

Unit II: Marriage, ^{Dair} ^{of} ^{Marriage} ^{Guardian} ^{-ship}

** Marriage **

* Introduction

Marriage i.e. Nikah in pre-Islamic Arabia meant different forms of sex-relationship between a man and a woman established on certain terms. Under the Muslim Law, marriage is considered to be a civil contract.

* Definition / Meaning

The word Nikah is an Arabic word that means union of the sexes.

In Baillie's Digest, marriage has been defined to be a contract for the purpose of legalising sexual intercourse and procreation of children.

* Nature of Muslim Marriage

1) Marriage as a civil contract - proposal (Ijab) from one party and acceptance (Qubul), capacity to contract marriage (free consent), repudiation of contract (guardian contracting marriage), ante-nuptial/post-nuptial agreement, breach of marriage contract.

2) Abdul Kadir v. Salima (1886) 8 All. 149

Justice Mahmood - Marriage - not sacrament but civil contract
recitation of verses from Quran - ibadat (devotional act)

3) Marriage as religious sacrament - Though sacramental nature of marriage is considered as an orthodox view but it is also supported by the judiciary.

4) Anis Begum v. Mohammad Istafa (1933) 55 AP 743

- held muslim marriage is both a civil contract and a religious sacrament.

5) Muslim marriage not as a civil contract - cannot be made contingent on future event, cannot be made for limited time (muta marriage), contract of resale - resell (wife cannot divorce her husband - if a part of dower)

unpaid.

* Essentials of Muslim Marriage

① Proposal and Acceptance - M - ijab-o-qabool i.e. declaration and acceptance

- Man / behalf & Woman / behalf - agree to M
- custom - 2 witnesses - woman - dower amount paid
- 1 meeting agt - witnessed by 2 adult witnesses - 2 male - 1M/1F
- + 1 relative
- yes → man + 3 people → Qazi - dower asks man for

* Rashida Khatun v. S.K. Islam AIR 2005 Ori. 57

- man - assuring lady for M - cohabits - child - lady claims status of wife - Qⁿ - validity of Muslim Marriage?
- Held. proposal, acceptance, presence & hearing of witnesses
- sane

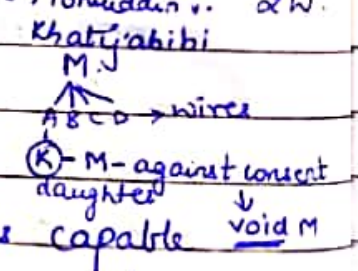
proposal at 1 meeting & acceptance at other - not valid M
- instant case - assurance to marry - not valid.

- Sunni - witnesses - 2M / 1M + 1F - sane adult / irregular

Shia - Free will & consent - Absence - invalid - not necessary at M but at dissolⁿ - minor - Mohiuddin v. W. Khatyabibi

② Competent Parties

- i) Age of marriage - sound mind, attained puberty, understand nature
- ii) Puberty - age at which a person becomes capable of performing sexual intercourse and procreating children
- iii) Capacity to be married - minor / lunatic - guardian



- Hanafi - completing 15 years, Shia - female - menstruation
- Maturity, Hedayah - B - 12 yrs, G - 9 yrs, in absence of evidence - 15 yrs

- iv) Guardianship in M (Tabr) - minor w/o guardian - nullity
- Order - f / paternal GF / brother & other paternal relatives / m / maternal relatives / Govt.
- Shias - f / paternal GF.

- legal incidents - no mutual rights of inheritance - infense
- children - legitimate - inherit from parents
- marriage dissolves on expiry of fixed period.
- divorce - not recognised in muta marr.
- husband may make a gift of unexpired period - hiba-i-muddat - wife leaves before
- dower is deducted
- M $\begin{cases} \text{consummated} & \text{wife - full dower - iddat - death} \\ \text{not consummated} & \text{half dower} \end{cases}$ +1/2 otherwise divorce +5D
- Maintenance v/125 A.P.C
- no limit to no. of wives.

	Muta	Nikah
1. Time	fixed	not
2. Sects	Shias	Shias + Sunnis
3. dissolution	expiry of period	divorce / death
4. Mutual right of inheritance	no	yes
5. Divorce	no	yes
6. Children	legitimate	legitimate
7. Consummation	non-c - half dower	c/nc - full dower
8. Maintenance	no	yes

* Option of Puberty - (Khayar-ul-bulugh)

- Meaning - minor contracted in M by guardian - minor on attaining puberty may choose ^{to satisfy} _{to repudiate}
- Traditional law on option of puberty - Minor's m contracted by F/GF m. valid and binding, not repudiated, unless acted wickedly / disadvantage. Disability removed by the Dissolution of Muslim Marriages Act, 1939.

- * Time of option by the female - where a minor girl is given in marriage by her father / paternal GF, u/s 2(vii) of DOMA, she is entitled to dissolution of m. if she proves -
 - i) she was given in marriage by her father / paternal GF
 - ii) m - not consummated
 - iii) m - before attaining 15 years
 - iv) m - repudiated before attaining 18 years.

- * if M - by "other guardian" - no reasons required for repudiation
- Shia : M by F/GF - valid ; others - ineffective unless satisfied

* Option when to be exercised -

- By wife - immediately on attaining puberty & being informed of the marriage and of her right to repudiate it.
- By husband - ~~before~~ after attaining puberty and before satisfying the marriage ^{express declaration} _{dower paid} _{cohabitation}

* Aziz Baro v. Muhammad 1925 7 AU. 823

- Shia minor girl married to Sunni by father - attained puberty - m - repugnant to her religious feelings.
- Held - right to repudiate

* Confirmation by civil court - M - not dissolved ipso-facto

③ No Legal Disability / Absence of Impediments (prohibition)

Absolute
(void-Batil)

Relative
(IRREGULAR / INVALID / Fasid)

Prohibitory

Directory

① Polyandry
Woman cannot marry - 2nd time

Kharabata v. Kharabata
Scotland India
I-Christian - M - G, muslim
↳ converts domiciled in India
↳ talaq by G
↳ M-K - Pawi
↳ qst - dissolution of M? valid

(till the time bar exists)
① Unlawful conjunction
Muslim Male
- cannot marry two women who are so

interrelated - if 1-mar
- Eg - 2 sisters, aunt & niece

- avoid confusion - kindeed (dual relation)
- removing prohibition - divorce

- Polyandry
- Muslim woman marrying non-Muslim

- Pregnant
- Prohibition of Divorce (Kholat)
- Pilgrimage

② Consanguinity (Qurbat)

- blood relationship
- man cannot marry
↳ M/GM (ascendants)
↳ D/GD (descendants)
↳ Sis ← full - common M+F
↳ consanguine - common F, diff M
↳ uterine - common F, mother diff F
↳ niece / great N
↳ aunt (P/M) / GA

② Marrying 5th wife
- removing prohibition

③ Absence of proper witnesses:

- Sunnis - satisfied by confirmation in presence of witnesses
- Shias

* Legal Effect
- Batil - no civil rights/obligations
- if consum - red custom, divorce
- Fasid - no sts/obligation
- if consum - (i) prompt specified - less -
(ii) iddat

③ Affinity (Musharat)

- man cannot marry
↳ wife's m/gm
↳ wife's d/gd (M - with wife is consummated)
↳ wife of father / GF
↳ wife of son / ss / ds

④ Difference of religion

- Kitabia - valid
- Idolaters / fire worshippers
↳ Sunni - irregular
↳ Shia - void
↳ Muta man - allowed with FW/K

④ Fosterage (Riza)

- suckling other woman than mother
foster-mother

- removing prohibition - embrace Islam
- female - can marry only a muslim
↳ void

- man cannot marry - fm/fs
- Exception - Suni - sister fm, fs-m, fsoni-s, fbro-s

⑤ Woman undergoing Iddat

- Defⁿ of Iddat - Iddat - period of chastity - bound to be observed by Muslim woman ^{death} divorce before lawfully marrying again. (Sunni - irregular, Shia - void)
- Purpose - to ascertain pregnancy of wife to avoid confusion of parentage.
- Duration - ① widowhood - 4 months 10 days
 - pregnant - 4 months until delivery - longer
 - commences - info reached - no info 4/10 - NO IDDAT

② Divorce → 3 menstrual periods - menstruation
 → 3 lunar months - not menstruation
 → pregnant - until delivery

③ Irregular Marriage - M - consumm - duration - 3 months

- Rights of wife - maintenance & residence
 - husband with 4 wives cannot marry 5th until completion of iddat
 - ~~death~~ death - inherit other's property

+ Valid Retirement (Khalwat - U - Sahiba) = consummation

- husband & wife - alone
 - privacy
 - no physical
 - no moral
 - no legal bar

- legal effect
 - confirmation of mehr
 - establishment of paternity
 - observing iddat
 - wife's Rt to maintenance & residence during iddat
 - bar of marriage with wife's sister

* Kinds of Marriages

valid (Sahih)	Legal Effect	Kids
void (Batil)	yes	leg
irregular (Fasid)	no - C - Customary	illeg
	Before C - no	leg
	After C - yes	

* Muta Marriage → means - enjoyment / use
 U/Shias → legal - temporary marriage

- Who may contract - Shia Male - Muslim, Christian, Jewish, fire-worshippers

- Essentials - Time fixed → Female - Muslim