

FOSTERAGE MARRIAGE IN ISLAM: LEGAL VIEWS ON PROHIBITION, ESTABLISHMENT, PROOF, AND CHILD STATUS

Aniqa Munir

M.Phil. International Relations 2023-25, Department of Political Science, University of the Punjab, Quaid-I-Azam Campus, Lahore, Pakistan

aniqamunir137@yahoo.com

Corresponding Author: *
Aniqa Munir

Received	Accepted	Published
01 January, 2025	21 February, 2025	31 March, 2025

ABSTRACT

Marriage within a foster relationship is considered haram and legally invalid in Islamic law, with any issues arising from such unions deemed illegitimate. The Quran and Hadith clearly prohibit fosterage marriages. This study explores the reasons behind this prohibition, the establishment of foster relationships, and the legal consequences for spouses and children across different Islamic schools of thought. Using analysis of Quranic verses, Hadiths, legal journals, research articles, and case law, the study finds that fosterage marriages are null and void. While interpretations vary slightly among Islamic schools, all agree on their illegality. The study calls for legal reforms in Pakistan to address these issues more clearly.

Keywords: Foster, Marriage, Children, Islam, Prohibition, Pakistan.

INTRODUCTION

Islam prohibits marriage based on consanguinity, affinity, and fosterage. Foster relation is built by breastfeeding and when a child sucks the milk of a woman, it makes the relationship prohibited as the relations are prohibited from birth. The fosterage is established by suckling the milk from breasts to a specific age and time. However major Islamic schools of thought differ in their views on the amount of milk, the age of the child, and the number of breastfeeding. From the time of the Holy Prophet (PBUH), marriage with a foster is considered haram and has no legal effect and importance in Islamic Law. The consequences of such marriage will be null and void. The children born from marriage with the foster relationship will also be illegitimate. Custody of an illegitimate child is given to his/her mother under Islamic law and an illegitimate child has no right to the inheritance of his biological father. The mother is responsible for the

maintenance and care of an illegitimate child—Islamic law as well as the.

This study comprises five parts. In the first part, the concept of fostering in Islam is discussed in the Quranic verses and Hadiths. In the second part, the basis of establishing fosterage relations in Islam is how fosterage is established along with the differences among different Islamic schools of thought regarding this and the proof of foster relationships that are established through either confession or evidence. The third part discusses the prohibition of marriage with foster relations and significant and famous incidents from the life of the Holy Prophet PBUH are also referred there to make this study authentic and evident. This part will also analyse some exceptions to the general rule with the comparison of prohibited blood-line relationships. The fourth part will discuss the legal position of such marriages along with the legal rights and maintenance of illegitimate children. In all of these parts, every major topic

of discussion is also ornamented with the viewpoints of all Islamic schools of thought. In the final part, a conclusion based on the findings mentioned in this article and the existing legislation in Pakistan, several significant recommendations is given to cope up with the crises resulting from such different opinions.

1- CONCEPT OF FOSTERAGE IN ISLAM

Fosterage in Islam is explained in the Quran as well as Hadiths. **There are several verses in the Holy Quran about the sucking of milk by a child from his/her real mother or another woman (foster mother/wet nurse).**

“Prohibited to you (for marriage) are foster mothers (who gave you suck), foster-sisters”.

(an-Nisa, 4:23)

“If ye decide on a foster-mother for your offspring, there is no blame on you”.

(al-Baqara, 2:233)

“The mothers shall give suck to their offspring for two

whole years if the father desires to complete the term”.

(al-Baqara, 2:233)

Notwithstanding, in case the child refuses to suck milk from any woman besides his/her mother, a mother can be forced into that scenario. As a consequence of sucking of the milk by an infant from any woman besides his/her biological mother, a foster relationship arises between the woman who suckled the child, that child, and the relatives of the woman. In the case of children, foster-related children cannot marry. This is because they have suckled from the same foster mother and by that, they have become related to an extent that a marriage between them has become prohibited by Islamic law. Also, if two different and non-related children are suckled by two different women, but the foster mothers in of the children are married to the same person, the children will be considered foster siblings and the husband the foster father respectively. Thus, fosterage creates such a relationship between people that marriage becomes prohibited between them (Sabreen M. , 2017). A relationship linked to blood is called a **“bloodline relationship”** and a foster relationship grows the same restrictions as

they are in a bloodline relationship, besides certain circumstances which will be discussed later.

2- ESTABLISHMENT AND PROOF OF FOSTERAGE

Regarding the **establishment of foster care**, the majority of jurists agree that the milk must be of a female human being, the milk must, either by suckling or drinking from a bottle or cup, get into the stomach of the baby. Breastfeeding may be via suckling through the nostrils. The milk must not get mixed with other substances. In case of mixing with further substances, the **rule of preponderance** will be applied i.e., fosterage would be established in case the number of human milk is more than that of additional substance(s). According to the unanimous opinion of the majority of Muslim jurists, the suckling must be done within the commencing two years of a child's life. Muslim jurists are divided on the number of suckling times; Hanabilah and Shafis agree on the five times suckling but Hanafis and Malikis are of the view that it does not make any difference whether the degree of suckling is smaller or greater (Shah, 1994) (Mohd, 2011).

According to Shaf'is, Hanbalis, and Hanafis, the relationship would not be established if the milk enters the ears, eyes, urethra, or in any open sore. (Döndüren, 2021) According to Abu Hanifa and Abu Yusuf, if the milk is a mixture of more than one woman's milk the fosterage would be developed with the one whose milk is more in amount than the other. If the amount of them is equal, the foster would be developed with both of them. Imam Mohammad, Zufar, and Malikis, both cases lead to establishing a foster relationship with both of them. It doesn't matter whether one's amount is more than that of the other or both are equal. This view is prioritized as the kinds of milk are of the same nature and there's no supremacy of the one over the other. Consequently, the bar of foster care would come into effect if a child is breastfed under the aforementioned conditions (Shah, 1994) (Döndüren, 2021) (Mohd, 2011). The Shia legal scholars place fosterage and consanguinity on equal footing and decline to perceive the exemption allowed by the Sunnis. The prohibitions because of 'consanguinity',

'affinity', or 'Fosterage' are outright, and contracted marriages in the negation of these standards are void (Qureshi, 2020).

Proof of a foster relationship can also be established either through confession or evidence. **Confession** is when both a woman and a man or any of them confess their foster relationship. If both of them acknowledge their foster relationship before getting married, the marriage won't be halal, it will be unlawful and the woman can't demand mahr. If they confess after marriage, right away they will have to get divorced. The judge divorces them by force if they don't get divorced by themselves and the woman right to claim, precedent mahr or prescribed mahr, one that's less. If a man confesses only before getting married, the marriage will be haram and if he confesses after the marriage, they've to get divorced immediately. If only women acknowledged before marriage, it wouldn't be halal for them. According to the fatwa, if the man doubts her making a lie, marrying her is halal for him, and if she acknowledges after marriage, it doesn't negate marriage unless it's confirmed by the man. **The evidence** here means the witnessing or evidence of someone about a relationship developed due to fosterage, in the court. There's an agreement of all of the four sects on the witnessing of, two honest men or a woman and a man, of foster relationship. But there's controversy about the affirmation of foster relationships with the witnessing of only one man, one woman, or four women. Such witnessing (evidence) is not acceptable, according to Hanafis as Hazrat Umar said:

"Fewer than two male witnesses are not accepted for the confirmation of foster-relationship".

As none among the Companions opposed it, there's a consensus of the Islamic scholars on it. According to Ibn Hanbal and Imam Shafii, foster relationships are confirmed by witnessing of four women or with the evidence of one man plus a woman together or a man plus two females, according to Imam Malik. Those sects that relied on female witnesses took the difficulty of finding male witnesses into consideration (Döndüren, 2021).

3- FOSTERAGE AS A GROUND OF MARITAL PROHIBITION AND ITS EXCEPTIONS:

In Islamic law, there is an absolute restriction on marrying to milk relationships developed by breastfeeding a child by a foster mother/wet nurse. In Shari'ah law fosterage is called Rada'a and it is originated from the term Rade'a meaning suckling. It is a proceeding in which an infant is fed by a woman's breast milk who is not the real mother of him/her and as an outcome of it, an association emerges between that child and foster mother and marital bars like that of consanguinity arises between them (Shah, 1994). A person breastfed by a foster mother/wet nurse is prohibited from getting married to the following relatives (Mohd, 2011). Firstly, lineal foster ancestors such as the foster mother and foster mother's mother (foster grandmother). Secondly, lineal foster ancestors like foster daughter, foster son's daughter, along with their children and grandchildren. It includes the descendants of foster parents i.e. foster brothers/sisters from the same parents, from different mothers but the same father, from different fathers but the same mother, foster mother's daughters, and daughters of the son of hers (granddaughter), and it is also barred to get married with their children and grandchildren. It is also prohibited to marry foster immediate siblings which include the siblings of the foster father and foster mother, whether the real or stepbrothers/sisters of the foster mother as they are their relationship with the foster child is of foster aunts and uncles. To marry the foster mother's husband's mother (foster father) is also prohibited (Döndüren, 2021) (Shah, 1994). Spouses of foster fathers and foster grandfathers are also prohibited on the same ground regardless of whether there was sexual intercourse between them or not. One is also barred from marrying the spouses of foster descendants including the spouses of foster-son or foster-grandson and to marry his foster daughter's son's spouses regardless of whether sexual intercourse happened between them or not. One can't marry his daughters-in-law. To marry a foster daughter's spouse or her foster granddaughter's spouse is also prohibited (Döndüren, 2021) (Shah, 1994). Moreover, if two issues of variant persons are breastfed by the

same wet nurse they would be known as foster-sisters and foster-brothers. (Shah, 1994)

The aforementioned restriction owes to the Quranic verses and prophetic praxes few of which are given below:

According to the Quran:

“Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful”. [Quran 4:23]

According to **Hadiths**, it is stated by Hazrat Ayesha upon the matter of approval of the entry of uncle of Hafsa by fosterage the Holy Prophet (PBUH) said: “Fosterage makes unlawful what consanguinity makes unlawful”. In another incident, Hazrat Ayesha relayed that the Holy Prophet (PBUH) stated that it was admissible for me to permit Aflah, a foster uncle of mine, to enter the Prophet (PBUH)’s house. Ume Habiba states that I recommended the Holy Prophet (PBUH) to marry Abu Salma’s daughter but He (PBUH) rejected her as her father was from His foster mother and she was His niece. Hazrat (Ali A.S) relays that he suggested to the Prophet PBUH to marry Hamzah’s daughter but He rejected her as she was His foster brother’s daughter and thus was unlawful for Him. Hence, fosterage is a ground of the prohibition of marriage as that of consanguinity is (Shah, 1994).

Nevertheless, by Hanafis, there come few **exceptions**: One’s allowed to get married to his foster sister’s or foster brother’s mother who is barred in a bloodline relationship. Another is that one can get married to his foster daughter’s or foster son’s foster sister/brother. Nonetheless, it’s prohibited in the case of a bloodline relationship. In a nutshell, there’s no restriction on marriage between the foster

mother’s bloodline children and the foster child’s bloodline brothers/sisters and as they aren’t breastfed by the same mother and hence there’s no similarity among these children’s physical and biological features (Döndüren, 2021).

There are certain rules about relationships too. Besides the aforementioned exceptions, if foster relatives get married, they are bound to get divorced as soon as that condition is realized. According to Abu Yusuf and Imam Muhammad, such kinds of marriages are invalid and according to Abu Hanifa, immoral. As the relationship developed because of sucking milk, this doesn’t create guardianship of property, inheritance, alimony, etc.

The same rights as the bloodline relationship wouldn’t develop.

4- LEGALITY OF MARRIAGES AND STATUS OF CHILDREN

A marriage prohibited by the rules of blood relationship, affinity, or fosterage is void. If one or more of the conditions for a valid marriage mentioned above are not met by the spouses before the marriage, the marriage is void (Syeda Shajia Sharmin, Laws of Muslim Marriage from the concept of the, 2018). A void marriage will have no legal effect. It does not even need proper divorce for the separation of the spouses. The spouses are considered to be separated from the moment they get to know about the fosterage relationship between them. They cannot exercise any rights or liabilities over each other after that because their marriage has no social or legal status due to the presence of a fosterage relationship between them. It is also established from the practices of the Holy Prophet (PBUH), that he used to separate couples married with fosterage relationships between them, remarking that such marriages are prohibited in Islam. Thus, by keeping in view Islamic practices and laws, marriage with fosterage relationships is unlawful.

Marriage with a foster is a Void marriage and thus, the issues arising out of a Void or Batil marriage are illegitimate. Under Islamic law, such children are called filius nullius meaning a son of nobody’ (Tariq, 2020).

The illegitimate children brought into the world by a void marriage are socially stigmatized as they

are considered shameful and offspring of wrongdoing along with social rejection and marginalization (Kayasseh, 2018). The illegitimate children born out of the marriage with foster, however, **have some rights from the State and their maternal side**, while lacking other rights from their paternal side in Sunni Law, but no rights from either maternal or paternal side in Shia Law.

There are different views in the Sunni and Shia schools of Thought regarding the rights of such children. According to the Sunni School of Thought, an illegitimate child is attributed to his mother, and not to his father. There are no rights of maintenance or inheritance between the illegitimate child and his father. This is because a wrongdoer cannot be allowed to benefit arising out of his wrongdoings, which is to inherit the estate or property of his illegitimate child. This logic also has grounds in a maxim in Latin *commodum ex injuria sua Nemo habere debet*, meaning 'a wrongdoer ought not to be empowered by law to take any advantage from his activities'. However, a mutual right of inheritance is recognized between the mother and her children, whether they are legitimate or illegitimate. Also, the right of mutual inheritance between the illegitimate child and his/her maternal relatives is recognized under this school of thought (Tariq, 2020). Also, an illegitimate juvenile born as a result of void wedlock will be attributed to the mother and will be subjected to the same rulings as other Muslims if his/her mother is a Muslim (ad-Daa'imah)). The reason behind this is that a child is presumed innocent of all sins at the time of birth, so he/she cannot be blamed for the shame caused by his/her parents. This is mentioned in the Quran that a bearer of burdens will not bear the burden of any other in Surat-u-Fatir, ayat 18 (Ali, 2015).

According to the Shia School in Islam, a juvenile born out of a void marriage is illegitimate, but the difference of opinion in Shia school concerning the Sunni school is that an illegitimate child is not entitled to maintenance or mutual inheritance from any of the parents. The illegitimate child, thus, does not inherit at all, not even from his/her mother or maternal relatives (Mulla, 2020). Case law can be cited related to the matter of custody, of

an illegitimate child. In the case, the Lahore High Court had held that under Islamic law, the father of an 'illegitimate child' has no lawful ties with the child even though he is his natural father, and the direct relationship between the two is undisputed. Further, the mother of an illegitimate child isn't simply qualified for the custody and upbringing of the child, but on the other hand, she is also viewed as the guardian of the child to the absolute exclusion of the child's father (Roshni Desai v. Jahanzeb Niazi, 2011).

5- CONCLUSION AND RECOMMENDATIONS

The purpose of writing this article was to establish the grounds for prohibition in marriages with foster relationships and to analyse the legal development regarding this issue in Pakistan. After doing thorough research on this topic, the researchers can conclude that marriages with foster relationships are void, having no legal grounds, and the issues arising out of it are illegitimate. One can see that in Pakistan, special emphasis has been laid on the treatment of children. For instance, it is established in the constitution for the protection of a child irrespective of his colour, creed, or race. It means that the state is under obligation for the protection of the liberty and dignity of every child. Article 35 of Pakistan's 1973 Constitution says that the state is required to protect marriage, family, mother, and child (Courting the Law, ND). Section 488 of Cr.P.C. makes it the mandatory duty of the father to maintain his wives and children; both legitimate and illegitimate. Under this provision, the month-to-month stipend for support should be a maximum of hundred rupees. The request to the court in case the failure of payment of maintenance comes about in detainment. However the duty of the putative dad to provide maintenance to his illegitimate kid is opposed by various orders. The Federal Shariat Court (FSC), considers keeping a kid born out of wedlock as retribution for the dad. About this explanation such a dad has no entitlement to the kid, however, has liabilities. (Sabreen, ND). Also, the State has the power to legislate special laws for the safeguarding of children. This includes legitimate (born out of valid marriage) as well as illegitimate children (born out of void

marriages for example fosterage marriage). Article 25(3) of the Constitution strengthens the State to take special measures to protect women and children, however, this issue is not well settled and needs thorough research and development. Some recommendations in this respect are that legislation should be done and proper laws should be made regarding the prohibition of marriage with foster relationships, heavy penalties and punishments must be imposed for people committing such acts, proper legislation must be done for the maintenance and protection of such children, to discriminate between the legitimate and the illegitimate off springs concerning the right of inheritance and maintenance is against the Rights of the Child (UNHCR, 1989), so equal rights and freedoms should be ensured for illegitimate children as are for legitimate children, people should be made aware about the restriction of marriage on these grounds through campaigns, and this topic should be included in the education curriculum of Islamic Studies as well as legal studies. Furthermore, to burden the mother only with the illegitimate children isn't justifiable, the state should make laws based on middle grounds in which both of the parties (mother and father) would be bound to bring up such children.

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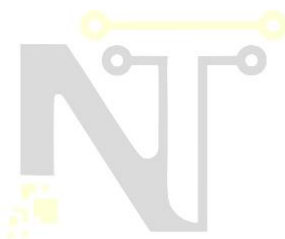
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