/wiki/listofyoungestbirthmothers> (visited 28th May 2010, 11:29pm)

⁴⁴ Rif at *Op cit*, p.87.

⁴⁵ Worldwide Ages of Consent at <http://avert.org/ageofconsent.html> (visited 26th May 2010 at 12:53am)

⁴⁶ Haroian L., Child Sexual Development, *Electronic Journal of Human Sexuality*, Vol 3 (2000) available at <http://www.cjhs.org/volume3/Haroian/body.htm> (visited 29th may 2010 at 12:14 am)

1.5 Conclusion

Judging from the foregoing, marriage in Islam being a contractual union provides for a peaceful dignified arena for comfort and satisfaction as well as obedience to Allah by the spouses. It guards their chastity and protects their integrity. It gives the spouses the opportunity to choose who is most suitable for the relationship in terms of the depth of his obedience to Allah and provides that in so doing a young female be protected and guided in her decision making by a *waliy* (guardian). The *waliy* is to guide her in her best interest. The fact that a girl is a child does not hinder her from marriage as there is no specific minimum age prescribed in Islam. What it tends to lean more towards is the attainment of puberty and even this fact is not strongly embedded as children differ in physique and some may attain it at very young age and others at later years. In any case where it can be proved that any relationship may cause harm to the female, then it is unlawful.

The case of Senator Ahmed Sani (Yeriman Bakura) is not the first and may probably not be the last. The allegation that he violated the rights of his supposed thirteen year old bride under Section 21 of the Child's Right Act is ironically argued to be a violation of his own rights under Section 38 of the 1999 Constitution. That is the right to practice his religion freely with no interference. Thus, if his marriage was strictly in conformity with the dictates of the Shari'a with respect to age of marriage as explained above then the uproar and labeling should be channeled elsewhere, as Islam provides only for the interest of the community.