

LAW OF MARRIAGE IN MUSLIM PERSONAL LAW

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1. INTRODUCTION

Marriage is a legal union of a man and a woman as husband and wife. It is a contract according to the form prescribed by law by which a man and woman capable of entering in to such contract mutually engage with each other to live their whole lives in state of union.

In Arabic marriage is known as Nikah, which literally means joining together. In the Holy Qur'an it has been described as hisn that is a fort, which means that it affords social, physical and moral protection to the couple joined together in wed lock, from the evil forces and carnal desires. The word also signifies the act, or formal proceeding by which persons are wed locked with each other. Islam attaches great sanctity to marriage. The purpose of marriage is the establishment of a happy home the spouses are enjoined to guard their chastity and be considerate and loving.¹ It is necessary for the continuance of generation as it provides the means of procreation of children which is the source of survival of human race Almighty Allah says- "And marry such of you As are solitary And the pious Of yourselves And maid servants. If they be poor Allah will enrich them Of His bounty. Allah is of ample means, aware."² He further revealed, "And if ye fear that Ye will not deal fairly By the Orphans, Marry of the women, Who seem good to you."³

Bukhari reports that a group of three men came to the houses of the wives of the Prophet (PBUH) asking how the Prophet worshipped (Allah), and when they were informed about that, they considered their worship insufficient and said, "Where are we from the Prophet as his past and future sins have been forgiven." One of them said, "I will not marry forever". Allah's messenger came to them and said "Are you the same people who said so-and-so? By Allah I am more submissive and more afraid of Him than you; yet I fast and break my fast, I do sleep and I also marry women. So he who does not follow my tradition is not from me."⁴

2. NATURE OF MUSLIM MARRIAGE

Jurists are of the different view regarding the nature of marriage. Ahadis are Quoted that one who marries, completes half of his religion it now rests with him to complete the other half by leading a virtuous life in constant fear of Allah. Another tradition says - "There are three persons whom the Almighty Allah himself has undertaken to help, first he who seeks but his freedom, second, he who marries ..."⁵

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¹ Professor Masoodul Hasan "The digest of the Holy Quran.(N.Delhi:Kitab Bhawan,1992)2nd ed.p.291

² M.M. Pickthall, Holy Quran S 24 A 32

³ Ibid. A .3

⁵ . Darrul Mukhtar, Trans B. M. Dayal (N.Delhi: Kitab Bhawan, 1992,) II. p. 12.

Muslim marriage is a contract. Traditions show that marriage has sacramental aspect also. However jurists have different opinion about its nature. Imam Abu Hanifa (Rah) considers the marriage as partaking of both sacrament as well as worldly affair⁶. Hanafi scholars say that it has sacramental aspect because the recitation of sermon and organization of walima are Sunnah. Again it is detestable to get the marriage dissolved. The performance of waiting period and legal impediment in remarriage makes the marriage other than the ordinary contract⁷. Moreover each and every Prophet was married. Prophet Mohammad (PBUH) said "O assembly of youths, you marry as it gives restraint to the passion and protection to the eye."⁸

Shafeyee considers the marriage as a purely civil contract. It is only permitted (Mabah) and may be left for extra worship (Nafil)⁹. If it is obligatory the Prophet (PBUH) would have forbidden his companions who were not married.

Justice Mehmood says marriage is a civil contract. Justice Sulaman analysing Mehmood's opinion says that the Judge accordingly felt compelled to make a deduction from certain privileges governing sale of goods and applying them to the contract of marriage. He further says, "The term of reasoning based on the analogy of sale has naturally been very severely criticized at pp. 148-9 in Wajid Ali Khan's case by the Qudh Bench, and also by Mr. Ameer Ali."¹⁰ Justice Sulaiman again quotes J. Mehmood "The marriage cannot be regarded as purely a sale of person by the wife"¹¹. Further, "It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as a religious sacrament."¹²

Prof. Tahir Mehmood is of the view that 'there is a popular misconception that no religious significance or social solemnity attaches to a Muslim marriage and that it is a mere "civil contract" this is not true. Of course, Islam does not regard marriage as a sacrament (Sanskar) in the Hindu Religious sense of term. However, the Prophet did describe marriage (nikah) as his Tradition as a matter of fact it is only the form of the Muslim marriage that is contractual and non-ceremonial marriage itself, as a concept, is not merely a contract'.

Thus "the ultimate analysis... can be said that the marriage in Islam is neither purely a civil contract nor sacrament. It is devoid of none but the blending of the two"¹³.

3. CAPACITY TO MARRY AND GUARDIANSHIP

It is to be seen here whether there is need of guardianship in marriage or a girl is free to marry. Hanafi school say that it depends upon the age of the girl, if she is minor, the guardianship is needed. Where she is major guardian's consent is not necessary. The marriage

⁶ Fathul Bari, Vol. IX p.104

⁷ Maulana Taqi Usmani'Darse Tirmizi'(Deoband:Darulkitab,1412A.H.).III p.344.

⁸ Nihaya, Vol. I p. 160, Quoted by Darse Tirmizi, Vol.III 347

⁹ Darse Tirmizi op cit p. 344

¹⁰ Anis Begam & others V. Malik Mohammad Istafa wali Khan L. J.R. (High Court) 1933, p. 1086.(High Court) 1933, p. 1086.

¹¹ Ibid p. 1088

¹² Ibid

¹³ Aquil Ahmad's Muslim Law – Dr. I. A. Khan (Allahabad:Centred Law Agency)16th ed. p. 52

performed with the consent of the father of a girl is void provided she refuses to cohabit with her husband¹⁴. Imam Malik is of the view that a woman can by no means contract herself in marriage to a man in any circumstances, whether with or without the consent of her guardians: neither she is competent to contract her daughter or her slave, nor to act as a matrimonial agent for any one, so as to enter into a contract of marriage on behalf of her is bad in law¹⁵.

As per Shafeyee school a woman is not allowed to marry her without the consent of guardian. They rely upon the Traditions of Abu Musa Ashari (Raz) and Ayesha (Raz) in which it is said that there is no marriage without the guardian. And a woman whose marriage is without the permission of a guardian, the marriage is void the marriage is void and the third time, the marriage is void. Hambali school is also of the similar view as Maliki or Shafeyee schools are.

4. AGE OF PUBERTY

Every person who is governed by Muslim Law is entitled to marry. No injunction can be granted to restrain marriage on a Muslim who has attained the age¹⁶ or who has attained the puberty¹⁷. The age of puberty in Muslim law as the judicial committee observed, referring Hedaya, that the earliest age is nine years for girl and 12 years for boys.¹⁸ Tayabji says¹⁹ that in the absence of evidence of attainment of puberty the age of competence is 15 years for the girl. Dr Tahir Mahmood has provided a list of enactments in different countries e g Art 88 of The Turkish Civil Code 1926 fixes the age of marriage as 17 and 15 years respectively of boys and girls . However guardians may apply for early marriage and court may permit on 15 and 14 years respectively. In Cyprus the age of marriage is 18 & 17 years of boy and girl respectively. Before 17 years the marriage of girl is not permitted unless there is consent of guardian. However the guardian may take permission of the court on the age 15&14 years respectively. In Egypt the age must be 18 & 16 of a boy and a girl for marriage. In Jordan also the age of marriage is 18 &16 years of male and female. In Syria the age of marriage of man and woman are 18 and 17 years. The marriage age in Tunisia is 20 years. But Court may permit boy & girl of below 20 years and 17 years respectively. In Moracco the marrying age is 18 and 15 years of male & female respectively. In Iraq normally the minimum age for marriage is 18 years. In Iran the minimum age of marriage is 18 & 15 years of male and female respectively . Marriage prior to the said age is punishable under Art –2 of the Marriage Law 1931. In Sri Lanka for registration of marriage the female party must have attained the 12 years of age.

¹⁴ Marriage of Khansa , D/o Khidam , Bukhari p. 52

¹⁵ . Ibid

¹⁶ Muhammad Yamin V . Razia (1919) 17 All. L. J .1138

¹⁷ Principles of Mahomedan Law – Edited by M. Hidayatullah and Arshed Hidayatullah, (Nagpur:Lexis Nexis)18th ed. 18th reprint p. 223.

¹⁸ Sadiq Ali Khan V . Jai Kishore (1928) 30 Bomb. L. R. 1346

¹⁹ Faiz Badruddin Tyabj 'Muslim law' Muhsin Tayyabji ed . (Bombay : N .M .Tripalhi Pvt . Ltd . 1968) P .52 &Atkia Begum V . Md .Ibrahim AIR1916 PC 250

In India a guardian may still validly give his minor ward in marriage by ijbar not withstanding, the punitive sanctions attached to the marriage of minors (boys below 18 years of age and girl below 16) by the Indian Child Marriage Restraint Act 1929. Any way, a girl so contracted in marriage during minority may repudiate the marriage even if she is given in the marriage by her father or grand father, provided marriage is not consummated.

5. FORMALITIES OF MARRIAGE

In marriage the following ingredients are to be fulfilled-

- (1). Offer and acceptance (Ijab wa Qubul).
- (2). Dower
- (3). Witnesses
- (4). Same meeting

5.1. OFFER AND ACCEPTANCE

The offer and acceptance is also necessary for marriage. There is no difference among the scholars of different schools in this regard. The only difference is that where the offer or acceptance is vitiated by coercion, undue influence, fraud, mistake or misrepresentation, what will happen? The Hanafis consider the marriage as valid. The scholars of other Schools do not agree with the Hanafis view. The former's view is taken from the Tradition where the Prophet (PBUH) said²⁰, "there are three things, which whether done in joke or earnest, shall be considered as serious and effectual, 1st marriage; the 2nd divorce and the 3rd taking back in nikah." while other scholars rely upon tradition reported by Ayesha (Raz) who says²¹, "I have heard the Prophet of Allah (SWT) say there is no divorce and no emancipation by compulsion"

5.2. DOWER

Dower is given by the husband to the wife as a mark of respect. It is considered necessary before the every School of Muslim Law. The difference is only of amount. If it is not settled at marriage it will be assumed that it is settled and proper dower will be given

5.3. WITNESSES

In marriage witnesses are must. But there is no detail of witnesses of marriage in the Holy Qur'an guides about witnesses and has revealed- **"O ye who believe When ye --- And get two witnesses, Out if your own men And if there are not two men, Then a man and two**

²⁰ Balughul Maram

²¹ Tayabji . pp . 53 .

women, **Such as ye choose, For witnesses.**'²² Hanafi says that²³ witnesses are required²⁴. Imam Malik. Shafeyee school considers witness as necessary for marriage. Hambal school is of the view that marriage is established with two male witnesses. However one man and two women can also fulfill the requirement of the witnesses²⁵. Thus witnesses are necessary

5.4. SAME MEETING

In marriage same meeting is necessary. It means where there is offer acceptance must be in that sitting. If persons are dispersed and meeting is ended then fresh offer is to be made by either side. Last meetings offer does not works a valid offer.

6. PROHIBITIONS

Among certain persons marriage is prohibited. Almighty Allah says, "And marry not women Whom your father married, Except what is past It was Shameful and adieus, An abominable custom indeed. Prohibited to you For (marriage) are – Your mothers, daughter, Sister father's sister, Mother's sisters, brother's daughters, Sister's daughters, foster-mothers (who gave your suck) foster sister, Your wives mothers Your step – daughters under your Guardianship, born of your wives To whom ye have gone in, - No prohibition if ye have not gone in, (those who have been) Wives of yours son's proceeding From your Laws, And two sisters in wedlock At one and the same time, Except for what is past; For Allah is oft forgiving Most Merciful; – Also (prohibited are) Women already married, Except those Whom your right hands possess. Thus Allah ordained (Prohibitions) against you Except for those, all others Are lawful, provided Ye seek (them in marriage) With gifts from your property, – Desiring chastity, nor fornication. Give them their dowry For the enjoyment you have²⁶."

Apart from these certain other persons are prohibited due to musahirat as Hanafi Scholars say. If a man commits fornication or adultery with a woman, her ascendants and descendents are prohibited to him²⁷. Shafeyees maintain that they are not prohibited²⁸. If a woman is touched in lust, Hanafis say the ascendants and descendents of that woman are prohibited to him. Here again Shafeyees does not agree with Hanafis²⁹.

7. CONCLUSION

²² S 2 A 282 (this is for evidence generally)

²³ Hamilton – Hedaya , p . 354

²⁴ Darse Tirmizi Vol. III p. 384. Imam Abu Hanifa is of the view that where marriage is with scriptures the witnesses may be non-Muslim.

²⁵ . Darse Tirmizi,p.384

²⁶ Holy Quran S 4 A 22 – 24 .

²⁷ Hedaya p. 29

²⁸ Ibid

²⁹ Ibid

Marriage is need of society. It is also necessary for carrying generation. Like other society Islamic society also encourages it. In Muslim Law monogamy is encouraged and polygamy is not. However there may be some circumstances where polygamy may be need. For example where there is more ratio of female than male in that society it may be necessity. So Muslim law allows limited polygamy dire need. It may be concluded that in Muslim Law woman person is independent but for marriage her guardians are to consent.