

Series of Questions Addressed to the Eminent Scholar Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his Facebook Page (Fiqhi)

Answer to Question:

It is Permissible in the Offer and Acceptance of the Marriage Contract that one of them to be in the Past Tense and the Other in the Future Tense

To: Aseel Mahmoud Abu al-Khair

(Translated)

Question:

Assalamu Alaikum wa Rahmatullah,

We would like to have a clarification on a passage in the Social System book that mentions... it is permissible in the offer (Ijab) and acceptance (Qabul) in the marriage contract that one of them to be in the past tense and the other in the future tense ...

Answer:

Wa Alaikum Assalam wa Rahmatullahi wa Barakatuh,

Firstly: In your question, you may be referring to what is stated in the book, *The Social System in Islam* (p. 120 Arabic edition):

“The marriage is contracted by legitimate offer and acceptance. The offer is what originates initially from the statement of one of the two contracting parties. The acceptance is what originates secondly, from the statement of the other contracting party, such as when the betrothed woman says to the suitor, I have married you. and the suitor replies I have accepted, or the suitor offers first and she accepts. Just as the offer and acceptance can take place between two fiancées it can also take place between their (guardian) of the other. It is stipulated in the offer that the wording should be of marriage and matrimony, but that is not stipulated in the acceptance. Rather the condition is the consent of the other (contracting party” to this offer, by any wording that indicates the consent and acceptance of marriage.

The offer and acceptance must be worded in the past tense such as 'I have married you' and 'I have accepted'. Or one must be in the past tense and the other in the future tense. For marriage is a contract, and its wording must indicate that it certainly happened, that is, in the past tense....” End.

Secondly: To make the answer clear, I will mention the following:

1- It is stipulated in the contracts in Islam that the wordings in the offer (Ijab) and acceptance (Qabul) should ensure certainty and binding to the two contracting parties:

- The words that serve this are the ones in the past tense, so if I said (قام فلان) he stood, then the action of standing up has happened and must had ...

- As for the present tense, it does not fully indicate the occurrence of the thing, but its commencement now or in the future, because the present tense indicates the present and the future. So, if I said (يقوم فلان) he is standing, then the action is unfinished, he either started to stand and has not yet finished standing, or he is preparing to stand up but has not yet stood up... But if you put the prefix (س) or the particle (سوف) to the present tense, the meaning will be defined in the future ...

- Whereas, the command tense it comprises the future, so, if I said stand up it is clear that the action has not yet been established. So, the people [experts] of the language say about the command tense "is preparing for the future". These tenses and their denotations are found in the language books ...

Abdelkarim Khudair stated in the explanation (Sharh) of al-Ajrummyah by Ibn Ajurrum, Muhammad Al-Sinhaji, Abu Abdullah, (Died, 723 AH) where **it came in the Matn " Al-Kalam (speech) is the beneficial, composed utterance, that confirms with the established rules., and it is divided into three types: noun, verb and a particle that conveys meaning) and then stated in the explanation** : "The noun (*ism*) is a word that expresses a meaning that is not connected to time, and the verb (*fi'l*) is a word that expresses a meaning or a process connected to time; if time has passed, it is the past tense, if it is the present time or the future then it is the present tense, and the particle (*harf*) is a word whose meaning can only be understood by joining it with other words... ")

Thirdly: According to the meaning of the above-mentioned verb tenses and the application of this in contracts, especially marriage (Nikah) contracts, which is the subject of the question, it becomes clear that:

1- Since contracts in Islam require certainty and binding to the two contracting parties and this is found in the past tense as we mentioned, then the contract of marriage takes place in the offer and acceptance worded in the past tense, such as if the father says "I have married you my daughter" and the husband says "I have accepted her marriage" ... then the marriage has been contracted.

2- Marriage does not take place in the offer and acceptance worded in the present tense which is connected with (*sa* س) or will (*sawfa* سوف), because the indication of the present in this case as we said is "not now, but more like a promise in the future," which does not ensure certainty and binding, and thus, marriage does not take place in this case ... So, If the father said, "I will marry you my daughter," and the man said. "I will marry her.", then the marriage does not conclude with this.

3- If the offer and acceptance are worded in the present tense abstract from the (*sa* س) or will (*sawfa* سوف), or in the command tense ... then based on what we have said that the present tense is used to indicate "the present and the future", as well as the command tense is "preparing for the future", and because the meaning of the future does not ensure certainty and binding but it is more like a promise that the subject to be completed in the future, and thus fixed binding contracts such as marriage do not take place in the future tense. Therefore, the present and the command tenses need Qareenah (connotation) to remove it from the present and exclude the possibility of the contract being concluded in the future, but rather now, and this Qareenah is that one of the two words (offer or acceptance) to be in the past tense, such as:

A- The guardian (Wali) says to the husband, "I came to you to marry you my daughter" and the husband replies "I have accepted her marriage", and the marriage is concluded, although the offer was worded in the present tense and the meanings of the present tense is the present and the future as we have shown ... But the acceptance was worded in the past, specifying the meaning that the contract is immediately completed and not a promise in the future.

B- Or the guardian to say to the husband: Marry my daughter, and the husband says: I accepted her marriage ... Marriage is contracted although the offer is in the command tense, and the command as it is called by the people of the language, is "to prepare for the future" as we have shown ... But the acceptance was in the past, specifying the meaning that the contract is immediately completed and not a promise in the future.

Fourth: This is the meaning of what is stated in the Social System book: (The offer and acceptance must be worded in the past tense such as “I have married you” and “I have accepted”. Or one must be in the past tense and the other in the future tense. For marriage is a contract, and its wording must indicate that it certainly happened, that is, in the past tense....). That is, if not the offer and acceptance both worded in the past tense, and the present or the command tense was used in one of them, then the second must be in the past tense. This is because marriage is a contract, so it must be used in it a word that indicates certainty and that is the past tense.

I hope this is adequate, and Allah is the Most Wise and Most Knowledgeable.

Fifth: For more benefit, I will mention some of what have been stated in this subject by several scholars:

1- It came in Al-Hidayah in the explanation (Sharh) of Bidayat al-Mubtadi (p. 185) of the Hanafi jurisprudence by Burhan al-Din al-Farghani (d. 593 AH) in the chapter of marriage:

[He said: the contract of Nikah (Marriage) is concluded through offer and acceptance using words that express the past tense ... and it is concluded with two expressions, where one of them expresses the past and the other expresses the future such as one party says marry me, and the other says I have married you ...]

2- Al-Hawi Al-Kabir Fi Fiqh Al-Shafi'i (9/162) which is a commentary on the Mukhtasar of Al-Muzni by Abi al-Hasan Ali, known as Al Mawardi (d. 450 AH) mentioned the following on the non-conclusion of marriage with the use of the future tense in the offer and acceptance:

[Chapter: As for concluding a marriage in the future tense, an example of which is: the guardian to say: “I give you my daughter in marriage” and the husband said “I will marry her”. This contract is not valid, neither by the saying of the guardian “Wali” nor by the saying of the husband, because the words of each of them is a promise to hold the contract and not a contract... And if the husband started and said to the Wali: “I marry your daughter”, and the Wali said: “I will give you her in marriage” the contract is not valid by the saying of one of them, because the words of each of them is a promise to hold the contract and not a contract...]

3- It was stated in Minhaj al-Talibin wa 'Umdat al-Muftiyin fi al-Fiqh by **Abu Zakaria Muhyi al-Din Yahya bin Sharaf al-Nawawi (d: 676 AH)** (p. 205):

“The marriage is not constituted except by an offer expressed in terms such as: “I gave you for wife” or “I gave you in marriage”, followed by acceptance, expressed in terms such as: “I married her”, “I took her as wife”, “I accepted to marry her”, or “I accepted taking her as wife”. The validity of the marriage is unaffected by the husband or the guardian being the first to express his will, but it is not valid except with the words nikah “marriage” and tazwij “give for wife” ... So, it is valid if he says “give her me in marriage’ and he said “I have given her to you in marriage” or if the Wali says “marry her” and he says “I have married her””. End

I will also mention some of the explanations of Minhaj:

A- It came in **Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj, author Shams al-Din Muhammad al-Khatib al-Sharbini Shafi'i (d. 977 AH)** - (12/99):

[(if) the one who proposes for marriage says to the wali “marry me” your daughter etc. the Wali said to him “I gave her to you in marriage” etc.. or the wali said for the proposer “marry her” i.e my daughter etc. then the proposer said “I have married” etc. the marriage is valid (Saheeh) in the two cases]

B- **Nihayat al-Muhtaj ila Sharh al-Minhaj, author Shams al-Din bin Hamza Shahabuddin Ramli (d. 1004 AH)** - (6/213):

[(if) the husband says to the wali “marry me your daughter and the Wali said to him I married you” my daughter etc.. or the wali said for the husband “marry her” i.e my daughter and the husband said “I have married” her etc. the marriage is valid (Saheeh) in both by what was mentioned, due to the decisive request which indicates consent].

4- The Encyclopedia of Fiqh in Kuwait (41/238) states:

“The significance of the Sigha (formula) on time and its impact on the contract:

- The fuqaha went on to say that marriage takes place with the offer and acceptance being worded in the past tense, such as the guardian says to the husband: Zawajtuka or Ankahtuka (I married you my daughter), and the husband replies: I accepted her marriage ...

The marriage is concluded with the offer in the form of command, such as the guardian says to the husband: marry my daughter, and the husband says: I have married her (Nihayat al-Muhtaj.”

5- It came in the Al-Fiqh al-Islami wa-Adillatuhu by al-Zuhaili (9/6528)

“In summary: Marriage does not take place according to the Shafi'i school except in the past tense, and with the words Nikah and Zawaj (marriage) and is concluded by the Maaliki and Hanafis in the past, present and command tenses if the Qareenah (connotation) or the present tense indicate that it is an acceptance and not a promise.

It is only the Hanbalis among the Jumhoor (the majority of ulema) who stipulate that the offer precedes the acceptance, rather it is commendable (Mandoob) that the guardian says: I give you in marriage (Zawajtuka) or (Ankahtuka). And the Hanbalis said: the validity of the marriage is not accepted if the acceptance preceded the offer, whether the word was in the past tense such as: I married, or in the demand form such as: marry me.”

The previous things were mentioned for further benefit, with Allah’s permission.

Your brother,

Ata Bin Khalil Abu Al-Rashtah

6th Safar 1440 AH

15/10/2018 CE

The link to the answer from the Ameer’s Facebook page:

<https://web.facebook.com/AmeerhtAtabinKhalil/photos/a.122855544578192/932598813603857/?type=3&theater>

The link to the answer from the Ameer’s Google Plus page:

<https://plus.google.com/u/0/b/100431756357007517653/100431756357007517653/posts/Ryra7V4P52b>