

Muslim Law
Muslim Marriage

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Marriage

This article deals with the Definition, Nature and Scope of Muslim Marriage. Marriage is a contract under Muslim law. And when two people enter this contract, with it also comes certain rights and duties of both the man and woman.

Etymologically, the meaning of marriage according to the Mohammedan dictionary is “the celebration of a marriage contract, marriage is enjoined upon every Muslim, celibacy is condemned by the prophet.

The essentials of Muslim Marriage are very much like a general contract that,

- Offer and Acceptance
- The parties are competent to enter into the contract
- There should not be any legal disability

Now the *first* essential that is offer and acceptance should be made by the man or the relative of the man, and the woman or the relative of the woman. Now since the woman is in *pardah* she needs to give permission to the person who is going to accept the offer on her behalf. Moreover, the person should be accompanied by two witnesses as well while the permission is granted by her.

The authorization has to be given on whilst of accepting mehar from the man. And if she accepts the mehar from the man then it is deemed that she has accepted the offer. The offer can also be accepted by other modes and under such circumstances, the Qazi comes into play. **And then the Qazi after reading verses of the Quran to officiate the marriage.** this thing shows that Muslim marriage is not a contract.

The Mohamedan law provides for religious and legal aspects to Islamic marriage. Because along with the Quran and Ijmas also the legal principles laid down are followed in India.

So there are four aspects to Muslim law in India:

- **Legal aspect**

In Muslim law, marriage is not a sacrament, it is a contract as was also reiterated in the case of *Abdul Qadeer v. Saliq*. This is one of the vital judgments which has been given by the first judge of the High Court of Allahabad. This judgment also highlights the importance of it being a religious sacrament.

The Mohammedan Law provides for very rigid implementation of nikah as an institution of marriage. Anciently, marriage was dealt as a measure for providing security to the women in a marriage. With the evolution of time, from securing to purchase to the acquisition of a woman by way of the property was in vogue.

This acquisition of women as a property by the mode of accepting the mehar given by the man to the woman and once the woman accepts the mehar, it is deemed that she has accepted the nikah as well. Mahmood J. also stated that though the Mohammedans cite their verses of the Quran while carrying out the nikah, it is still in the nature of the civil contract.

He further stated that this contract of marriage has a purpose and this purpose is to carry on the lineage of the family. This is the strength of marriage also called the *ejab-o-kabool*.

There are three conditions under which marriage shall not hold well, i.e.

- a. when there is no consent between the parties,
- b. where there is a breach of provisions in the contract and
- c. the marriage contract should be legal.

When it comes to marriage in Islamic law, there are two things kept juxtapose to each other. On one hand, Mahmood J. stated that it is a civil contract and on the other hand, it is also a sacrament. So we can see that on one hand, there are principles of contract law that is applicable and on the other hand the principles of Quran.

To fathom this dichotomy, we also need to bring aspects into consideration like the object of marriage, its aims and purposes and for that,

we need to understand that the Quran and the principles laid down by the Prophet. However, an institution of marriage is based on love, affection, togetherness between the man and the woman, sexual relations and the lineage.

- **Religious Aspect**

Marriage is an institution which helps a man to become a better human and for lineage. This is something which has been said by the Prophet. It is a devotional act between the man and the woman which is called *ibadat* and the Prophet expects each and every Muslim man if he is capable, to provide for healthy livelihood and be a party to the marriage and the man and the woman should strictly have affection and respect each other. According to certain scholars, Prophet had also stated that one who is a fit person should be in this contract or else it becomes *jihad* or sinful.

Prophet believed that one who marries fulfils half his duty as a Muslim by the virtue of marrying to secure his chastity to defend the almighty and his cause and to be free and one who marries will be blessed by the almighty. The arguments made in legal aspect for a marriage to be a contract is partially incorrect because according to the teachings of Islam, a man who marries fulfils half the duties of his religion.

Amir Ali, stated that it is incorrect to state that marriage is only to protect one's lineage but it for the betterment of the society and to ensure that people do not indulge in the foulness of chastity. That is the reason why the Holy Prophet believed that the marriages should be conducted in mosques with the blessings of almighty and treated *nikah* to be *sunnah* which means the marriage was treated as a tradition.

Prophet further delves into the fathoms of marriage by stating that marriage uplifts the spirituality and morality of a man and also determines the status of a woman because according to him, a nobleman shall ensure that the authority and the permission is taken for marriage. The one who does not pray, stay awake and fast shall be scolded by the Prophet.

- **Social Aspect**

Now, marriage being a union of two people, a man and a woman, obviously has a social impact to it. The Mohammedan law puts a woman after marriage on a higher pedestal. The concept of unlimited polygamy has been restricted in modern times unlike the ancient era. That the Prophet expects every Muslim man capable to earn a livelihood and able to maintain a family to be married.

So according to **Sulaimaan CJ**, marriage in Mohammedan law is not only a civil contract without any religious and moral customs because it also believes in the union of two souls together by the virtue of love, affection and togetherness.

- **Ordinary Contract kept Juxtapose to Marriage Contract**

In this aspect, Sulaimaan CJ. has a different point of view than Mahmood J. According to Mahmood J., he drew a parallel of a marriage contract by stating that a contract is an agreement of sale of goods. He further also applies the right of lien when it comes to an unpaid seller by making a comparison to an unpaid mehar and that a woman can deny the restoration of conjugal rights in such cases. Sulaimaan CJ.

Further stated that a marriage should not be regarded as sale of goods and that the wife should not be considered as consideration for the mehar paid by the man.

On the other hand, compared the contract of marriage to lien and sale of goods which may have consequences as follows:

- When it comes to the sale of goods in contract law and there is non-payment by the buyer then the seller has the right to breach the contract and sell the goods to a third party. However, when it comes to marriage, the wife cannot leave or divorce her husband if the mehar is unpaid.
- The right to lien applies when the goods are agreed to be sold by the seller to the buyer and these goods are sent to the buyer and are in transit. The right accrues when the seller has parted his ways and goods are in transit. However, this concept cannot be applied in case of marriage since the woman cannot just deny the restoration of conjugal rights until the mehar is not paid.
- Right to lien also applies in cases of partial fulfilment or partial delivery of the goods. However, when it comes to marriage and a partial payment of mehar is paid, it doesn't mean that the woman will go back to the husband's house and then decide to deny the restoration of conjugal rights till the mehar is not fully paid.
- There are two parties to a contract; the one who is selling and the one who is buying and the goods or the product is the subject matter. However, in a marriage, the wife herself receives the mehar and not her family. This concept helps us to understand the fact that a woman is treated as a chattel. Before the Prophet, the principles of Mohammedan law stated that the woman is a chattel and the mehar was consideration for the acquisition of women in the marriage and she was treated as an inheritance after her husband died. But after the Holy Prophet, a woman has been given a higher pedestal in society.

- All arguments made by Mahmood J. are incorrect because mehar is treated as a mark of honour and respect which is given to a woman as a wife.
- Further, Muslim marriage is different from a civil contract because a civil contract cannot be valid by the virtue of future promises and in a civil contract there comes the concept of limited time. It may be argued that Muta, a type of marriage is one such example. However, Muta marriage is an exception to a general rule.