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Nikah - A Contract of Marriage

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Marriage is one of human life's most significant parts. This paper presents you with some important information related to Muslim Marriage. This paper explains to you the importance of marriage in the lives of Muslim people. This explains to you the process and steps taken in Muslim marriages. With all the processes being displayed, it also enlightens you with the essential elements of Muslim marriage in detail. This research is designed to grasp the proper information related to a Muslim marriage. The research is anticipated to help the next generation to learn about the importance of marriage in their lives under the Quran and the laws of the land.

Keywords: *nikah, contract, marriage.*

INTRODUCTION

'Nikah' is an Arabic word used to describe weddings; it's translated into 'gender union.' And the usage of this Arabic term now means a civil agreement under Muslim law¹. The objective of a contract is marriage, the goal of which shall be to define the rights and duties of the two sexes by establishing both rights and responsibilities for the parties having an interest in this

¹ 'Marriage Under Muslim Law' (Lawoctopus, 7 December 2014)

<<https://www.lawctopus.com/academike/marriage-under-muslim-law/>> accessed 22 July 2021

agreement and between the parties and children born with this union. Unlike civil contracts, a contract by Nikah is not time-bound and cannot be terminated if procreation is not achievable (due to various reasons).² It is a highly holy and emotional act from the point of view of the Muslim faith – two souls gathered to fulfill the constant lines of mankind. Marriage serves as a way to fulfill and controls sexual needs so that you do not become a prisoner. It is a social need because marriage is the foundation of families and one of the essential elements of our society is families.³

The legally binding marriage contract between bride and bridegroom; the Islamic marriage contract. A contract that results in man and woman living and supporting each other within the confines of the rights and duties laid forth for them⁴. Marriage is a civil contract, not a sacrament, in accordance with the rule of Mahomedan law. All the rights and obligations which it creates are immediately applicable and are not subject to any previous circumstances like the husband's payment of a door to a wife.⁵ The Muslims undertake many rites and ceremonies in their marriages, although these are not fundamental to Muslim marriages.⁶ In order to validate the marriage, there are some essentials that are required to be followed. These are as follows:

- (i) Proposal and Acceptance
- (ii) Competent parties
- (iii) No legal disability.

PROPOSAL AND ACCEPTANCE

Under Muslim marriage, the proposal is termed as 'ijab,' and acceptance of that proposal is termed as 'qubul.' Like any other contract proposal and acceptance are the essence of the contract

² *Ibid*

³ Abhishek Kumar Pandey, 'Concept of Marriage in Muslim Law' (*legalserviceindia*) <<https://www.legalserviceindia.com/article/1162-Concept-of-Marriage-in-Muslim-Law.html>> accessed on 22 July 2021

⁴ Harshit Khare, 'Muslim Marriage in India' (*legalserviceindia*) <<http://www.legalserviceindia.com/article/1418-Muslim-Marriage.html>> 22 July 2021

⁵ Pandey (n 3)

⁶ *Ibid*

being entered,⁷ so it's the same in the Muslim marriage contract; also there has to be a proposal to which if the other party accepts, then only there will be the completion of the marriage contract⁸. This marriage must take place at one meeting, and two individuals must be a witness to the agreement, and it is very important that the man himself or a person on his own behalf and the women individually or a person on his behalf agree to the agreement before the witness. Since Muslim women are under *pardha*, a connection of the girl and two witnesses are sent to her, and they ask her if she accepts the marriage proposal and the husband's dower or not.⁹ If she accepts it, then the matters fall in the hands of Qazi, the husband, along with the relation, and the witness is presented in front of the Qazi, who asks him that if he offers to marry the girl with payment of dower. If he says yes, then the relation who was sent inside to take the answer of the girl conveys the girl's message "yes" then the Qazi reads some portion of the Quran, and in his way, marriage is completed. Both consents taken must be free consent without any external pressure.

Mst. Zianaba vs Abdul Rahaman,¹⁰ Was the case where the court enlisted some of the essentials of Muslim marriages, such as the contract can be oral or written. When the contract is written, the document is called *Kabin-nama*, important evidence of marriage.¹¹ There must be no ambiguity in words expressed at the time of the agreement; both the parties must be clear and must stand by what they have said. *Abdul Kadir v. Salima and Anr*,¹² This case is also related to providing some essentials of Muslim marriage.

Rashida Khatoon v S K Islam,¹³ this case is the perfect example to show how this contract works. A man promised a lady that he will marry her and persuaded her and cohabitated with her, which resulted in a child being born. The women claimed that status of wife. But as per Muslim law, there has to be a proposal and acceptance in the presence of 2 witnesses at a one-time

⁷ Khare (n 4)

⁸ Ashish Agarwal, 'Essential Conditions for Muslim Marriage in India' (*legal bites*, 4 November 2020) <<https://www.legalbites.in/essential-conditions-for-muslim-marriage/>> accessed 23 July 2021

⁹ *Ibid*

¹⁰ *Mst. Zianaba v Abdul Rahaman* AIR 1945 Pesh 51

¹¹ *Ibid*

¹² *Abdul Kadir v Salima & Anr* (1886) ILR 8 All 149

¹³ *Rashida Khatoon v S K Islam* AIR 2005 Ori 57

meeting. None of the essentials were met. He only promised he doesn't give the proposal. So she was denied the title of wife because none of the essentials were met.

Under Sunni law requires the presence of 2 witnesses, the absence doesn't leave the marriage void, but it becomes irregular.¹⁴ Under Shia law, witnesses' presence is not important neither required. Only at the time of dissolution of the marriage in Shia presence of a witness is required.¹⁵ Under Hanafi law, even if the consent is not free and even if there was no intention of the parties to get under a marriage contract, they consider it a valid marriage.¹⁶

COMPETENT PARTIES

The age of marriage – the parties, must be competent to enter into a contract. They must know the nature of the actions they are performing. A Muslim with a sound mind and puberty may conclude a marriage contract. An unsound-minded person's marriage contract is invalid unless it is entered within a lucid interval. A guardian can enter into a marriage contract on behalf of the lunatic.

Puberty is the stage at which a person is capable of sexual intercourse and procreating children. The majority used in general contract law and puberty in Muslims are one and the same thing.¹⁷ The presumption in Muslim law of the majority is 15 years, but Hedya lays down that the earliest age of puberty for a man is 12 years and for girls is nine years. Hanafi presumes it as 15 years for both sexes. Shia takes it when a girl starts menstruating for the girls. With respect to marriage, Muslim law is untouched by the Indian Majority Act 1875.¹⁸

But the Prohibition of Child Marriage Act, 2006,¹⁹ declares that the age of marriage for boys is 21 years and for girls is 18 years. A marriage below this age would be voidable at the option of the concerned person by section 3 of the above act.

¹⁴ *Kadir* (n 12)

¹⁵ *Khatoon* (n 13)

¹⁶ *Ibid*

¹⁷ *Zianaba* (n 10)

¹⁸ Indian Majority Act 1875

¹⁹ Prohibition of Child Marriage Act 2006

Marriage of guardian – below the age of puberty, if anybody wants to enter into a marriage contract, then he has to take the consent from his guardian; without his permission, he or she would not be able to enter into the contract.

Guardianship in marriage (jabr) – in Sunni law, the rights of guardianship falls in the hands of following people successively;

- (a) father,
- (b) paternal grandfather
- (c) brothers and other male members of the father's side
- (d) mother
- (e) maternal uncle or aunt or any other maternal relation without the prohibited degree
- (f) the state

*Abdul Ahad v Shah Begam*²⁰ Was a Jammu and Kashmir high court case, a 14-year-old minor girl was married to a major man. The husband stayed at her parent's home with his wife, then sought to pull her away, but her parents refused. They denied it, which led to litigation.²¹ The high court held that the girl was minor at marriage, and the marriage was guaranteed by a person who was not competent to give her in marriage at the time of the girl's minority.²² The person who granted his permission to the marriage was Girl's Wali, who was her uncle who happened to be the father of the groom and who had no legal right to give guarantee in the marriage of this minor girl. The court declared that the girl did not even need a repudiation to annul the marriage of void ab intio. Under Shia law, only the father and the grandfather, how high soever are recognizable as the guardians for the marriage of a minor.

²⁰ *Abdul Ahad v Shah Begam* AIR 1940 Cal 251

²¹ *Ibid*

²² *Ibid*

Authorization is given by an unauthorized person (Akd Fazuli) – when consent for the minor marriage is given by remoter guardian in spite of the presence of the nearer guardian, who has not given the consent, the marriage is void.²³ But if the party agrees to the marriage after attaining puberty then the marriage becomes valid.

Option of puberty – when a minor is married with the consent of the guardian, and after attaining puberty, he gains the right to repudiate or rectify the marriage contract. So, the option of puberty is the right given to the boy/girl who was married by the consent of the guardian in order to recheck the marriage contract.

In *Abdul Karim vs Amina Bai*,²⁴ It was declared that the repudiation choice provided to the wife is based on the values emphasized in the Qur'an repeatedly. This is one of the safeguards by which Islam alleviates the effects of pre-Islamic institutions, which mercilessly assault women and children. When a woman reaches puberty, he must quickly exercise his choice of repudiation, and the option is to be lost if the wife consummates. Nevertheless, I definitely would not be accountable for a judgment made that violates the basic principles that I referred to and which are properly enshrined in all the documents. I would not want to forget that if the woman comes to puberty while she lives with her spouse (as the plaintiff said), her choice is not established until she expressly consents or implies marriage. It is not enough to consummate. Consummation must take place with the permission and consent of the wife.

(1) *Saghir* – The first stage is when the boy or girl is under the age of 7, and the marriage is therefore invalid *ab intio*. There are no conditions at this stage of marriage.

(2) *Sariri* – this is the second stage where the age of boy or girl is between 7 and 15 years, here there can be a valid marriage but only when guardians perform this. The boy or girl's consent would not stand at this stage.

(3) *Bulugh* – here boy or girl who are above 15 years, they can marry with their own free consent.

²³ *Zianaba* (n 10)

²⁴ *Abdul Karim v Amina Bai* ILR (1953) 59 Bom 26

NO-LEGAL INCAPABILITY

There are some circumstances where marriage is not permitted. These prohibitions are divided into four types;

(1) **Absolute incapability** - where marriage is absolutely prohibited. This can be possible in three cases.

(a) Consanguinity - In the following blood relationships, marriage is forbidden for the man - (i) his mother and grandmother, (ii) his daughter or granddaughter, (iii) his sister, full or inherent, (iv) niece and grand-niece, howsoever, (v) paternal or maternal aunt, as high as ever. The aunt or great aunt is forbidden. In such relationships, marriage is void and illegitimate.

(b) Affinity - some relationships are forbidden for man to marry, (i) marriages with the mother of a wife or a grandmother, (ii) a daughter or a granddaughter of a wife or a granddaughter, and (iii) a wife of a father or a grandfather of a father how high-so ever, (iv) a wife of his son or the son of his son or the son of his daughter. By reason of affinity, marriage is invalid.

(c) Fosterage - when a child is orphaned by his mother or father, the mother who fostered him, know as foster-mother, a person must not marry his foster-mother or her daughter. The Sunni sect has some exception it.

(2) **Relative incapability** - this is the incapacity that occurs due to some situation that renders a marriage invalid and irregular for the time being. When this situation ceases to exist, then the marriage again becomes valid. For example, a Muslim man is prohibited from marrying more than four women; if he marries the 5th woman, then the 5th marriage is invalid until he divorces any of the other four women. Some of the grounds on which marriage can become invalid for the time being are as follows; unlawful conjunction, polygamy (more than 4), absence of a witness, differences of religion, women undergoing iddat.

(3) **Prohibitive incapability** - it happens in the following cases;

(a) Polyandry – polygamy is allowed in Muslim law, but polyandry is prohibited. A woman cannot marry more than one man until the first marriage is annulled. Women performing polyandry are punished under the Indian Penal Code.

(b) Muslim women married a non-muslim – If a woman marries a non-Muslim, either a Christian or a Jew or any other faith, marriage under Sunni law is irregular and, in the case of Shia law, is invalid.

(4) **Directory incapability** – it can occur through the following reasons;

(a) marrying a women 'enceinte' (marrying a woman pregnant with a former husband, this is invalid),

(b) prohibition of divorce (when marriage is dissolved, then they cannot remarry except by nikah hall, but this has now become unlawful,

(c) marrying during the pilgrimage (under Shia marrying someone during the pilgrimage is prohibited, but other sects consider it is marrying during a pilgrimage to mecca as sacrosanct),

(d) marrying with a sick man.

MUTA

Shia laws allow muta marriage. Muta marriage is a temporary marriage or one for a limited duration. Traditionally, such marriages could be solemnized when the man in the marriage was traveling for long distances. In this event, a marriage between a Shia man and a non-Muslim lady might be validated.

CONCLUSION

Marriage is a religious obligation of every Muslim and is seen as a moral safeguard and social necessity. The Prophet added that the marriage is my custom, and anyone who stays away is not among me. In contrast to Hindu weddings, where weddings are a ritual, Muslim weddings

are of a civil contract. In order to legitimize a kid, marriage is essential. In line with the stipulated rules, the marriage establishes different rights and duties for both partners.

Based on the legal view, we can readily infer that marriage is only a civil contract in accordance with Muslim law. It meets every contractual need and acceptability, free consent, and consideration. But Muslim marriage is a devotional act from a religious point of view. Marriage does not lack any spiritual and religious values. It also shares the characteristics of a holy union of two souls, together with its secular side, for spiritual purposes. Spouses are severely commanded to love and honor one another in the Quran and Hadith. Each of us has been called a noble gesture of delight and showering love and compassion.