

Journal of

Business,

Law &

Society



**Introduction to Jurisprudence of Marriage under
Muslim Law in India**

Tanish Khandelwal
Student, TheNorthCap University

Introduction

“Nikah” literally means the Union of sexes and in law it means marriage. Marriage completes a man and a woman. It is a contract for the purpose of legalizing sexual intercourse and the procreation and the legitimation of children and the regulation of the social life is the interest of the society. In Islam, marriage is an amalgam of tradition religion, superstitious instinct and reason which concerns every aspect of human life punctuated with dominant socio-religious touch, revealing the divine culture behind it and its exaltness, so assiduously nourished by the Holy Prophet and gave it a complete and unflinching religious touch and sanction.

Marriage: Sacrosanct or Contract

In Hindu Law marriage is a sacrament, whereas marriage, according to Mahomedan law is not a sacrament but a civil contract. Marriage (nikah) is defined to be a contract which has for its object the procreation and the legalising of children. The pillars of the marriage as of other contracts are “Ijab-o-Qabool” or “declaration or acceptance” i.e., it is performed by expressing mutual consent of a declaration and acceptance.

In *Amina v. Hassan Koya*¹ it was held that a Muslim marriage cannot be considered as a pure and simple contract to be governed by the provisions of the Contract Act. Rules to be applied for interpreting a Muslim marriage are not exclusively confined and cabined within the four walls of the general statutes - Contract Act and Allied Acts. It is always to be understood and interpreted in the light of the personal laws of the parties and the ethic content and ethos of the institution of Marriage as popularly understood by the Muslims in the country.

The Rajasthan High Court has made a very sound observation in the case of *HasinaBano v. Alam Noor*² that unlike a Hindu Marriage, which is a sacrament, according to the Islamic Law, a marriage ("Nikah") is a permanent and unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to mutual enjoyment and procreation and legalizing of children. One of the essential features of a valid marriage is the payment of "mehr" (dower). Although it is an obligation upon the husband, but the wife is well within her rights to relinquish the said dower. Since the concept of contract is the basis of marriage, the principles of a valid contract would be applicable to the relinquishment. Thus, the relinquishment should be made voluntarily. It should not be made

¹1985 Cr LJ.

²A.I.R. 2007 Raj 49.

by duress, fraud, misrepresentation, under the influence or mistake. It should be made with free consent.

Essentials of a Valid Marriage

It is essential to the validity of the marriage, that there should be:

1. Proposal and Acceptance (Ijab-o-Qabool)
2. Competent Parties
3. Consent and free will
4. No legal disability

Proposal and Acceptance

The proposal and acceptance both must be expressed at one meeting. A proposal made at one meeting and acceptance made at another, do not constitute a valid marriage. Neither writing, nor any religious ceremony is essential. The offer should be accepted by the other party. There is no prescribed procedure or form for the declaration of "ijab" and "Qabool" of the marriage.

Marriage under Sunni Law, the proposal and acceptance must be made in the presence of two Muslim males who has attained the age of puberty or in the presence of one male and two females who shall of sound mind, adult and Muslim. The absence of a witness does not render the marriage void, but make it voidable.

Marriage under Shia Law, witness(s) are not necessary at the time of marriage. The offer and acceptance need not be made in writing. In case the offer and acceptance are reduced in writing, the said document is called "Nikahnama".

Competency of Parties

1. Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage. In *Md. Idris v. State of Bihar*³ it was held that, a Mahomedan girl of 15 years who has attained the age of puberty is competent to marry without the consent of her parents. Marriage under Mahomedan Law is a civil contract and hence it should attract all the incidents of contract as any other stipulated in the Contract Act. The provisions of Section 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally. The provisions of section 64 of the Contract Act are clear in this behalf and require only that person to return the benefits

³1980 Cri LJ. 764.

under the Contract, at whose opinion the contract is rescinded *Mahmad Usaf Abasbhai Bidiwale v. Hurbanu Mansur Atar*⁴.

2. Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians. Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

Therefore, marriage under Muslim Law is perfectly valid if the parties attained the age of puberty and all the conditions specified by the law.

Free Consent

Free consent of the parties is necessary for a valid marriage. If a marriage is brought without the consent, is void, even if a Mahomedan is of sound mind and has attained puberty. When consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified. Where consent to the marriage has not been obtained, consummation against the will of the woman will not validate the marriage.

A minor is incompetent to give a valid consent. The right to contract a minor in marriage belongs successively to the following persons:

1. Father,
2. Paternal Grandfather how high so ever,
3. Brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries.

In default of paternal relations, the right devolves upon the-

4. Mother,
5. Maternal uncle or aunt and other maternal relations within the prohibited degrees.

In default of maternal kindred, it devolves upon the-

6. Ruling authority.

Consent and Capacity under Shia marriage is laid down under *SibtAhmed v. Amina Khatoon*⁵. In the case of Shias the age of puberty begins with menstruation and the presumption is that menstruation takes place between the age of nine and ten years. In this case the girl has become an adult at the time of 'Nikah' the consent of her father could not take the place of her own consent, which under the Shia law is essential for the validity of marriage.

⁴(1978) Maha.LJ. 26.

⁵ AIR 1929 All 18: ILR 50 All 733.

Whereas the consent contemplated under Shafi Sect is that of the wife and not of other persons; the Wali only communicates the consent of the wife to the Kazi. This is because marriage among Muslims is a contract, contracting parties are the husband and wife.

No Legal Disability

Under Muslim Law, marriage under certain circumstances is prohibited or not permitted.

1. Prohibition on the ground of consanguinity.
2. Prohibition on ground of affinity.
3. Prohibition on the ground of fosterage.
4. Unlawful conjunction.

Kinds of Marriage

The Shia Law recognizes two kinds of marriage, namely (1) permanent, and (2) *muta* or temporary.

Muta Marriage

A Muta marriage, according to Shia law is a temporary marriage, its duration being fixed by agreement between the parties. It confers no right on the wife or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father.⁶

A Shia of the male sex may contract a muta marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a muta marriage with a non-Muslim.

It is essential to the validity of a muta marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years, and that (2) some dower should be specified. When the term and the dower have been fixed, the contract is valid. Whereas, if the term is specified, but the dower is not fixed, the contract becomes void. But in case the dower is fixed, and the term is not specified, the contract, though void as a muta, may operate as a "permanent" marriage.

The following are the incidents of a muta marriage:-

1. a muta marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents;

⁶Shoharat Singh v. Mst. JafriBibi, AIR 1916 Mad 152.

2. where the cohabitation of a man and a woman commences in a muta marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would, in default of evidence to the contrary, be that the muta continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father;
 3. even if there is evidence of the term for which the muta marriage was fixed and cohabitation continues after the expiry of that term, the inference is that the term was extended for the whole period of the cohabitation and that the children conceived during the extended term are legitimate;
 4. amuta marriage is dissolved ipso facto by the expiry of the term. No right of divorce is recognised in the case of a muta marriage, but the husband may at his will put an end to the contract of marriage by “making a gift of the term” (hiba-i-muddai) to the wife, even before the expiration of the fixed term;
 5. if a muta marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term.
 6. a woman married in the muta form is not entitled to maintenance under the Shia law.
- The Sunni Law does not recognize muta marriages at all.

Void and Irregular Marriage

A marriage may be a valid (sahih), or irregular (fasid), or void from the beginning (batil).

1. A marriage which is not valid may be either void or irregular.
2. A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity, affinity or fosterage, is void, the prohibition against marriage with such a woman being perpetual and absolute.
3. An irregular marriage is one which is not unlawful in itself, but unlawful “for something else,” as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus, the following marriages are irregular, namely-
 1. a marriage contracted without witness;
 2. a marriage with a fifth wife by a person having four wives;
 3. a marriage with a woman undergoing iddat;
 4. a marriage prohibited by reason of difference of religion.

Void Marriage

Prohibition on the ground of consanguinity

A man is prohibited from marrying if;

1. his mother or his grandmother how high so ever;
2. his daughter or granddaughter how low so ever;
3. his sister be whether full, consanguine or uterine;
4. his niece or great niece how low so ever; and
5. his aunt or great aunt how high so ever, whether paternal or maternal.

A marriage with a woman prohibited by reason of consanguinity is void.

Prohibition on ground of affinity

A man is prohibited from marrying if;

1. his wife's mother or grandmother how high so ever;
2. his wife's daughter or granddaughter how low so ever;
3. the wife of his father or paternal grandfather how high so ever; and
4. the wife of his son's son or daughter's son how low so ever.

A marriage with a woman prohibited under the said ground is void. In case (2), marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

Prohibition on the ground of fosterage

Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or foster sister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited under the said ground is void.

Plurality of husbands

It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void.

Irregular Marriage's

Unlawful Conjunction

A man may not have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. This bar only renders a marriage irregular, not void.

Absence of Witnesses

A marriage contracted witnesses as required by law is irregular, but not void.

Number of Wives

A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular.

Marriage with a Woman Undergoing Iddat

A marriage with a woman before the completion of her period of iddat is irregular, not void. The Lahore High Court at one time treated such marriages as void,⁷ but in a later decision held that such a marriage is irregular and the children legitimate.⁸

Iddat - "Iddat" may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by divorce, the duration of the iddat if the woman is subject to menstruation, is three course; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. In case the marriage is dissolved by a way of death, the iddat period is four months and ten days has to be followed. If the woman is pregnant at the time, the iddat lasts for four months and ten days or until delivery, whichever period is longer.

If the marriage is dissolved by a way of death, the wife is bound to observe the iddat whether the marriage was consummated or not. If the marriage was dissolved by a way of divorce, the wife is bound to observe the iddat period only if the marriage was consummated, whereas there was no consummation, there is no iddat. Therefore, she is free to marry immediately.

The iddat of divorce commences from the date of the divorce; and that of death from the date of death. If information of divorce or of death does not reach the wife until after the expiration of the period of iddat, she is not bound to observe any iddat.

Registration of Marriage

Muslim Law does not require registration of a marriage as a requisite for a valid marriage. On the other hand, Muslim Law never prohibits registration of marriage. A Muslim marriage can be proved by direct evidence or in the absence of direct evidence, by establishing prolonged continuous cohabitation or acknowledgment' by the man of the paternity of the child or the

⁷Jhandu v. Mst Hussain Bibi (1923).4 Lah. 192

⁸Muhammad Hayat v. Muhammad Nawaz (1935) 17 Lah. 48

acknowledgment that a particular woman is his wife. In order to assure a proper mode of proof, Muslim in an area may devise a process by which the proof of marriage may be made easier, namely, by registration by Jamath. In course of time, it develops into a custom, a valid custom which is not violative of the Personal Law. The custom would become invalid only if it is sought to be made mandatory and violative of the Personal Law. The Muslim Personal Law (Shariat) Application Act, 1937, does not abrogate any custom or usage as long as such custom or usage is not contrary to the Personal Law.

Once it is established that the Muslims in the area had developed it as a custom to have the marriage of willing persons to be registered, it assumes the character of a customary right and not a mere contractual right.⁹

Inter Religious Marriage

A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a Kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular.

A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a Kitabi that is, a Christian or a Jew. A marriage, however, with a non-Muslim' whether he is a Kitabi, that is, a Christian or a Jew, or a non-Kitabi, that is' an idolator or a fire-worshipper, is irregular, not void.

⁹ M. Jainoon v. M. Ammanullah Khan and others (2000) 2 M.L.J. 714.