CHAPTER ELEVEN

THE EFFECTS OF MARRIAGE

It is the quality of the marriage contract itself which dictates the effects of the marriage. Marriage contracts have been classified, both by classical Islamic jurists and some modern legislators, into regular or valid (sahih) marriage contracts, irregular marriages, which are also known as defective or invalid (fasid), and void marriage contracts (batil), although the Shi‘ahs consider the irregular marriage equivalent to the void marriage.

The concept of a valid marriage contract is simple to understand, but the difference between the latter types of contract, the void and the irregular (also known as defective or invalid) can be confusing, and difficult to grasp. Because the readers are going to encounter these words frequently, certainly within the next few pages, I think perhaps there is no better way of clarifying the subject than to quote from M.D. Malik’s Handbook of Mahomedan Law 4th Ed., Bombay 1948:

...marriages that are not valid may be either invalid or void. This distinction is peculiar to Sunni law alone. Under Shi‘ah law, a marriage is either valid or void. Marriages that are invalid under Sunni law are void according to Shi‘ah law. This distinction between invalid and void marriages under Sunni law is based on the nature of the impediment to the marriage. If the impediment is an absolute and permanent prohibition, the marriage is void, and does not create any civil rights and obligations between the parties, and the offspring of such a union are illegitimate. In the case of an invalid marriage, the impediment is only relative or temporary or due to an accidental circumstance. Such a marriage has no effect before consummation. But after consummation, some of the legal consequences of a valid marriage ensue, viz—(a) the wife is entitled to ‘proper’ or ‘specified’ dower—whichever is less; (b) the children of the marriage are legitimate; (c) the wife is bound to observe the iddat of divorce, but not of the death. An invalid marriage differs from a valid marriage in that (a) it can be dissolved by a single declaration of talak on either side...; and (b) the parties to the marriage are not entitled to inherit from each other even after consummation (pp. 43–44).

To return now to the effects of marriage, the valid contract is a contract which fulfils all its essentials and conditions of conclusion and validity. This Shari‘ah definition is adopted by Syria (Art. 47), Jordan (Art. 32),
Morocco (Art. 32/1) and Kuwait (Art. 43/b). Under the Shari’ah, a regular contract is effective (naﬁdh) if both parties are adult, sane, of discretion, and act on their own behalf—i.e. have full legal capacity. If either party is lacking in any of these conditions, or is represented by a voluntary agent (foudouli) thus making the contract subject to the approval of the guardian or principal, then the regular contract is no longer effective, but becomes mauquf, which translates as “suspended”. Shari’ah law retains this distinction within the regular contract which makes a suspended marriage equivalent to an irregular marriage. The irregular marriage is a contract which fulﬁls its essentials and conditions of conclusion, but lacks a condition of validity which might be, for example, the marriage of a man to his foster sister without either realising the connection at the time, or might, for the Sunnis, be the lack of witnesses. Syrian law (Art. 48) gives a similar deﬁnition of an irregular marriage as “every marriage which satisﬁes its essentials of offer and acceptance, but lacks some conditions.”

Jordanian law does not give a deﬁnition, but lists, under Article 34, the cases of an irregular marriage as follows:

- either or both parties lacking the conditions of marriage capacity at the time of the contract;
- no witnesses present at the time of the contract;
- the contract was entered into under coercion;
- the witnesses not complying with Shari’ah requirements;
- unlawful conjunction on the grounds of afﬁnity or fosterage;
- the muta and temporary marriages.

The Mejellat ul-Ahkam al-Adliyya, (known simply as the Mejelle) that is “The Compendium of Legal Provisions”, was codiﬁed in 1293AH (1876AD) as the Ottoman Civil Code with the purpose of providing an authoritative statement of the Islamic Law in matters of contracts and obligations, and is based mainly on the Hanafi juristic schools. Until the 1950’s, it remained the Civil Code of many Arab states until it was replaced by their own legislations. The Tunisian Mejelle deﬁnes the irregular marriage as one which is subject to a condition that conﬂicts with the substance of the contract or which contravenes the conditions already laid down (Art. 21).

Under the Shari’ah, the void marriage is one which is defective in its essentials, or in any condition of conclusion or of validity. It becomes void if the form of the contract does not denote establishment of the