

# Marriage (Nikah) under Muslim Law

## Nature of Muslim marriage

- Under Muslim law marriage is a civil contract for legalization of intercourse and for legitimization of children.
- **Justice Mahmood** said that Muslim Marriage is not a sacrament but purely civil contract.
- **Abdul Raheem** has termed marriage in the nature of 'Ibadat' [devotional act] and 'muamlat' [dealings among men].
- As far as the social aspect of marriage is concerned **Nikah** is a well-established social institution which confers a dignified status upon a woman
- Marriage is also considered a religious duty. It is the sunnah of the Prophet. According to Prophet Muhammad 'marriage is my sunna'. "Who so ever keep away from it is not from me".

## Object of marriage

Object of marriage is twofold

1. Legalization of sexual relationship between husband and wife; and
  2. Legalization of generations [children]
- Because marriage is considered a contract there are no ceremonies as such for marriage in Muslim law, only the conditions for a valid contract of marriage have to be fulfilled.

## Essentials of valid marriage

- a) The parties must have capacity to contract marriage
- b) Consent of the parties or their guardian must be free
- c) There should be a proposal & There should acceptance of proposal

- d) There should be no prohibitions/impediments to the marriage.
- e) Consideration

### 1. Capacity to Contract marriage

- Any **Muslim** with **sound mind** who has attained the **age of puberty** has a capacity to marry. Persons who are not of sound mind or who have not attained puberty can be married by their guardians. [**Jabr**]
- **Age of puberty**- Privy council in Atika Begum versus Mohammed Ibrahim, laid down that a girl become major on happening of either of the two events:-
  1. completion of 15th year or,
  2. attainment of puberty at an early period
- This requirement may be applied to boys also.

### 2. Consent of the parties

- Consent of the parties to the marriage must be free. It was vitiated by force, fraud or any compulsion.
- If the parties are sane and adult then their own consent is required. If the parties are minor then the consent of the guardian is required. [**Jabr**]
- If the consent is obtained by compulsion the marriage is void under all schools of Muslim law except Hanafi School. In Hanafi school such marriage is valid.

### 3. Proposal and Acceptance

- The proposal (**ijab**) and Acceptance (**qubul**) should be there for a valid Muslim nikah.
- Offer and acceptance must be in oral or writing.
- Proposal and acceptance should be expressed in one meeting.
- Proposal and acceptance should be without ambiguities and should be made by the parties themselves or by other on their behalf.
- An assurance to marry in future does not constitute a proposal.

- There should be **two male witnesses/one male and two female witnesses-** In **Shia law** a presence of witness is not required. A marriage without a witness is also valid. In Sunni Law a marriage without a witness is irregular [fasid].
- Void, Voidable and Irregular marriage

#### 4. There should be no prohibitions/impediments to the marriage

- In Muslim law: A valid marriage is 'sahih', A Void marriage is 'batil', An Irregular marriage is 'Fasid'
- **Absolute impediments [Batil Marriage- A void marriage]**
- Following are the impediments to marriage which will render the marriage as void. (Batil), they create what we call Absolute Incapacity or Prohibition.

##### 1. Polyandry

- A married woman cannot contract another marriage while her husband is alive and the marriage is subsisting. Such marriage is void.

##### 2. Consanguinity: [ with in family]

- The bar of consanguinity renders a marriage void. The following are the prohibited relationships of consanguinity, viz., a man cannot marry his:
  - a. Ascendants, e. G., mother or grandmother, how high so ever;
  - b. Descendants, e.g., daughter or grand-daughter, how low so ever;
  - c. His sister, whether full, consanguine or uterine;
  - d. His niece or great niece, how low so ever;
  - e. His aunt or great aunt, how high so ever, whether paternal or maternal.

##### 3. Affinity: [relationship by marriage]

- Marriage is also prohibited on ground of affinity. Thus, a man cannot marry:
  - a. His wife's mother, or grandmother, grandmother, how high so ever;
  - b. His wife's daughter or grand-daughter, how low so ever, if his marriage with his wife is consummated.
  - c. His father's wife or any other ascendant's wife; and
  - d. His sons or any other lineal descendant's wife.

##### 4. Fosterage

- Fosterage means when a woman other than its own mother has suckled a child under the age of two years, the woman becomes the foster-mother of the child. A man may not, for instance, marry his foster-mother or her daughter, or his foster sister.

### **Relative impediments [Fasid Marriage]**

- In Muslim law irregular marriage is because of lack of some formality, or the existence of some impediment which can be made good. Meaning that the irregularity can be removed and the marriage can be made sahih. A fasid marriage is a marriage i.e. With the process of removing irregularity, all of these conditions create Relative incapacity to marry which render the marriage invalid only so long as the cause which creates the bar exist.
  - Shia law does not recognize irregular marriage; the marriage in presence of these prohibitions under Shia law is either valid or void.
- 1. Unlawful conjunction:** - Muslim is prohibited to have to wife at the time if these two wife's are related to each other by consanguinity, affinity or fosterage. Is that if they had been of different sexes, they could not have inter married.
    - Solution - (by divorcing the wife who is the obstacle)
  - 2. Marriage with fifth wife:** - Muslim can marry lawfully with four weeks at a time. He is prohibited to marry the fifth wife. Marriage with fifth wife is irregular in Sunni law and void in Shia law
    - Solution - (by divorcing one of the 4 wives)
  - 1. Marriage with a non Muslim:** a Muslim male can contact a marriage with a kitabiya female but cannot marry a non Muslim for a non Kitabiya female. Marriage against this provision is irregular in Sunni law. Marriage With a non Muslim is void under Shia law
    - Solution - (conversion of religion, women can adopt Islam, Christianity or Jewish religion but man has to adopt Islam)

### **Inter religious marriage may be summarized as follows**

Muslim male [of any sect] and Muslim female [of any sect]	<b>valid marriage</b>
Sunni male and kitabiya female	<b>valid marriage</b>
Sunni male and non Muslim and non kitabiya female	<b>irregular marriage</b>
Shia male non Muslim female	<b>void marriage</b>
Muslim female and non Muslim male	<b>void marriage</b>

**2. Marriage without witness:** - In Sunni law a marriage without to competent Muslim is irregular. In Shia law the presence of witness is not necessary and therefore a marriage without witness is valid

- Solution - (By acknowledgement before witnesses)

**3. Marriage during iddat:** in Sunni law marriage with a woman observing iddat is irregular. In shia law of marriage with the woman observing iddat is void

- Solution - (by expiration of iddat period)

### **Legal effects of irregular marriage**

- An irregular marriage may be terminated by either party, if the termination is before consummation it has no legal effect.
- But if the termination is after consummation, then:
  - 1) Wife is entitled to dower, prompt or specified, whichever is lower.
  - 2) She is bound to observe iddat for three courses.
  - 3) Children born out of such marriage are legitimate
- In both the cases of irregular marriage (consummated or not consummated) no legal rights of inheritance are created between the parties.

### **Effects of a Legal Muslim Marriage**

- 1) Sexual intercourse becomes lawful and the children born of the union are legitimate.
- 2) The wife becomes entitled to her dower (mahr).

- 3) The wife becomes entitled to maintenance.
- 4) Mutual rights of inheritance are established.
- 5) The prohibitions regarding marriage due to the rules of affinity come into operation.
- 6) The wife is not entitled to remarry after the death of her husband, or after the dissolution of marriage, without observing iddat.
- 7) A woman does not change her status on marriage. She remains subject to her own pre-marital school of law. Neither the husband nor the wife acquires any interest in the property of the other by reason of marriage.

## Muta marriage

- The word 'Muta means' 'enjoyment'
- Muta marriage is a temporary union of male and female for a specified time and for payment of consideration.
- This type of marriage is almost obsolete in India and only certain schools acknowledge it is a valid marriage like **Ithna Ashari Shia.**

### **Essentials of a Muta marriage**

- 1) The parties must have attained the age of puberty, must be of sound mind.
- 2) Consent of both the parties must be free
- 3) Formalities of a regular marriage are necessary.
- 4) Parties must not be within any of prohibited relationship.
- 5) **Form;** There should be a contract containing declaration and acceptance.
- 6) **Subject,** i.e., a man may contract a Muta with a woman professing the Mahomedan, Christian or Jewish religion or even with a fire-worshipper (ex. Zorastrians), but not with a woman following any other religion. A man may contract Muta marriage with any number of women.

A Shia woman, however, cannot contract a Muta with a non-Muslim. Relations prohibited by affinity are also unlawful in such marriage;

- 7) **Term,** which means that the period of cohabitation should be fixed, which may be a day, a month, a year or a term of years; and

### **8)Dower.**

- When the term and the dower are fixed, the contract is valid. If, however, the term is fixed but the dower is not specified, the contract is void. Further, if the dower is specified and the term is not fixed, the contract, though void as muta may operate as a 'permanent' marriage.
- Right of Inheritance does not create any rights of inheritance between man and woman but **children** born out of this marriage are legitimate and can inherit from both parents.

- A muta marriage is dissolved ipso facto my expiry of the term.
- Before the end of term, the husband may, at his will, put an end to the contract by 'making a gift of the term' to the wife which is called '**hiba-i-muddat**'. The wife's consent is not required for such termination.
- If the Muta marriage is consummated, the wife is entitled for full dower amount, but if the marriage is not consummated the wife is entitled to half of the dower amount. If the women leaves before the end of the 'term' husband can deduct can deduct a proportionate part of the dower.

### **Legal effects of Muta marriage**

- Cohabitation is lawful, children are legitimate and are entitled to inherit properties of both the parents.
- A Muta husband and wife have no mutual right of inheritance.
- Muta wife is not entitled to get maintenance under Shia law but she may get maintenance under Code of Criminal Procedure **Section 125 of Cr.P.C.**
- If consummation takes place wife is required to observe iddat of two monthly courses. If marriage is dissolved by death of husband then period of iddat is four months and ten days.
- There is no divorce in Muta marriage. The marriage ends by death of parties or on expiry of specified period or where husband leaves the wife before expiry of term.
- If marriage is consummated the wife is entitled to get full dower, if marriage is not consummated the wife is entitled to get half dower.