CHAPTER-II

STATUS OF WOMEN IN ISLAM AND MARRIAGE LAWS:

2. General:

Marriage as an institution is encouraged by Islam because family life not only ensures survival of the human race but also guarantees social stability and a dignified existence for both woman and man. According to the Quranic philosophy, there is nothing wrong with sex if it is used for procreation within the marital framework and not merely for enjoyment and pleasure. The Quran specifically forbids sexual relations for “fornicating and receiving paramours” as it cannot impart dignity to women1. It would not only reduce sex to mere physical pleasure but would also lead to a much greater exploitation of women. According to Quran, “Husband and wife are each other’s garments.”2 Thus marriage is not merely a sexual urge which brings woman and man together; it has a higher end, exalted motive, and is a relationship of love and mutual respect.

Islam has given every possible right to women for accepting or repudiating the marriage. Muslim marriage is a valid contract between the parties that means both partners entering into marriage contract have got equal rights. Muslim marriage is civil contract with the object of legalizing sexual intercourse and procreation and legitimation of children. Limited polygamy is permitted but polyandry is not permitted. No religious ceremonies are required. Irregular marriages may be validated by removing temporary or relative impediments and after cessation of impediments, all legal effects of a valid marriage ensue. Marriage is a religious duty of every Muslim and is considered to be a moral safeguard and social need. The Prophet has

2 Holy Quran 2:187
also said, “Marriage is my tradition whosoever keeps away there from is not from amongst me”.

2.1 MARITAL STATUS OF WOMEN:

2.1.1 Prior to the advent of Islam:

In the pre-Islamic Arabian society, the position of women was very bad. In those days, the customary laws of Arabia were all in favour of the males. The females were treated as properties and not as human beings. The only object of a marriage was the enjoyment of sex and procreation of children. Limitless polygamy prevailed and a man could have as many wives at a time as he liked. Except a very few blood-relations, such as the real mother or real sister, there was no restriction in marrying a girl even on one’s close relationship. Several kinds of marriages were recognized. But, they were almost different forms of prostitution. The form of marriage, which was very near to the present marriage, was one in which the father or any other guardian sold the girl to the husband in the same manner as he used to sell his camels or sheep. There was, therefore, no certainty in the matrimonial status of a wife. To be precise, the women in those days were not better than the slaves and had no existence of their own in the status.

3 According to Abdur Rahim, in the pre-Islamic Arabian society, just before the advent of Islam, four kinds of marriages (or customs for establishing relationship of sexes) were prevalent: (1) The girl was sold by the father or her guardian to the husband (person desirous of marriage with her); (2) A man would say to his wife to have intercourse with some other man (generally a famous man) and then remain away from her society till a child was conceived. After pregnancy became apparent, she would return to her husband. This probably originated from desire to secure a noble-blood, (3) In another form of marriage, the girl would invite several men (not less than ten) to have intercourse with her. After a child was born, she would call all the men and name any one to be the father of her child. The named by her, could not deny paternity of that child; (4) In yet another form, the woman (prostitute) would fix a flag on her tent so as to indicate an invitation to all men, to come and have intercourse with her. If child was born to such woman, the men who visited her, would be assembled and the father of that child was decided on the basis of child’s features or profile by a physiognomist (see Abdur Rahim, Mohammedan Jurisprudence, p.7.)
2.1.2 After Coming of Islam:

It was Prophet Mohammad who brought about a complete change in the position of women. The improvement was vast and striking and their position is now unique as regards their legal status. Islam is a strong advocate of marriage. There is no place for celibacy, like for example the Roman Catholic priests and nuns. The Prophet has said “there is no celibacy in Islam. Marriage is a religious duty and is consequently a moral safeguard as well as social necessity.” Prophet Mohammad (PBUH) placed woman on a footing of almost perfect equality with men in the exercise of all legal powers and functions, which stand in bold relief when compared with the state of law amongst the ancient Arabs of the pre-Islamic period.

2.2 RIGHT TO MARRY AND IMPORTANCE OF MARRIAGE UNDER ISLAMIC LAW:

2.2.1 Under Constitution of India:

Under Article 21 of Constitution of India which says, ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’ The right to marry is a component of this article. This right has been recognized even under the Universal Declaration of Human Rights, 1948. Article 16 of the same states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

\[5\] Hedaya (Hamilton’s Translation) Ed II p.25
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

In *Lata Singh v. State of Uttar Pradesh*, the Supreme Court viewed the right of marriage as a component of right to life under Art.21 of the Constitution of India. The facts that gave rise to the litigation were violent reactions following an inter-caste marriage between two adults. There were complaints, arrests, threats, and criminals cases against the girl’s husband and his family members. The girl (wife) filed a writ petition under Art.32 of the Constitution of India with a prayer for issuing a writ of certiorari and/or mandamus for quashing the trials in the lower courts, against her husband and his relatives. The petition was allowed and the police/administration was directed to protect them from harassment, threats or acts of violence, and take stern action against those who do so, by intituting criminal proceedings against them. The court observed:

*This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.*

Both the partners in the case were adults and so free to marry of their choice. The court further observed that there is no bar to an inter-caste marriage under the

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7 Ibid, p. 2525.
Hindu Marriage Act, 1955 or any other law. “Inter-caste marriages are in fact in the national interest as they will result in destroying the caste-system.”

2.2.2 Importance of Marriage under Islamic Law:

The Quran says: “And Allah has made for you your mates (and companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best; will they then believe in vain things, and be ungrateful for Allah’s favours?”

“And Among His signs is this that He created for your mates among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Undoubtedly in these are signs for those who reflect”.

Thus according to verses of the Holy Quran, Allah has created men and women as company for one another, and so that they can procreate and live in peace and tranquility according to the commandments of Allah and the directions of His messenger. These verses clearly show that in contrast to other religions like Christianity, Buddhism, Judaism, etc. which consider celibacy or monasticism as a great virtue and means of salvation, Islam considers marriages as one of the most virtuous and approved institutions. The Prophet (PBUH) declared “There is no monasticism in Islam.” He further ordained “Marriage is my Sunna and whosoever keeps away from it is not from my followers”.

The word zawaj is used in Quran to signify a pair or a mate. But in common parlance it stands for marriage. Since the family is the nucleus of Islamic society, and marriage is the only way to bring families into existence, the Prophet insisted upon his

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8 Ibid p. 2522
9 Ibid p. 2525
10 Holy Quran 16:72
11 Holy Quran 30:21
12 Hadith Bukhari 64
followers entering into marriage. The Shariah prescribed rules to regulate the functioning of the family so that both spouses can live together in love, security and tranquility. Marriage in Islam as aspects of both ‘ibadah’ (worship) of Allah and ‘muamlah’ (transaction between human beings).\textsuperscript{13}

\textbf{2.3 OBJECT OF MARRIAGE:}

The main object of marriage is preservation of human race. It is through marriage that the paternity of a child is established. According to Abdur Rahim ‘the Mohammedan law has obtained the institution of marriage, sanctioning thereby sexual relations between two members of the opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and wife and of mutual help in earning livelihood.\textsuperscript{14}

Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from the foulness and unchastity.\textsuperscript{15}

Marriage was instituted for the solace of life and one of the prime original necessities of man. \textsuperscript{16} It is therefore, lawful in extreme old age and after hope of offspring has ceased and even in the last or death or illness.\textsuperscript{17}

The Prophet himself gave much significance to this institution. Once he said, ‘the man who does not marry is not one of my followers….the married man is more pleasing in the sight of God than the most pious bachelor…\textsuperscript{18}

From the above statements, the following points emerge as background of

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\textsuperscript{13} Singh RK, \textit{Muslim Law}, Ed. 2011 p.58
\textsuperscript{14} Abdur Rahim, \textit{Mohammedan Jurisprudence}, 1911 Ed. p.237
\textsuperscript{15} Ameer Ali, Student’s 7th Ed. p.97. This Edition is based on the Quran and Traditions.
\textsuperscript{16} Fatwa Alamgiri, Vol I
\textsuperscript{17} Baillie’s Digest I
\textsuperscript{18} Hadith Bukhari 67,
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Marriage:

1. Legalization of sexual intercourse for the purpose of enjoyment, and
2. Procreation and legitimation of children for the purpose of:
   a. Preservation of human race,
   b. Systematization of domestic and social life.

2.3.1 Meaning of Marriage:

According to *Encyclopaedia of Islam*, the meaning of Marriage (which has been derived from the word ‘Mara’) means the Nikah. The *English Dictionary* meaning of Marriage, *(mar‘ij)* the ceremony, act, or contract by which a man and woman become husband and wife. The Arabic word nikah means the union of the sexes or tie up together and in law this term means ‘marriage’. According to *Encyclopedia Britannica*, the human beings, like all higher animals, multiply by the union of the two sexes. But neither conjugation nor the production of off-spring is as a rule sufficient for the maintenance of the species. (The marriage is rooted in the family, rather than the family in “Marriage”—Westermarck) . It is a physical, legal and moral union between man and woman in complete community of life for the establishment of family.

2.3.2 Definition of Marriage:

The Marriage has been defined by different authors of Muslim Law as:

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19 Ed VI, p.599
20 AM Macdonald, Chambers Twentieth Century Dictionary OBE BA (Oxon), p.804 (Published by Allied Publishers Ltd)
21 Vol 4 p.940
22 Ibid p. 950
According to Fyzee, ‘among the Arabs Nikah, ‘marriage’ is a wide term, comprising many different forms of sex relationship,’ but in Muslim law it has a very definite legal meaning. It is a contract for the legalization of intercourse and the procreation of children.  

In Hedaya it is defined as: “Nikah in its primitive sense means carnal conjunction. Some have said that it signifies conjunction generally. In the language of law it implies a particular contract used for the purpose of legalizing generation”.  

In Baillie’s Digest marriage has been defined to be “a contract for the purpose of legalizing sexual intercourse, and procreation of children”.  

Ashabah says: “Marriage is a contract underlying a permanent relationship based on mutual consent on the part of a man and woman.  

Dr. Jang is of opinion that—“Marriage though essentially a contract is also a devotional act; its objects are rights of enjoyments and procreation of children and regulation of social life in interest of society.”  

Similar is the view of Abdur Rahim, who says: “The Mohammedan jurists regard the institution of marriage as partaking both of the nature of ibadat or devotional acts and muamalat or dealings among men.”  

The Prophet of Islam is reported to have said:

“Marriage is my Sunna and those who do not follow this way of life are not my followers.”  

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25 Ibid  
26 Baillie, *Digest of Mohammedan law*, Part I, Ed.II  
And that—"There is no monkery in Islam." The Islam religion is not governed by Priests and Monks as it is primarily based on the versions of Quran, Hadith and Sunna, which are the basic sources.

Marriage under Muslim law is very much unlike St. Paul’s concept of marriage as clearly a concession to the weakness of the flesh. In Shoharat Singh v. Jafri Begum, the Privy Council held that where cohabitation of a man and woman commenced with a muta and there was no evidence as to the term of the marriage, the proper inference would, in default of evidence to the contrary, be that the muta continued during the whole period of cohabitation. Marriage is recognized in Islam as the basis of society. It is a contract but it is also a sacred covenant. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. The main aim of the institution of marriage is to protect the society from foulness and unchastity. It has also been said that marriage is so holy a sacrament, that in this world it is an act of ibadat or worship, for it preserves mankind free from pollution.

There is a consensus of Muslim Jurists that marriage is Sunnat Muwakidda. A Sunnat Muwakidda is defined, “the person who complies with it, is rewarded in the next world, and he who does not, commits a sin.” According to Ameer Ali, marriage is an institution ordained for the protection of the society and in order that human beings may guard themselves from foulness and unchastity.

As Fitzgerald observes, “Although a religious duty, marriage emphatically is not a sacrament. There is no sacrament in Islam, nor is it coverture.”

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30 (1914) Bom 17 LR 13
31 Ameer Ali, Students 7th Ed., p. 97 (This definition is based on the Quran and traditions).
32 Ibid.
33 Fitzgerald, Mohammedan Law, 1931 Ed, p.37
According to Justice Mahmood in *Abdul Kadir v. Salima*,

"Marriage among Muhammadan is not a sacrament, but purely a civil contract" though solemnized generally with the recitation from the Holy Quran, yet Muslim law does not positively prescribe any service peculiar to the occasion. That is a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other contracting parties, or of their natural or legal guardian before competent and sufficient witnesses, and also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case.

Thus, marriage, according to Muslim Law, is a contract for the purpose of legalizing sexual intercourse and the procreation and legitimating of children and the regulation of social life in the interest of society by creating—

(i) The rights and duties between the parties themselves, and
(ii) Between each of them and the children born from the union.

According to Tyabji: “Marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children, between a man and a woman, who are referred to as ‘parties to one marriage’ and who after being married, become husband and wife”

According to Schacht: “Marriage is a contract of civil law, and it shows traces of having developed out of the purchase of the bride, the bridegroom concludes the contract with the legal guardian (wali) of the bride, and he undertakes to pay the

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34 (1886) 8 All 149 (154)
35 Hedaya, (Hamilton’s Translation) Ed II p.33
36 Tyabji, *Muslim Law*, Ed IV, pp.44-45
nuptial gift or dower (mehr, sadac), not in the wali as was customary in the pre-Islamic period, but to the wife herself.”

In *Anis Begum v. Mohd, Istaafa*, case Shah Sulaiman, C.J., observed, “In Islam, marriage is not only a civil contract but also a religious sacrament (too).” He further struck a note of caution in the following words:

“If one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and textbook writers, it would not be proper for us in the twentieth century to go behind such a consensus of opinion, and decide a point contrary to such opinion, on the ground that the majority of the three imams favoured that view in the earlier centuries... Rule of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view... But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions without expressing any preference for either, then it is implied that the conflict of opinion was still continuing without any general concurrence having been attained, and it would then be open to choose whichever of the opinions appears to be the sounder and better adopted to the conditions and needs of the times.”

From the above it follows that in case of a disputed question of opinion and in the absence of any specific rule of interpretation to be followed, the Court is competent to arrive at its own conclusion and to choose any opinion, subject to the principles of justice, equity and good conscience.

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37 Schacht, *An Introduction to Islamic Law*, 1964 Ed, p. 22
38 (1933) 55 All 743 as cited in *Muslim Law*, Syed Khalid Rashid, 5th Ed. P.53
2.4 MARRIAGE UNDER DIFFERENT PERSONAL LAWS:

2.4.1 Marriage under Hindu Law:

Marriage, according to Hindu Law, is a holy union for the performance of religious duties. It has been held in this case by the Bombay High Court that marriage is a sanskara or sacrament. It is the last ten sacraments enjoined by the Hindu religion for purifying the body from inherited taint. Same view has been taken by the High Court of Madras in Gopalkrishna v. Venkatnaras. Considering Hindu marriage to be entirely a sacrament, as the acceptance of the bride is necessary and indispensable part of the ceremony, a person whose loss of reason is complete should be held incompetent to accept the bride, and the marriage must be regarded as invalid on that ground. The marriage brought about during the minority of either party does not render the marriage invalid, because the mere fact is that unlike Muslim marriage it is not a contract. When a congenial marriage was arranged by his father and his wife gave birth to two sons, it was held that he was lawfully married.(Amirthammal v. Vallinayil Ammal)

Marriage according to Hindu Law is a holy sanskar (sacrament) and not a contract unlike Muslim law. The maxim “conjunctic marititet perminae est de nature” means that to keep husband and wife together is the law of nature and the maxim “viret unor consentur in lege una pensoma” means that husband and wife are considered one in law. Kanyadan (formal donation of the bride by her father) and

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39 Sundrabai v. Shivanarayana (1908) 32 Bom 81.
40 Ibid
41 (1914) 37 Mad 273 (FB); 17 IC 308; AIR 1914 Mad 432, overruling Govindarazulu v. Devarbhootla (1904) 27 Mad 206 (a case of Brahmans), Kameswara v. Veeracharlu (1911) 34 Mad 422; 8 IC 195 (a case of Shurdas).
43 (1942) Mad 807: 203 IC 648: AIR 1942 Mad 693
saptpadi (circumambulation of holy fire by the bride and the groom) have basic importance in Hindu Marriage.44

The four approved forms of Hindu marriage under ancient Hindu law were:

1. The Brahma
2. Daiva
3. Arsha and
4. Prajapaty

The unapproved forms of Hindu marriage under ancient Hindu law were:

1. Asura
2. Ghandarva
3. Rakshasa and
4. Paishacha

The only forms of marriage now recognized are:-

(i) The Brahma form, which is one of the approved forms; and
(ii) The Asura form, which is one of the unapproved forms.45

BRAHMA MARRIAGE—where the father or other guardian of the bride gives the bride in marriage without receiving any consideration from the bridegroom for giving the girl in marriage, the marriage is called Brahma.

ASURA MARRIAGE—where the father or other guardian receives such consideration which is technically called shulkha or bride’s price, the marriage is called Asura.46

44 The Hindu Marriage Act, 1955 (Introduction)
45 Mulla, Principles of Hindu Law, Vol I, ED. 17th p.650-51
2.4.2 Parsi Marriage:

The concept of Parsi Marriage is clearly indicated in section 3 of the Parsi
Marriage and Divorce Act, 1936, read with section 2(6) of the said Act.\textsuperscript{47} The
essentiality itself indicates that Parsi Marriage, though a contract is a religious
ceremony of \textit{ashirvad} which is for its validity, and this fact cannot be ignored in view
of section 3(1) (b) of the Act. Literally meaning “blessing”, \textit{ashirvad} is essential for
its validity. Ashirvad means a prayer or exhortation to the parties to observe their
marital obligations.\textsuperscript{48} The marriage is solemnized by a Parsi priest in the presence of
two witnesses.\textsuperscript{49} Parsis in India are those who profess Zoroastrian religion. The Parsi
Marriage and Matrimonial cases are regulated by the Parsi Marriage and Divorce Act,
1936 as amended by the Act of 1988. Under this Act, the marriage can be performed
only between two Parsis and for every such marriage the religious ceremony of
‘ashirvad’ is necessary.\textsuperscript{50}

2.4.3 Jews Marriage:

In India Jews Marriage is not governed by any statutory law. It is a contract
and monogamous marriage\textsuperscript{51}. A written contract called \textit{Ketuba} between the parties to
marriage is essential for the validity of the marriage. A religious ceremony is also
required.\textsuperscript{52}

According to Meyer Waxman\textsuperscript{53}, as per Bible and Jewish tradition, the entire
nation sprang and developed from a single family and furthermore the development
proceeded not from all members of the family but from those whose character

\textsuperscript{46} Ibid
\textsuperscript{47} S.Krishnamurthi Aiyar, \textit{Law of Marriage, Maintenance, Separation and Divorce}, Ed. 73, p. 11
\textsuperscript{48} See Parshottam v. Meherbai, ILR (1880) 13 Bom 302.
\textsuperscript{49} Paras Diwan, \textit{Family Law}, 9\textsuperscript{th} Ed. p.26
\textsuperscript{50} Supra note 47.
\textsuperscript{51} S.Krishnamurthi Aiyar, \textit{Law of Marriage, Maintenance, Separation and Divorce}, Ed. 73, p. 5
\textsuperscript{52} Supra 49
\textsuperscript{53} Meyer Waxman, \textit{Judaism, Religion and Ethics}
displayed traits of nobility and righteousness and according to the Book of Genesis, marriage was instituted by God himself at the very beginning of creation of man. Genesis II-6 says, “It is not good for a man to be alone.” Thus Jewish marriage has a religious touch and a marital tie is considered divine. The Jewish marriage is performed by observing various ceremonies like “Birkat Eurisn”, “Kiddushin”, and “The Ketubah”. The Ketubah is the formal marriage document in which the willingness of both parties to enter into the contract of marriage is expressed and some of the duties specified. It is followed by “mohar” also known as Ketubah money.\textsuperscript{54}

2.4.4 Christian Marriage:

In India, the Christian Marriages are performed under the Christian Marriage Act, 1872. This Act provides that such marriages may be solemnized in India by

1. Any person who has received Episcopal ordination if the rites and ceremonies prescribed by the church are observed;
2. By any minister of the church of Scotland under the same conditions;
3. By any minister of religion licensed under the Act for the purpose;
4. By or in the presence of a Marriage Registrar appointed under the Act;
5. By any person licensed under the Act to grant certificates of marriages between native Christians.

The marriage has to be celebrated in a church unless there is no church within a distance of 5 miles.\textsuperscript{55}

2.5 CONCEPT OF MUSLIM MARRIAGE:

In considering the basic idea in the conception of a Muslim marriage, the fact has to be borne in mind that Muslim law is, in almost every aspect, so intimately

\textsuperscript{54} S.Krishnamurthi Aiyar, Law of Marriage, Maintenance, Separation and Divorce, Ed. 73, p.3
\textsuperscript{55} Ibid, p.5
connected with the religion that the law cannot diserved from religion as observed by Justice Mahmood in *Govind Dayal v. Inayat Ullah*,56 "Hindu and Muhammadan Laws are so intimately connected with the religion, that they cannot readily be disserved from it. As long as the religion last, the laws founded on them last. It is therefore, essential that for appreciating a proper concept of marriage, the various aspects of it must properly understood. The three aspects of marriage in Islamic law which are necessary to understand the institution of marriage as a whole are—legal, social and religious.57 The social setting in which the law of Islam was promulgated is of particular importance. There were numerous pre-Islamic customs in which the position of women was very much lower. Many revolutionary changes were introduced by the Prophet of Islam and the status and position of wives was improved e.g. by restricting unlimited polygamy and giving them rights of inheritance). An element of sacredness resulting from the religious ideas also finds a place in the conception of marriage. These aspects are—legal, social and religious.58

2.5.1 Legal Aspect:

The elements which constitute a marriage and the manner in which it is completed is similar to that of a civil contract and on the contractual nature it has following characteristics:

1. There can be no marriage without consent;
2. Like contract, the Muslim marriage requires the condition of proposal (Ijab) and acceptance (Kabul)
3. As in contract, provisions is made for its breach, to wit, the various kinds of dissolution by act of parties or by operation of law;
4. The terms of a marriage contract are within legal limits capable of being altered to suit individual cases;

56 (1885) 7 All 755 805.
5. Consent of the parties is an essential ingredient for a contract. In Muslim marriage also, free consent of the parties to a marriage is required. In other words, the marriage should not be induced by coercion or undue influence or fraud.\textsuperscript{59}

Indian courts have also declared Muslim marriage as a contract. Mahmood J., while defining Muslim marriage observed.\textsuperscript{60}

"Marriage in Muslim law is not a sacrament but purely a civil contract though it is solemnized generally with recitation from the Quran, yet Muslim law does not positively prescribe any service peculiar to the occasion. That is a civil contract. It is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural or legal guardians before competent and sufficient witnesses, and also upon the restrictions imposed and certain of the conditions required to be abided by according to the peculiarity of the case."\textsuperscript{61}

Commenting on the legal aspect of a Muslim-marriage, Ameer Ali observes:

"In the language of law as well as in the common parlance, the formal conclusion of contract is 'aqd', conveying the same meaning as the term obligation in the Roman law. In fact the aqd is the completion of contract which commences with the proposal or demand in marriage and ends with the consent."\textsuperscript{62}

MARRIAGE A CIVIL CONTRACT: Marriage in the sense of a ceremony takes a form of contract, mutual assent being the predominant and indispensable features in most legal systems. Contracts of marriage for minors are entered into by persons whose position is recognized by law as that of guardians. Remedies are also

\textsuperscript{59} Fatima v. Fazal Karim, AIR 1928 Cal 303
\textsuperscript{60} Abdul Kadir v. Salima, (1886) ILR 8 All 149
\textsuperscript{61} Ibid (Quoting J.N. Sircar's, Tagore Law Lectures)
\textsuperscript{62} Ameer Ali, Muhammedan Law, Vol. II. Ed. III, p. 313
provided for enforcing the obligations under matrimonial contracts as in the case of other contracts.\(^63\)

From a purely juristic point, marriage among Muslims is not a sacrament but a civil contract and though it is solemnized generally with recitations from the Quran, yet Muslim Law does not positively prescribe any service peculiar to the occasion. That is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted.\(^64\) Marriages may be terminated by death or divorce.\(^65\)

As marriage among Muslims is in its constitution a contract, it is open to man and woman entering upon marriage to define their future rights and liabilities.\(^66\) It has been held in many cases that a Muslim marriage is only a civil contract.\(^67\) A marriage is said to be a purely civil contract and nothing more.\(^68\)

**HOW FAR MUSLIM MARRIAGE CONTRACT RESEMBLES OTHER CONTRACTS?**

Muslim marriage contracts have certain points of resemblance with contracts of sale.

1) Marriage is like any other contract because no such relations as those connected by marriage can be established between two members of the opposite sexes except by their voluntary action.\(^69\) It can be compared with a contract of partnership.\(^70\)

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\(^{64}\) *Abdul Kadir v. Salina* (1886) 8 All 149 pp 155-156.

\(^{65}\) *Jahangir Khan v. Abdul Rahman*, 1923 All 128: 64 IC 943.

\(^{66}\) *Bailie I 18; Hed 33; Asha Bibi v. Kadir 33 Mad 22 at p 25: 3 IC 370."


\(^{68}\) *Ahmad Kasim Molla v. Khatoon Bibi* 1933 Cal 27 at p 33; *Abul Kasim v. Jamila* 1940 Cal 251.

\(^{69}\) *Asha Bibi v. Kadir* 33 Mad 22 p 24.

\(^{70}\) *Ekin Bebee v. Meer Ashraf Ali* I WR 152.
2) A contract of marriage under Muslim Law is a civil contract and is like an ordinary contract of sale. A contract of sale is the transfer of property for a price. In the contract of marriage the wife is the property and dower is the price. The Arabian jurists often apply the analogy of a contract of sale. The wife while a contracting party is, in a sense also the object of the contract. Some of the technical terms like sahi, fasid and batil have some traces of the law of sale in them. A fasid marriage has no legal effect just as there is no legal effect just as there is no legal effect of a fasid sale till the delivery of possession of the property. A promise to marry is recognized as a valid consideration for gift and would constitute an ewaz for a hiba-bil-ewaz.

3) A suit for restitution of conjugal rights is treated as a suit for specific performance, being founded on a contract which Muslim Law regards as a civil one and like other contracts relief may be refused on the ground of inequitable nature of the claim, for instance, on the ground of risk to the life or happiness of the wife.

4) One of the effects of marriage is dower which is said to be an exchange for the effect, that is, the usufruct of the wife. Dower is the consideration for the enjoyment of the buza (private parts of the person of the wife).

Although the jurists generally speak of marriage as a contract, there are many features which are entirely different from other contracts. But while marriage contracts have some elements of ordinary contracts in them there is no doubt that marriage contracts have, in almost all systems, features which are unique to them. Other contracts give rise to continuous relationship with more or less indefinite

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72 Abdul Kadir v. Salima (1886) 8 All 149 p 196
73 Fitzgerald 34, 45.
75 Khursheed Begum v. Abdul Rashid 1927 Nag 139: 100 IC 169.
76 MUS Jung: Muslim Law of Marriage p 28; Hed 44; Baillie II p 70 (fn)
obligations like those of landlord and tenant, master and servant, etc. In the case of those contracts, the parties are at liberty to determine their rights and obligations (except when certain legal limitations are placed in particular cases). But the incidents of a marriage contract are most rigorously fixed by law and the scope for variations is exceedingly limited. Certain effects are determined by virtue of the very contract creating the legal status of husband and wife. Such contracts cannot be said to be wholly analogous to other contracts.77

HOW FAR MUSLIM MARRIAGE CONTRACT IS DIFFERENT FROM CONTRACT OF SALE?

1) In marriage the individuality of the wife is maintained and is not like a sale in which the purchaser acquires absolute ownership of the property purchased. The rights he acquires are conjugal rights which are strictly defined by law.

2) A contract of sale is rendered null and void by any invalid conditions. This is unlike a marriage contract which is valid in spite of any nugatory conditions. Thus, if a marriage is contracted for unlawful dower, the marriage would be valid and the conditions void.78

3) Although dower is a consideration for conjugal intercourse,79 the dower is not exactly a consideration given by the man to the woman for entering into the contract but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman.80 If the Arabic text books of Muslim Law have compared dower to the price in a contract of sale, it is simply because marriage is a civil contract under the law and

77 B.R Verma, *Muslim Marriage and Dissolution*, Ed.1971 p.15
78 Hed 51; Bail II 76.
79 Hamira Bibi v. Zubaida 38 All 581: 36 IC 87 p 90 (PC)
80 Baillie 191; Abdul Rahim p 334.
sale is a typical contract which Mohammadan Jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy.\textsuperscript{81}

It is an essential incident and fundamental feature of marriage with the result that even if no dower is fixed the wife is entitled to some dower from the husband.\textsuperscript{82} It is presumed by virtue of the contract itself even though it has not been fixed in the contract.\textsuperscript{83}

4) Marriage is itself an obligatory religious duty. Civil contracts do not involve any ideas of religious obligations. Notions of virtue or sin and reward and punishment find no place in any civil or secular contract.\textsuperscript{84}

5) Except in the case of one of the Shia sects, marriage is a permanent tie and is not, like other contracts, to be permitted for a limited period.\textsuperscript{85}

2.5.2 Social Aspect:

Nikah is a well-established social institution which gives to the women a separate and dignified status in the society. In its muamalah aspect, marriage being a lawful response to the basic biological instinct to have sexual intercourse and to procreate children, the Shariah has prescribed detailed rules for translating this response into a living human institution reinforced by a whole framework of legally enforceable rights and duties, not only of the spouses, but also of their offspring. It is narrated by Anas that the Messenger of Allah said: “when a man marries, he has fulfilled half of his religion, so let him fear Allah regarding the remaining half”. The Prophet considered marriage for a Muslim as half of his religion because it shields him from promiscuity, adultery, fornication, homosexuality, etc. which ultimately

\textsuperscript{81} Abdul Kadir v. Salima (1886) 8 All 149 p 158.
\textsuperscript{82} Abidhumissa v. Mohd Fathieuddin 41 Mad 1026: 44 IC 293; Sabir Hassan v. Farzand Hasan 1938 PC 80 p 82; Qazi Siddique Hussain v. Salima 61 CWN 187.
\textsuperscript{83} Bail II p. 171.
\textsuperscript{84} Jung : Muhammadan Matrimonial Law p 13.
\textsuperscript{85} Bail I 18; Hed 38; Asha Bibi v. Kadir 33 Mad 22 : 3 IC 370.
lead to many other evils like slander, quarrelling, homicide, loss of property and disintegration of the family. According to the Prophet the remaining half of the faith can be saved by taqwa. Muslim jurists considered marriage to be a *sunnat muvakida*, that is, something on compliance with which he would be rewarded, after life and failure to comply with which results in sin. Marriage was considered by the Prophet as one of the religious matters to which preference was given over *jihad* (religious war). Marriage is thus an imperative duty particularly when there is uncontrollable sexual desire. Marriage is undesirable only when there is apprehension of its being a source of annoyance of misery or oppression. Muslim religion therefore definitely discourages celibacy.

Muslim marriage is not simply a contract but also a social institution on the following grounds:

1. Islamic law gives to the woman definitely high social status after marriage
2. Restrictions are placed upon the unlimited polygamy of pre-Islamic times and a controlled polygamy is allowed;
3. The Prophet, both by example and precept, encouraged the status of marriage. He positively enjoined marriage to all those who could afford it; and the well-known saying attributed to the Prophet ‘There is no monkery in Islam’ expressed his attitude towards celibacy briefly but adequately.
4. There is no place for *celibacy*, like for example the Roman Catholic priests and nuns. The Prophet has said “there is no celibacy in Islam.

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86 Abdur Rahman I. Doi, Marriage, [http://www.islamawareness.net/Marriage/doi.html](http://www.islamawareness.net/Marriage/doi.html)
87 Jung : *Muhammadan Matrimonial Law*, p 11-12 ; Durr Mukhtar 3.
88 Siz arm 1 315 : Durrul Mukhtar 3 – 4.
Marriage is a religious duty and is consequently a moral safeguard as well as social necessity.91

2.5.3 Religious Aspect:

In its ‘ibadah’ (devotional act) aspect, marriage is an act pleasing to Allah because it is in accordance with His commandments that husband and wife love each other and help each other, to make efforts to continue the human race and rear and nurse their children to become true servants of Allah. Marriage is recognized in Islam as the basis of society. It is a contract, but it is also a sacred covenant. Temporary marriage is forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. Spouses are strictly enjoined to honour and love each other. Secondly, the traditions of the Prophet follow the same lines. The Prophet was determined to raise the status of women. He asked people to see their brides before marrying them,92 and taught that nobility of character is the best reason for marrying a woman.93 The Founder of Islam once delivered a sermon on marriage and to this day it is repeated with certain variations at Muslim marriages; it contains practical wisdom and noble sentiments.94

Shah Muhammad Sulaiman, CJ observed ‘it may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that marriage is not regarded as a mere civil contract but as a religious sacrament.95 Shah Sulaiman, C J further observed that marrying a suitable girl is not only social activity but also a religious duty of every Muslim; he has made it clear that apart from being a contract, a Muslim marriage is also a religious sacrament.96

91Rakesh Kumar Singh, Muslim Law, 2011 Ed.
93 Muhammad Ali, 272-23, Faitimid Law, 10
94 Muhammad Ali, 274; cf. Faitimid Law, 32
95 Muslim Law, Tyabji. Ed IV. pp.44-45
96 Anis Begum v. Mohd. Istafa, (1933) 55 All 743
Tahir Mahmood is also of the view that marriage among the Muslims is a “solemn pact” (mithaq-e-ghalid) which in law takes the form of a contract (aqd). He says that there is popular misconception that no religious significance or social solemnity attaches to a Muslim marriage and that is a mere ‘civil contract’. This he says, is not true. “Of course Islam does not regard marriage as a ‘sacrament’ (sanskar) in the Hindu religious sense of the term. However, Prophet did describe nikah (marriage) as his sunnat, and those who know the socio-legal significance of Sunnat as recognized by Muslim can well understand what marriage means to a follower of Islam. The Koran does not treat marriage as an ordinary contract. As a matter of fact it is only the form of Muslim marriage that is contractual and non-ceremonial; marriage itself as a concept is not merely a contract. A.A.A. Fyzee observes that while considering the social and legal aspects, the aspect of religion is often neglected or misunderstood....marriage partakes of the nature both of ibadat (worship) and muamalat (worldly affairs).

2.6 CAPACITY FOR MARRIAGE:

a. Every Muslim (boy and girl) of sound mind and having attained puberty, may enter into marriage contract. In Md. Idris v. State of Bihar

98 Ibid.
99 Fyzee, Outlines of Muhammadan Law, 4th Ed. pp. 89-90
100 Ibid.
101 Hedaya, 529, Bailie, 4 note that the provisions of Indian Majority Act, 1875 do not apply to matters relating to marriage, dower, and divorce. A Mohammedan wife who has attained puberty and is under 18 years of age may file a suit for divorce without the appointment of a next friend. (Naksetan Bibi v. Habibar Rahman 1948, 50 CWN 689 AC.66)
102 Mulla, Principles of Mahomedan law, 19 Ed. p. 223
103 1980, Cr. L.J 764 it was held that a muslim girl of 15 years who has attained age of puberty is competent to marry without the consent of her parents.

Marriage under the Mahomedan Law is a civil contract. Hence it should attract all the incidents of contract as any other stipulated in the Contract Act. The provisions of section 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally. The provisions of the Contract Act are clear in this behalf and require only that the person to return the benefits under the contract, at whose opinion the contract is rescinded Mahmad Usaf Abasbhai Bidiwale v. Hurbanu Mansur Atar, (1978) Maha. L.J 26
b. Marriage brought about without the consent of the parties having sound mind and having attained puberty is void.

c. Minors and Lunatics who have not attained puberty may be validly contracted in marriage by their respective guardians. In *Sadiq Ali Khan v. Jai Kishori* with reference to a Shia girl the Judicial Committee observed that the age of puberty in Mahomedan law is nine years and that of boy is twelve years. In *Mst. Atika Begum v. Mohd Ibrahim Rashid Nawah*, the Privy Council had made it clear about the age of puberty by saying that according to Muslim law a girl becomes major on the happening of either of two events, (1) the completion of her fifteen years or (2) on her attainment of a state of puberty at an earlier period. The same rule may be applicable in respect of the age of a boy. Thus, it may be said that in the absence of any evidence to the contrary, a Muslim is presumed to have attained the puberty at the age of fifteen years. After attaining the age of fifteen years, a person becomes mature enough to give consent for his or her marriage, so no consent of the guardian is necessary to validate the marriage. Under Muslim law, a minor married during minority by a guardian, has a right, on attaining majority, to repudiate such marriage.

2.7 ESSENTIALS OF VALID MARRIAGE:

The essential conditions of a valid marriage may be summarized as follows:

"*Ijab* (offer), *qubul* (acceptance), *baligh* (adult age or puberty), *rashid* (sound mind

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104 In certain circumstances, minor contracted in marriage by the guardian for marriage has the right of repudiating or ratifying the marriage contract on attaining puberty, this right of the minor in known as the option of puberty (Khyar-ul-Bulugh). Thus, “option of puberty” is the right of a minor boy or girl, whose marriage has been contracted through a guardian, to repudiate or confirm the marriage on attaining puberty. (Aqil Ahmed, *Muslim Law*, Ed 23rd, revised by IA Khan)

105 (1928) 30 Bom. L.R 1346, 109 I.C 387, ('28) APC.152

106 AIR 1916 PC 250: 36 Ind Cas 20

107 Baillie, II.p. 14-5
not majnum or non-compos mentis) parties – i.e. groom and bride, or when minor their guardians, two witnesses (in Hanafi Law, not Shia law), and same meeting (that is at one session complete). The completion of this contract which commences with proposal or demand in marriage and ends with the consent is called aqd.\(^\text{\textsuperscript{a}}\) (Ameer Ali). The Muslims who are married under Special Marriage Act, 1954 will be governed by the Act only. They need not to fulfill the essential laid down by the Muslim Personal Law. Following conditions must be fulfilled in a valid Muslim Marriage.\(^\text{\textsuperscript{108}}\)

1. The parties to the marriage must be competent.
2. The consent of the parties or their guardians must be free consent.
3. The required formalities are duly completed and
4. There must not be any prohibition or impediment in contracting the marriage.\(^\text{\textsuperscript{109}}\)

### 2.7.1 Competence of the Parties:

Parties are said to be competent at the time of marriage if they fulfill the following conditions:

- a. The Parties must have attained puberty
- b. Parties must be of sound mind and
- c. Parties must be Muslim\(^\text{\textsuperscript{110}}\)

  a. *Age of Puberty*—the age of majority under Muslim law is not 18 years for the purpose of marriage, dower and divorce. In respect of these the age of majority is considered to be equal to the age of puberty.\(^\text{\textsuperscript{111}}\) According to Hedaya, the earliest

\(^{108}\) Syed Khalid Rashid *Muslim Law*, Ed 5\(^{th}\), p. 61

\(^{109}\) Singh Rakesh Kumar, *Muslim Law*, Ed. 2011 p. 68

\(^{110}\) Ibid

\(^{111}\) In respect of other matters e.g. gift, waqf, will, guardianship etc., the Indian Majority Act, 1875 is applicable under which the age of majority is 18 years.
possible age of puberty with respect to a boy is twelve years, and with respect to girl is nine years. But this cannot be treated as absolute regarding the age of marriage because sexual competency, as evidenced by physical features, depends upon several factors and may vary from person to person. Thus in *Mst. Atika Begum v. Mohd Ibrahim*, the Privy Council had made it clear about the age of puberty by saying that according to Muslim law a girl becomes major on the happening of either of two events, (1) the completion of her fifteen years or (2) on her attainment of a state of puberty at an earlier period. The same rule may be applicable in respect of the age of a boy. Thus, it may be said that in the absence of any evidence to the contrary, a Muslim is presumed to have attained the puberty at the age of fifteen years. After attaining the age of fifteen years, a person becomes mature enough to give consent for his or her marriage, so no consent of the guardian is necessary to validate the marriage.

*Option of Puberty*—In certain circumstances, a minor contracted into marriage by the guardian has the right of repudiating or ratifying the marriage contract on attaining puberty, this right of the minor in known as the option of puberty (Khyar-ul-Bulugh). Thus, “option of puberty” is the right of a minor boy or girl, whose marriage has been contracted through a guardian, to repudiate or confirm the marriage on attaining puberty.

The Bombay High Court held in *Abdul Karim v. Amina Bai*, “The option of repudiation given to the wife is based on principles repeatedly emphasized in the Quran. It is one of the safeguards by which Islam alleviates the incidence of pre-Islamic institutions pressing harshly against women and children. A Muslim wife must exercise the option of puberty immediately on attaining puberty and the right is

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112 Hedaya (Hamilton’s Translation), Ed II, p.530
113 AIR 1916 PC 250: 36 Ind Cas 20
114 Aqil Ahmed, Mohammedan Law, 23rd Ed, revised by I.A. Khan,
115 I.L.R (1953) 59 Bom. 26
lost if she permits the marriage to be consummated thereafter. If she is living with her husband when she arrives at puberty, her option is not determined unless she assents explicitly or by implication to the marriage; nor is the mere consummation sufficient. There must be consummation with wife’s consent. Moreover, all the necessary facts should be proved by the husband to the wife.

Minor’s Marriage—Under Muslim law, a minor married during minority by a guardian, has a right, on attaining majority, to repudiate such marriage. Minors who have not attained puberty may be validly contracted in marriage by their respective guardians. In Nawab Sadiq Ali Khan v. Jai Kishore, it was observed that the age of puberty for shia girl in Mahomedan law is nine years and that of boy is twelve years, but according to Shia law, the age of puberty for a male is 15 years and for a female is 9 years. In Mst. Atika Begum v. Mohd Ibrahim Rashid Nawah, the Privy Council had made it clear about the age of puberty as already mentioned above. The requirement of the age of puberty is essential not because of competency for consummation, but also because it is considered to be the age at which the parties can give their own consent for marriage. After attaining fifteen years, a person becomes mature enough to give consent for his or her marriage not consent of the guardian is necessary to validate marriage.

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116 Baillie, II. 14-5
117 In certain circumstances, minor contracted in marriage by the guardian for marriage has the right of repudiating or ratifying the marriage contract on attaining puberty, this right of the minor in known as the option of puberty (Khyar-ul-Bulugh). Thus, “option of puberty” is the right of a minor boy or girl, whose marriage has been contracted through a guardian, to repudiate or confirm the marriage on attaining puberty. (Aqil Ahmed, Muslim Law, Ed 23rd, revised by IA Khan)
118 (1928) 30 Bom. L.R 1346 109 I.C 387 (’28) APC.152
119 AIR 1916 PC 250: 36 Ind Cas 20
120 Rama Kant Sinha, Muslim Law p. 43
121 Under Shafei and Maliki laws, the consent of a girl is irrelevant. In the marriage of Shafei and Maliki girls the consent of their father or guardian is necessary even if they have attained puberty. But in Kamma v. Ithumanna, (1967) KLT 913, the Kerala High Court has held that if a shafei girl has attained puberty, the consent of her guardian is not necessary.
Under Shia law the only guardian for marriage are (i) father, and (ii) paternal grandfather, how highsoever. A marriage contracted by any other guardian must be expressly confirmed by the minor on attaining puberty.

Section 2 of The Child Marriage Restraint Act, 1929 (as amended in 1978) provides that the minimum age for marriage is 21 years for males and 18 years for females. This Act is applicable to every person in India, including Muslims. A marriage in which any of the parties is below the prescribed age is a “child marriage”. So if the parties to the marriage are under age which is prohibited by the Act, such marriage will not be declared void but it merely laid down certain punishments for a breach of its provisions. It is only punitive Act. A guardian or any person who performs or conducts any “child marriage” commits an offence. The amending Act, 1978 includes provisions for strict implementation of the Act. Section 7 of this Act now provides that offences under the Act are cognizable offences. Effects of this enactment on minor’s marriage (including a Muslim marriage) may be summarized as under:

d. If a marriage is a ‘child marriage’ within the meaning of this Act, the marriage is not void. The marriage exists and is perfectly valid.

e. But, a person who contracts, directs, conducts or performs a minor’s marriage, commits a cognizable offence and is to be punished under the Act.

f. Under Section 12 of the Act, a ‘child marriage’ may be prevented by means of an injunction from the court before such a marriage takes place. Violation of such an injunction is also punishable.

g. According to Section 3(1) of the Prohibition of Child Marriage Act, 2006, every child marriage, whether solemnized before or after commencement of this

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122 STATEMENT OF OBJECTS AND REASONS: The Child Marriage Restraint Act, 1929 was enacted with a view to restraining solemnization of child marriages. The Act was subsequently amended in 1949 and 1978 in order, inter alia, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnization of child marriages yet it does not
Act, shall be voidable at the option of the contracting party who was a child at the
time of the marriage.

h. This Acts extends to the whole of India except the State of Jammu and Kashmir;
and it applies also to all the citizens of India without and beyond India. It is clear
from this Act that Muslim Marriage if solemnized at the age below the age
prescribed in this Act is punishable and the marriage is treated as Voidable
Marriage. In *Makklikarjunaih v. H.C. Gowrama,* where a husband sought a
declaration of marriage as void on the ground that he had not completed the age
of 21 at the time of marriage, it was held, the law does seek to discourage
marriage of underage boys and girls but not to the extent of making them void or
voidable.

b. *Soundness of Mind*—both the parties must be of sound mind at the time of
marriage. Persons of unsound mind who have no capacity to enter into the
contract of marriage because their own consent for the marriage is no consent in
the eyes of law.124

c. *Parties must be Muslim*—Both parties have right to marry a Muslim as per the
Muslim Law, irrespective of the sect or sub-sect e.g. one(female) is Shia and
other(male) is Sunni* Syed Gholam Hossein v. Musst. Setabah Begum* and *Aziz
Bano v. Muhammad,* and where marriage is between male Shia and female
*Sunni Nisrat Hussain v. Hamidun,* The marriage is inter-sect marriage which
is perfectly valid. But if the religion of the parties is different i.e. where one party

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123 AIR 1997 Kant.77
124 Singh Rakesh Kumar, *Muslim Law,* Ed. 2011 p. 70
125 (1866) 6 WR 88
126( 1925) 47 All. 823 I.C 690,
127 (1882) 4 All.205
is a Muslim but the other is a non-Muslim, their marriage becomes an inter-religious marriage. (Ishan v. Panna Lal) \(^{128}\)

**2.7.2 Free consent of Parties:**

The consent for the marriage should be free from all forces, where the parties to the marriage are sane and adult, it is their own consent which is required. But if any one of them is minor or insane, then the consent on his or her behalf must be given by the guardian. Consent is not free if it is given under compulsion, fraud or mistake of fact. \(^{129}\)

**COMPULSION**—When consent for a marriage is obtained by application of force, under threats, coercion or any other compulsion, it is not free and it cannot be said that such a person has intended to what he or she consented. Under all schools of Muslim law except Hanafi if the consent of the parties or of their guardian has been obtained under any compulsion, the marriage is void. \(^{130}\) The legality of a marriage under compulsion is an exceptional rule only to Hanafi law, under other schools of Sunni sect and also under the Shia law such marriage is void.

**FRAUD**—if consent has been obtained by playing fraud, the marriage is voidable at the option of the party defrauded. It means when such a defrauded person comes to know that fraud was committed in the marriage he or she may either accept the marriage as lawful or reject it altogether. Where the marriage is invalidated by rejection, it becomes void. On the other hand, if such a person thinks that there is no harm in being deceived, he or she may approve the marriage expressly or impliedly; the marriage the continues to be lawful. \(^{131}\) The marriage is invalid when consent to marriage has been obtained by force or fraud, unless it is ratified, in *Abdul Latif v.*

\(^{128}\) (1928) 7 Pat 6 103 IC 430

\(^{129}\) Singh Rakesh Kumar, *Muslim Law*, Ed. 2011 p.70

\(^{130}\) Tyabji, *Muslim Law*, Ed IV, p.53

\(^{131}\) Supra not p.71
Nyaz Ahmed, the wife’s illness was concealed. In Kulsumbi v. Abdul Kadir, pregnancy was concealed. Where the consent to the marriage has not been obtained, consummation against the will does not validate the marriage.

2.7.3 Formalities in the Marriage:

Under the Muslim law the only essential formalities are that the offer and acceptance are made at the same sitting.

The offer (ijab) is in the form of declaration and in generally made by the side of the boy or his guardian. The offer for marriage must also be accepted (qabool) by the girl or her guardian. No specific words are prescribed for an offer and acceptance, but they must indicate expressly a clear intention of the parties to marry. The offer and acceptance may be either oral or in writing. Where it is in writing, it is called Kabin-Nama or Nikahnama which is an important documentary evidence of the marriage. Offer and acceptance have to be made at the same sitting. The legal requirement is that the offer and the acceptance must be simultaneous to each other so that they may form part of the same transaction.

Marriage can be conducted at home of either of the parties, and ceremony is presided over by the Qazi or law officer who appoints two men as witnesses on

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132 (1909) 31 All 343 1 IC 538.
133 (1921) 45 Bom 59 IC 433
135 Singh Rakesh Kumar, Muslim Law, Ed. 2011 p.71
136 Ibid p.73
137 Qazi Mohd. Njamuddin Hussain v. State of A.P AIR 2005 469 in this case the court held that the Kazi’s act, 1880 neither gives any power to any Kazi appointed under it, nor grants any privilege to the Kazis appointed under the Act. This Act also does not close doors for Muslim to appoint anybody else, than a Kazi appointed by the Government for performing the functions or ceremonies, which are performed by a Kazi appointed under the Act. Section 2 of the Act is vague and in the absence of a definition to the “Principal Mohammadan” the appointment of Kazis by the government would also be a difficult task. In Qazi Habeeb Abdullah Rifai v. Govt of AP, (2007) 3 An LD 792 it was held that The Qazi has no option except to perform rituals of marriage. He cannot act as arbitrator or adjudicator in any disputes that arise between parties after their marriage is performed. But within this
the groom's behalf, to receive orders for the Nikah from the bride's family. In addition to witnesses, the presence of the two walis (guardians—the bride's and the bridegroom's father) is also necessary.  

**Consideration of Marriage**—The Dower: Mahr (Dower) is a consideration for Marriage which is a compulsory amount of either money given by the groom or any valuable items like gold movable or immovable property to the bride. The members of the two families decide the amount of Mahr (nuptial gift) on the day of limitation, a Qazi does not have a role to become an auxiliary ingredient of the Indian Muslim marriage "ceremony". The relevance of the institution of Qazi has been substantially restricted, and for all practical purposes, it is confined to the celebration of marriages, and performance of related rites and ceremonies.... The duties of the Qazi are restricted, mostly to verify the age of the parties, particularly of the bride, entering necessary particulars of the bride and bridegroom in the registers to be maintained by him, and ensure that there exists free consent. Though both the parties of the marriage are required to be accompanied by their respective parents relations or acquaintances, the verification as to existence of free consent, particularly from the bride by the Qazi, independently, assumes significance, in view of the fact that the marriage under Muslim Law is more a contract, than a ceremony....It is duty of the Qazi to ensure that there does not exist any surviving marriage with the bride and that the bridegroom does not have more wives than three at the time of the proposed marriage....Once satisfied about the above conditions, he has no option but to perform the rituals of marriage

138 Aqil Ahmad, *Mohammedan Law*, Ed 23rd, revised by I.A.Khan p.147. In Shia School witnesses to marriage are not necessary,
139 Singh Rakesh Kumar, *Muslim Law*, 2011 Ed, p. 72-73
140 CLASSIFICATION OF DOWER

(I) Specified dower (Mahr-i-Musamma) which is again divided into:

Prompt dower and

Deferred dower

(II) Unspecified dower or Customary dower or Proper dower (Mahr-i-Mist).

Prompt Dower (maujal mahr)—it is payable immediately after marriage on demand. According to Ameer Ali—a wife can refuse to enter into conjugal domicile of husband until the payment of the prompt dower.

Deferred Dower—is payable on the dissolution of marriage, or upon the happening of a specified event, if so agreed.

Sunni law—when it is not settled whether the dower is prompt or deferred, the law is that some part of it is to be treated as prompt and the rest as deferred. What portion would be prompt and what deferred would depend upon the local customs, amount of the dower, and the status of the parties.

Shia law—according to Shia law in the absence of any indication whether the dower is prompt or deferred the whole amount is regarded as Prompt. Unspecified dower: When the dower is unspecified in a marriage, the wife is entitled to get the Proper Dower which is fixed by courts of law. Dower is an integral part of every Muslim marriage and it must be specified by the parties themselves either at the time of marriage or thereafter. But if the parties have not specified it either negligently or intentionally, a proper sum of money or property is settled in their marriage by operation of law. The Privy Council observed in *Hamira Bibi v. Zubaida Bibi*, (1916) 43 IA 294

"Dower is an essential incident under Mussalman law to the status of marriage; to such an extent this is so that when it is un specified at the time of marriage is contracted, the law declares that it must be adjusted on definite principles."
nikah. Mahr or dower is that sum of money or property which a Muslim wife is entitled to get from her husband on marriage as a token of respect towards herself. Justice Mahmood defines dower in *Abdul Kadir v. Salima* \(^{141}\) “Promised by the husband to be paid or delivered to the wife, the consideration of the marriage and even where no dower is expressly fixed, the law confers the right of dower upon the wife as necessary effect of marriage”.

Calcutta High Court has observed in *Saburannessa v. Sabhdu Sheikh*, \(^{142}\) that Muslim marriage is like a contract of sale in which the wife is the property and dower is the price.

According to Wilson, “Dower” is a consideration for the surrender of person by the wife. It is the technical Anglo-Mohammadan term for its equivalent ‘Mahr’ in Arabic. \(^{143}\)

According to Ameer Ali, “Dower” is a consideration which belongs absolutely to the wife. \(^{144}\)

According to Mulla “Dower” is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. The word ‘consideration’ is not used in the sense in which the word is used in Indian Contract Act. It is an obligation imposed upon the husband as a mark of respect to the wife. \(^{145}\)

\(^{141}\) *Il.R (1886) 8 All 149*

\(^{142}\) *AIR 1934 Cal. 609*


\(^{144}\) *Ameer Ali, Mohammedan Law*, Vol II

\(^{145}\) *Mulla, Principles of Mohammedan Law,*
Dr. Jung defines “Dower” as ‘the property or its equivalent, incumbent on the husband either by reason of being agreed in the contract of marriage or by virtue of a separate contract, as special consideration of Buza, the right of enjoyment itself.”

According to Baillie, “…the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself….Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman.”

The consent of the bride for quantum of mahr decides the acceptance nikah; once the bride gives her consent the Qazi reads the marriage contract to the groom. After the groom gives the consent then the Nikah-Nama is then signed by the bride, bridegroom, their walis (guardians) the witnesses and the Qazi (an expert having the Islamic knowledge). The Nikah-Nama (marriage document also called Kabin-Nama) also contains certain terms and conditions, which are in accordance with the religion and agreeable to both parties. After Nikah-Nama is signed, the Qazi delivers a sermon called Khutba, consisting of verses from the Quran which were recited by the Prophet and which lay particular emphasis on the audience with an explanation of the mutual rights and duties of the spouses.

The Nikah Ceremony—According to Shariah, the wife-to-be says, “I have given away myself in Nikah to you, on the agreed Maht.” Immediately, the bridegroom says, “I have accepted the Nikah”. With these pronouncements they become husband and wife, though the marriage is allowed at all times. Under the

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146 M.U Jung, *The Muslim Law of Marriage*, 147 Baillie, *Digest of Mohammedan Law*, 148 According Shariah, the wife-to-be says, “I have given away myself in Nikah to you, on the agreed maht” Immediately, the bridegroom says, “I have accepted the Nikah”. With these pronouncements they become husband and wife. Singh Rakesh Kumar, *Muslim Law* p.73 149 Ibid.
Islamic law no religious ceremonies are required for the validity of a marriage. But in India most of the marriages are performed ceremoniously. In a customary form of marriage many ceremonies are performed but in the legal (Shariah) form, no ceremonies are required. Muslim law does not insist on any religious ceremonies or rites for the validity of marriage. In fact, a marriage contract is a civil institution which rests on the same footing as other contracts. No mulla is needed and no sacred rites are required. There is no priesthood in Muslim law. Even the presence of the qazi (person having Islamic knowledge) can be dispensed with without affecting the validity of the marriage. Although it is a customary to call in a Maulvi for the purpose of celebration of marriage, it is not necessary to do so for the purpose of a valid marriage. A valid marriage may be contracted even though no ceremony may be proved to have gone through. The absence of religious ceremonial is immaterial and in no way affects the validity of marriage. No writing is necessary.

**Customary Ceremonies:** Although it is not necessary under the law that any particular ceremony should be performed, the contract being completed by the offer and acceptance, as a matter of practice every marriage is generally attended with some sort of customary ceremonies. These ceremonies are generally performed with a view to afford satisfactory evidence of marriage in matters of dispute.

**Registration of Muslim Marriage:** Registration of marriage is not necessary under Muslim personal law. However, there are Muslim Marriage and Divorce Act in force in six states (i) West Bengal, (ii) Bihar,(iii) Jharkhand (iv) Assam (v) Orissa and (vi) Meghalaya, providing for registration of marriages and divorces among local

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150 Habib-ur-Rahman v. Altaf Ali, (1921) 48 IA 114
151 Ameer Ali, II, p. 272
152 Abdul Nabi v. Ajmat Hussain, 1935 Nag 123.
153 Maung Kyi v. Ma Shave, 1929 Rang 341: 7 Rang 77.
155 Nafisu-nissa v. Mirza Mumtaz, 1922 All 363.
156 Jogu Bibi v. Mesal Sheikh, 63 Cal.
157 Razia Bann v. Nawab Ara Begum, 1955 NUC 3602 (All)
158 B.R.Verma, *Muslim Marriage and Dissolution*, p. 20
Muslims$^{159}$. The purpose of registration is to make the ‘proof’ of a marriage or divorce easier and authentic. But under these enactments, the registration of Muslim marriage or divorce is not compulsory but optional. In *M. Jainoon v. Ammanullah Khan*,$^{160}$ Madras High Court held although under Muslim law, the registration of marriage is not compulsory but it cannot also be said that Muslim Personal Law prohibits registration. In order to ascertain a proper mode of proof, the Muslims of any particular locality may develop the process of registration by which the proof of marriage may be made easier. In this case due to the lack of marriage evidence, the plaintiff suffered a great mental agony for the compensation of which he filed a suit for damages against Secretary of Jamath (who was in charge of marriage register). The Madras High Court held that since the registration of marriage was recognized as a customary law of the locality, the plaintiff has a legal right under his customary law to get his marriage registered. The Court observed that intentional absence of the Secretary and his failure to send the register, amounted a denial of plaintiff’s legal rights which resulted in untoward and unpleasant events at his marriage function causing him mental agony. The Court held the secretary of jamath liable and ordered him to pay Rs. 5000 as compensation. Besides this, the *Kabin-Nama or Nikah-Nama* (marriage documents) is itself the essential documentary proof if marriage was solemnized in written form.

Supreme Court held$^{161}$ that marriages of all persons who are Indian citizens belonging to various religions should be made compulsorily registerable in their respective States, where the marriage is solemnized. The highest court notes with approval the view of the National Commission for Women that compulsory

$^{159}$ The parent law among these is the Old Bengal Mohammedan Marriage and Divorce Registration Act, 1876 which is now in force in the first three of the above states. The Orissa legislature re-enacted in 1949, with some changes, the old Bengal law 1876 referred to above. Titled Orissa Mohammedan Marriage and Divorce Registration Act, 1949 it extends to the whole State. The Assam legislature had enacted a similar law in 1935—the Assam Moslem Marriage and Divorce Registration Act. The newly created State of Meghalaya locally re-enacted this law in 1974 with no substantive change, as cited in Muslim Law, R K Singh, p.87

$^{160}$ AIR 2000 Mad 381

$^{161}$ Seema v. Ashwani Kumar, (2006) 1 KLT 791 (SC)
registration will, inter alia, defer parents from selling young girls to any person including a foreigner, under garb of marriage. The Qazi should not mutely perform such marriage or report it to the State. Andhra Pradesh itself has a law requiring compulsory registration of marriages. Thus a Qazi can play an important role by assisting the State in protecting national security. Now in some states the Imams are receiving emoluments from Wakf Boards, may be the Welfare State comes out in future with a scheme to protect the legitimate interests of the Qazis.

The registration of marriages must be made compulsory for all marriages in India.\textsuperscript{162} Prima facie this secular procedure does not interfere with rituals, if any. Like the municipal laws requiring birth and death registration, it is a post facto civil formality rendering evident value to a traditional form of marriage. Difficulty may arise if the Shias interpret it as an extension of the Sunni prescription of two witnesses to a marriage. Since, however, the witnesses signing before the marriage registrar would be testifying to only the factum of registration and not at the traditional wedding, the objection would be tenuous.\textsuperscript{163} The registration of marriage has now received a very strong support by the Supreme Court of India in its decision.\textsuperscript{164}

2.7.4 Absence of Prohibition and impediment:

The Muslim law requires that contract of marriage must not be against the interests of the society. Law therefore, prohibits the marriage between certain persons or being contracted under certain circumstances. The prohibitions are of two kinds—absolute and relative,\textsuperscript{165} besides these, there are other prohibitions also.

\textsuperscript{162} Marriage, Registration of Marriages and Decrees of Nullity, B. Sivaramaya, in Menon (Ed) Uniform Civil Code
\textsuperscript{163} Syed Khalid Rashid, Muslim Law, revised by V.P. Bhartiya, 5\textsuperscript{th} Ed.
\textsuperscript{164} Seema v. Ashwani Kumar, (2006) 1 KLT 791 (SC)
\textsuperscript{165} Ibid p.74
2.8 KINDS OF MARRIAGE: Marriages may be either permanent or temporary.\textsuperscript{166}

2.8.1 Permanent Marriage:

When two persons marry with no intention to dissolve the marriage in future, the marriage may be termed as a permanent marriage, although no marriages are permanent in the sense of being indissoluble, and all marriages are temporary, since all are potentially terminable.

2.8.2 Temporary Marriage:

The Shia Muslims (the Ithna Asharis) recognize a type of marriage called Muta(discussed in detail on P.No.81 ) marriage which is usually called temporary marriage, though in fact it is a term marriage, such marriage is not recognized among other sects of Muslims.

2.8.3 Other Marriages:

The marriage relationship which is governed by Foreign Marriage Act, 1969 is called Foreign Marriage and the Court or Civil Marriage is that which is solemnized under Special Marriage Act, 1954.

2.8.3.1 Foreign Marriages:

When a Muslim resident in India goes abroad and marries in some foreign country and one or both of the parties may change their faith then the marriage may be rendered void or irregular according to the personal law of one or both of the parties.\textsuperscript{167} The Foreign Marriage Act, 1969 was outcome of a study of the problem of

\textsuperscript{166} Ibid, p.40-41
\textsuperscript{167} Fyzee, Outlines of Muhammadan Law,
foreign marriage, made by Law Commission. The Act is modelled on the Special Marriage Act, 1954, and the English and Australian legislations on the subject of foreign marriages, subject to certain important modifications rendered necessary by the peculiar condition prevailing in India, the features of this Act are:

1. It provides for an enabling form of marriage more or less on the same lines as the Special Marriage Act, 1954, which can be availed of outside India, where one of the parties to the marriage, is an Indian citizen.

2. It lays down certain rules in respect of capacity of parties and conditions of validity of married, and also provides for registration of marriage on lines similar to those in the Special Marriage Act, 1954.

3. The provisions of the Special Marriage Act, 1954, in regard to matrimonial reliefs are applicable, with suitable modifications, not only to marriages solemnized or registered under the Act, but also to other marriages solemnized abroad to which citizen of India is a party.

Macnaughten says that if a married Muslim were to marry again, the second wife being a European converted to Islam; such second marriage would be lawful. It is not mentioned that the marriage takes place in India; but presumably that is so and there is no difficulty.

A Muslim husband having Muslim wife in India, proceeds to England and there enters into a form of Marriage with an English Christian woman. According to Muslim law a man can marry a second wife who is Christian. According to English law bigamy is not lawful but it may be argued that the Muslim marriage, being a potentially polygamous union and not recognized as such by English law, is not a

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170 Ibid.
171 Principles and Precedents of Mohammedan Law, (Sloan's edition) 1897
marriage at all, hence the English marriage is valid. This argument would not prevail now in view of the latest cases.\textsuperscript{172}

In \textit{Ali v. Ali},\textsuperscript{173} an Indian Muslim married at Hyderabad in 1958 according to the rites of Islam. Later, husband and wife came to reside in England where husband had been residing since 1954. In 1959 wife left the husband and came away to India with her child. By the middle of 1961 husband obtained a domicile of choice in England. In 1963 he presented a petition for divorce on the ground of wife’s desertion. Wife denied desertion, alleged cruelty and denied the court’s jurisdiction on the ground that the marriage was polygamous. In 1964 the husband committed adultery and wife cross-prayed for dissolution on that ground. It was held that:

1. The court was precluded from exercising jurisdiction as the alleged desertion took place in 1959, at a time when a potentially polygamous union existed between the parties;
2. The husband acquired English domicile by choice in 1961, and thus altered the nature of the union to a monogamous union;
3. For this reason the court had the power to exercise jurisdiction on the grounds of adultery committed by husband in 1964 and
4. The wife was entitled to a decree \textit{nisi}

In \textit{Rex v. Hammersmith},\textsuperscript{174} an unmarried Indian Muslim may contract a valid marriage with an English woman before a registrar in England. A marriage between Muslim and non-Muslim woman celebrated in foreign country is valid under Muslim law if it is performed in accordance with the \textit{lex loci contractus}.\textsuperscript{175} But \textit{aliter} if the Muslim is duly married in Indian and purports to marry in England a domiciled

\textsuperscript{172} ibid
\textsuperscript{175} Ameer Ali II, 155, 156-7
English woman converted to Islam. A marriage was celebrated in England according to Muslim rites in a private house. The person who celebrated the marriage was indicted under Section 39 of the Marriage Act (now Section 75 of the Marriage Act 1949) for unlawfully celebrating a marriage. In R. v. Rahman, it was held that the Muslim marriage contracted in India was recognized despite the fact that it was potentially polygamous, and the second nikah was declared unlawful according to the law of England.

It has been held in Srinivasan v. Srinavasan, that if a Hindu having a lawfully married wife living in India goes through a form of marriage at a registry office in England with an English woman, such a marriage is a nullity and the English woman is entitled to decree nisi. In the second case, Baindal v. Baindal, it was held that the domicile of the Hindu husband was immaterial and the result would be the same whether the husband’s domicile was England or India. In both cases, Justice Barnard held that the Hindu marriage, though potentially polygamous in character, was to be recognized as valid in English law; hence the second marriage was bigamous and amounted to a nullity.

As has been held in Risk v. Risk that A Hindu marriage has now been recognized for certain limited purposes as lawful by the English law, by a parity of reasoning it is impossible to deny the legality of a Muslim marriage. It is, therefore, submitted that the observations in re Ullee would now be treated as overruled; that a Muslim marriage lawfully contracted in India would be accorded recognition in some measure; and that the subsequent marriage before a registrar in England entered into by a Muslim would be treated as a nullity. In Shahnaz v. Rizwan, The parties were

176 (1949) AER 165
177 AIR 1946 PC 76; [1945] 2 AER 21
178 (1945) 2 AER 374 affirmed in AIR 1946 PC 122; JHC Morris, Kaw Quarterly Review, 1946, 116-18
179 (1950) 2 AER 973, Ameer Ali II, 171, 178;
180 [1964] 2 AER 664; Tolstoy, ‘Conversion of Polygamous Union into a Monogamous Union’.
married in Hyderabad, although the marriage was potentially polygamous, it was considered lawful by the law of England and a contract for dower acquired.

*R. v. Rahman*[^1], the above case, was however, been overruled by the Court of Criminal Appeal in *R. v. Bham*[^2] where it was held that a nikah between a Muslim and English girl who had adopted the Muslim faith in a private house was potentially polygamous. As such it was no intention to affect an English marriage.

To this rule, however, there are certain limitations. Suppose a Hindu wishes to marry a Muslim in India, the only way to legalize such a union would be to marry under the Special Marriage Act 1954. Such unions are fairly common after the passing of the Act.[^3]

### 2.8.3.2 The Court Marriage:

A Muslim, whether male or female, can lawfully marry a non-Muslim under the Special Marriage Act, 1954. Marriage contracted under this Act is called ‘Court Marriage’. When a person (whether a Hindu or Muslim etc) contracts marriage under this Act, the marriage is not governed by the personal law applicable to him. Thus, if any Muslim contracts a marriage under this Act, the marriage and its other incidents (i.e. rights and duties of the parties) are regulated by the provisions of this Act and Muslim Personal law is not applicable. Succession of the properties of the couples married under the Special Marriage Act, 1954, is governed by the provisions of the Indian Succession Act, 1925, and not by the Muslim law of inheritance.[^4]

[^1]: (1965) 3 AER 124
[^2]: (1965) 3 All E.R 124
[^3]: Outlines of Muhammadan Law by AA Fyzee revised and edited by Tahir Mahmood
S.I. Jafri J. of the Allahabad High Court observed in *Anwar Ahmed v. State of U.P.*<sup>185</sup> “Notwithstanding the fact that the personal law permits a Muslim male to contract four marriages, if a second marriage is contracted under the Special Marriage Act, 1954 *vis-à-vis* the fact that he has legally wedded wife who has been married to him under the Mohammedan law, Sec. 494 of IPC has to claw at the erring male..... Mohammedan law does not take preference over Special Marriage Act, 1954.....There being no saving clause for the applicant to purge him of the charges u/s. 494 of IPC...... the applicant is liable to be punished under this section.

It was observed in *Gigal v. Phio*<sup>186</sup> that a nikah marriage or sagai or pat (Karsan Goja: Bai Rupa,)<sup>187</sup> marriage falls within the purview of this section; but not jinghara.

Besides the marriages which have legal validity and acceptance of society over all, there are some marriage ties also for which the parties undergo, although some of the ties are such which are not accepted by society overall but still are in practice in India and abroad, no matter what the religion of the parties is. These marriage ties are Maitri Karar or friendship agreement and Misyar.

**2.8.3.3 Maitri Karar (Friendship Agreement):**

In India, where the law forbids bigamy, a new form of contract marriage known as *maitri karar* was formulated by the lawyers in the city of Ahmadabad. This was popularly known as a *Friendship Agreement*, contracted usually between a married man and a single woman in order to sidestep divorce. Though such a contract, which is published along with this work, is held to be null and void being devoid of any legal effect whatsoever, yet it is interesting to note that several hundred couples in

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<sup>185</sup> 1991 CrLJ 717 at 719,
<sup>186</sup> (1888) PR No. 25 of 1888,
<sup>187</sup> (1864) 2 BHC (CrC) 117 Sec 494 IPC M.Hedaytullah p. 559 27<sup>th</sup> Ed.
and outside the city shifted cultural gear to sign Friendship Agreements or maitri karar as they have come to be called in Gujarati, a sophisticated camouflage for what is widely known as ‘living together’ both here and in the west.188

It is necessary at this stage to quote extensively Dina Vakil’s candid observations published in the Express Magazine of the Indian Express, 2nd May 1982.

“For the most who sign the Friendship Agreements, the women specially, it is not the law which seems to matter as much as social sanction. And the one dubious benefit of maitri karars, if benefit it can be called, is that they offer a cloak of legitimacy to the woman who sign them (although some lawyers allege that the contract is a fraud on the woman who is often unaware that it is not a marriage at all). What is fair and game for lawyers, however, is that even those women who are aware that the agreements are void in law, still feel that they derived some legitimacy from them.”189

Cases of maitri karars were discovered in 1980: “The local newspapers played them up and, since divorce is difficult here this form of contract caught the Gujarati’s fancy.”190 Further, “at the heart of the matter are the stringent divorce laws in the state which make it almost impossible for a spouse to obtain a divorce unless the other spouse agrees. Added to this is the diffidence of the middle class Gujarati housewife who usually has nowhere to go and nothing to do if her husband deserts her.”191

Finally, the man and woman who wished to enter into such a contract ‘registered’ it. “For Rs.100, he could approach, the sub-register of documents, declare on stamp paper that ‘no power on earth could separate him and his friend’ since they,

188 The Express Magazine of The Indian Express (Sunday Edition) 2nd May, 1982, p. 2 reference taken from ‘The Empowerment of Muslim Women in Islam’ with Special Reference to Marriage and Divorce by Zeenal Shaukat Ali. Professor, Islamic Studies, St. Xavier’s College Mumbai
189 Ibid., p. 2
190 Ibid., p.2
191 Ibid.,p.2
could not live without each other and under Section 18(1)(vi) of the Registration Act, he could embark on a sentimental journey with a flatulent conscience intact.

There would be no marriage hence no fear of bigamy; the husband would openly move out of one household and set up another, hence there was no guilt of deceit, and he would maintain both his legally wedded wife and children as well as his newly acquired ‘friend’ and such issue as “by chance or accident” might arise, hence there would be no abandonment.”

Further it is emphasized: “There are men who are dissatisfied with their wives but do not have the courage to sue for divorce: And there are men who do not wish to (or on occasion, cannot afford) the price for one demanded by their wives.”

However, even supporters of this contract agree that the karar is weighed against the woman. Since the agreement is legally unenforceable, the woman has no recourse if the man walks out on her, she cannot continue to claim maintenance, nor can she ask for a share in his property. Her children, if any, as a result of such an alliance can, however, claim maintenance from the father (under Section 125 of the criminal procedure code). “If the woman is properly advised, she should insist on some property for her in trust and ask her husband to include her children in his will.”

2.8.3.4 Misyar Marriage:

Misyar marriage is a legal alternative marital arrangement more Saudi men and women are using to offset prohibitive marriage costs and the stigma unmarried women face.

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192 Ibid., p.2.
193 Ibid., p.2.
194 Ibid., p.2
195 www.marricgemessyar.com visited on 26.2.2011
In a misyar marriage the woman waives some of the rights she would enjoy in a normal marriage. Most misyar brides don’t change their residences but pursue marriage on a visitation basis. Some marriage officials say seven of 10 marriage contracts they conduct are misyar, and in some cases are asked to recommend prospective misyar partners.

Most of the women opting for misyar are either divorced, widowed or beyond the customary marriage age. The majority of men who take part in such marital arrangements are already married.

Arab News surveyed 30 Saudi men and women aged 20-40 regarding misyar marriage. Over 60 percent of the men surveyed would consider misyar marriage for themselves with the majority of the respondents in their 20s. Those who would not consider it for themselves would not allow it for kin, be it sisters, brothers, sons or daughters. However, among the men who would consider it themselves, only two would find such a marriage acceptable for a female relative.

The reasons men gave for favoring misyar most often related to cost that they do not have to take care of her financially and don’t even have to provide a house for her,” said 25-year-old Rayan Abdullah, an unmarried medical student at the city university. “It’s a great solution — isn’t it? It costs less than having a girlfriend — doesn’t it?” Or is it a male convenience in a male-dominated culture?

The opinions of women respondents about misyar marriage were a sharp contrast to the males’. More than 86 percent of the women in the age group 20-40 would not even consider such a marriage for themselves. Only four women — all in the over-40 category — would consider such marriages for themselves or relatives.

Most of the women respondents called it “legal prostitution” or objected to the lack of women’s rights in misyar marriages.
Despite optimistic expectations, such marriages are not always blissful. Former and current misyar spouses said it can become a nightmare if pregnancy results from the union or if there are already children from former marriages. With most misyar marriages rooted in secrecy, the husband is only a ghostly figure occasionally seen. Once a child is conceived, the luxury of secrecy disappears.

There can be other unforeseen consequences of secrecy. “I’d been married misyarically for almost a year when members of the Commission for the Promotion of Virtue and the Prevention of Vice paid me a terrible visit accusing me of prostitution,” said a 35-year old divorcée and mother of two who chose to call herself Warda. They wanted to drag me to the police station even though I kept showing the marriage contract in their faces. A social worker who frequents the courts denounced misyar marriage. “The courts are overflowing with problems from regular marriages regarding financial obligations that husbands ignore, custody problems and alimony,” she said.

“There is a horrible, growing problem in enforcing the law upon neglectful husbands and fathers. How can anyone legalize a procedure such as misyar marriage that will make room for more irresponsibility?” the social worker asked.

2.9 CONDITIONS IN VALID MARRIAGE:

The Conditions in marriage contract may be valid or invalid. Valid conditions are those conditions which may be in enforcement of law. These conditions must be legal, reasonable and not opposed to the spirit of Islamic Law. Conditions may be appended to a marriage contract which may be ante or post nuptial. The parties could modify or rescind these conditions at any time they like; it is because marriage is mainly a civil contract. In cases where invalid or illegal and unreasonable condition is
attached with a marriage contract, the condition alone and not the marriage itself will be treated as invalid.\textsuperscript{196} There are two kinds of conditions as mentioned below:

1. Valid Conditions or Legal Conditions
2. Invalid Conditions or Illegal Conditions

\textbf{2.9.1 Valid Conditions or Legal Conditions:}

The following are the typical valid conditions attached with a marriage contract:

i. The condition agreed upon by the guardians of minors whose marriage has been so contracted, that the wife could divorce the husband in case he takes a second wife without her consent. (\textit{Marfatalli v. Zahedunnissa},)\textsuperscript{197}

ii. “I (the husband) accordingly agree that if I forsake the (\textit{Malak-o-Badar}) community or am expelled from it by the spiritual head, my wife may get a divorce form me pronounced by a person appointed by her on my behalf which divorce I will accept as valid.” It was held that the condition is valid, and is not opposed to Muslim law. (\textit{Fida Ali v. Sanai Badar},)\textsuperscript{198}

iii. It will be a valid condition if it says that the wife would be entitled to separate maintenance if her relationship with the husband becomes strained. Such a condition is not against the public policy. (\textit{Muinuddin v. Jamal Fatima})\textsuperscript{199}

iv. It can validly be agreed upon that the wife shall live in her parent’s house and shall not be removed elsewhere, and in the case of dissension with the husband, he would pay a monthly allowance to her as maintenance and

\textsuperscript{196} Syed Khalid Rashid, \textit{Muslim Law}, Ed 5\textsuperscript{th} revised by VP Bhartiya p.62
\textsuperscript{197} AIR 1941 Cal 657
\textsuperscript{198} AIR 1923 Nag 262
\textsuperscript{199} AIR 1921 All 152
will allow her to remain in her parent’s house. (Sakin v. Shamshad Khan) 200

v. The wife may validly stipulate to be allowed to leave her husband’s house in case of his misbehavior or cruelty. (Banney Sahib v. Abida Begum) 201

vi. The husband authorized the wife to seek divorce in the event he mistreats her, her parents or her relations. Long afterwards, the husband instituted a criminal proceeding against his wife who exercised her right to seek divorce and sent a notice to this effect to her husband. The husband did not receive the notice. It was held that the fact whether the husband received notice or not is immaterial. The eventuality in which he has allowed his wife to seek divorce is present and she is not affected in any way by the non service of the notice. (Samseranessa v. Abdul Samad) 202

vii. It is valid condition through which the husband stipulates that he would earn his livelihood and maintain his wife and would live in a house approved by the wife and her parents, and on his failure in doing so, the wife may seek divorce. (Mohd Yasin v. Mumtaz Begum) 203

viii. That the husband will not marry another wife. 204

ix. That a certain portion of dower shall be paid at once or within a certain period while the remainder shall be paid on dissolution of the marriage. 205

2.9.2 Invalid or Illegal Conditions:

Following are the invalid or illegal conditions in marriage contract. 206

200 AIR 1936 Pesh 195
201 AIR 1922 Oudh 221
202 AIR 1926 Cal 1144
203 AIR 1936 Lah 1716
204 Aqil Ahmad, Muslim Law, p. 134
205 Ibid
i. A condition that the wife will have liberty to live permanently with her parents or leave her husband's house without any justified cause.

ii. An agreement for future separation between husband and wife without any cause.

iii. A condition limiting the time period of marriage to specified time under Sunni law.

iv. A condition negativing the husband's freedom for pronouncing divorce.

v. A condition binding the husband that he will live in his wife's house.

vi. That the husband shall prevent her from visiting or receiving the visits of her relations

vii. A condition that (i) the woman should forgo her right of maintenance, (ii) she should not be entitled to any dower, or that (iii) they would have no mutual rights of inheritance.

viii. A condition that the wife cannot be prevented by the husband from frequenting immoral places.

2.10 PROHIBITIONS AGAINST MARRIAGE:

Prohibitions in Muslim-marriage are of four kinds:

(i) Absolute prohibitions.

(ii) Relative prohibitions.

(iii) Prohibitory incapacity and

(iv) Directory incapacity or prohibitions.

2.10.1 Absolute Prohibitions:

A marriage contracted in violation of any of the absolute prohibitions is null and void under all the schools of Muslim law. For a valid marriage, therefore, there

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206 Ibid.
207 Aqil Ahmed, Mohammedan Law, 23 rd Ed. p.122 revised by IA Khan
must be absence of prohibited relationship between the parties. There is an absolute prohibition for a Muslim to marry a person who is within his or her ‘prohibited relationship’ if they are related to each other by."\(^{208}\)

(1) Consanguinity

(2) Affinity

(3) Fosterage

(1) **Consanguinity or Qurabat** (Relation by blood)\(^{209}\)

A man is prohibited from marrying

(i) his mother or his grandmother how highsoever;
(ii) his daughter or granddaughter how lowsoever;
(iii) his sister whether full, consanguine or uterine;
(iv) his niece or great niece how lowsoever; and
(v) his aunt or great aunt how highsoever, whether paternal or maternal.

A marriage with a woman prohibited by reason of consanguinity is void.\(^{210}\)

(2) **Affinity or Mushaarat** (Relation by marriage)

Affinity means nearness. It is created through marriage. On the basis of affinity one cannot marry with any of the following relations:

(i) his wife’s mother or grandmother how highsoever;
(ii) his wife’s daughter or granddaughter how lowsoever;
(iii) the wife of his father or paternal grandfather how highsoever; and
(iv) the wife of his son, of his son’s son or daughter’s son how lowsoever,

\(^{208}\) Sinha Rama Kant *Muslim Law*, p.51
\(^{209}\) Aqil Ahmed, *Mohammedan Law*, 23 rd Ed. p.122 revised by IA Khan
\(^{210}\) Hedaya, 27.; Baillie, 24. As to void marriage.
A marriage with a woman prohibited by reason of affinity is void.\textsuperscript{211}

\textbf{(3) Fosterage or Riza (Relation to Milk)}

Where a child, under the age of two years, has sucked the milk of any woman (other than its own mother) such a woman is called the foster-mother of that child, although there is no blood-relationship between that woman and the child yet, she is treated as the real mother of that child for purposes of prohibitions in the marriage.\textsuperscript{212}

Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or foster-sister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.\textsuperscript{213}

\textbf{2.10.2 Relative Prohibitions:}

Under Shariat, the rules which are not mandatory are called directory (Mustahab) and are without any legal effect. Relative prohibitions are those prohibitions the compliance of which is not mandatory (must) but their presence is deemed to be unjust. Therefore, a marriage contracted in violation of these prohibitions is merely irregular, not void. As a matter of fact, the violation of any relative prohibition in marriage is because of some small irregularity. As soon as that irregularity is removed, the marriage becomes perfectly valid. Under Shia law, which does not recognize an irregular marriage, a marriage against any of these prohibitions is either void or perfectly valid. The relative prohibitions are given below.\textsuperscript{214}

\begin{enumerate}
\item Unlawful Conjunction
\end{enumerate}

\textsuperscript{211} Hedaya, 28.; Baillie, 24-29, 154, As to void marriage.  
\textsuperscript{212} Fyzee, \textit{Outlines of Mohammadan Law}, Ed.IV, p.100  
\textsuperscript{213} Ibid  
\textsuperscript{214} Rama Kant Sinha, \textit{Muslim Law}, p. 54
2. Marriage with Fifth Wife
3. Marriage with non-Muslim
4. Marriage without Witnesses
5. Marriage during Iddat

(1) Unlawful Conjunctions

A Muslim is prohibited to have two wives at a time if these two wives are related to each other (by consanguinity, affinity or fosterage) in such a manner that if they had been of different sexes, they could not have inter-married. Marriage with two such wives is an unlawful conjunction. For example a man is prohibited to marry the sister of his wife because, if one of them is presumed to be a male, they would become brother and sister and could not inter-marry. Similarly, a Muslim cannot marry the aunt (Booa or Mausi i.e Khala) or the niece of his wife. However a man can lawfully marry his wife’s sister after the death or divorce of his wife. A marriage against the rule of unlawful conjunctions is irregular.

Shia law. – (i) Under Shia law, marriage with wife’s aunt (Booa or Mausi i.e Khala) is not unlawful conjunction. Therefore one can marry with his wife’s aunt. But he cannot marry with wife’s niece without consent of his wife; with wife’s consent, marriage with wife’s niece is permitted.

(ii) A marriage against the rule of unlawful conjunction (except marriage with wife’s aunt) is void under Shia law.215

(2) Marriage with the Fifth Wife:

Muslim law permits a limited polygamy of four wives. That is to say, a Muslim can marry lawfully with four wives at a time. But is prohibited to marry with

the fifth wife. However, marriage with the fifth wife is only irregular. After the death of divorce of any of the four wives, this irregularity does not exist, and he can lawfully marry because at a time he will have four wives, which is permissible.216

*Shia law.* — Marriage with the fifth wife is void.

**Polygamy:** There are two verses in the Quran as far as multiplicity of wives is concerned i.e. 4:3 and 4:129. However, to take an overall view of Quranic spirit we will have to take more verses in account besides these two. Those other verses are equally important to determine the Quran approach to the controversial issue of polygamy.

The verses which make direct pronouncement on polygamy i.e. 4:3 and 4:129. The first verse i.e. 4:3 appears to permit taking up to four wives while 4:129 seems to caution against hazards of multiplicity of wives. Needless to say both the verses must be read together in order to determine Allah’s intention. While the first verse takes given context into account and seems to permit multiplicity of wives, the second one takes long term view and also the likely consequences of taking second wife and this verse tends to be more normative than the other.217

The first verse says: “*And if you have reason to fear that you might not act equitably towards orphans, then marry from among women such as are lawful to you—two or three, or four: but if you have reason to fear that you might not be able to treat them with equal fairness, then (only) one—or those whom you rightfully possess.*”218 This verse could be interpreted differently. It is not very clear whether it means two or three or four at a time or during ones lifetime. If up to four was meant it could have said “up to four”. But the Quran rather chooses more complex way of putting it.

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216 Ibid
217 Asghar Ali Engineer, *The Quran Women and Modern Society*,
218 Holy Quran 4:3
Even if what is meant are two or three or four at a time, the Quran does not permit it according to the whims of a man. It lays down strict condition for treating all wives with equal fairness and if you have reason to fear that they cannot be treated with equal fairness then marry only one. Thus if one reads this verse alone literally, it would be obvious that more emphasis is on equal and fair treatment rather than having more than one wife. And this should not be determined by husband alone whether he can treat his wives with equal fairness or not.219

Thus polygamy was permitted by the Quran to do away to orphans and widows (actually the Arabic word yatama includes widows also). The Arabs,220 would marry orphans and widows with beauty and wealth (far in excess of four women) and then try to usurp, their wealth and do justice to them in treatment. The Quran in order to save these orphans from such injustices (and hence it begins with the word ‘if you fear that you shall not be able to deal justly with orphans’.....) those Arab were permitted to marry up to four (thus reducing the number of wives one could take drastically) to avoid injustice to the orphans.

Thus polygamy (without any restriction as to the number of wives) already existed in the society and also injustices to the orphans. Thus with this verse (4:3) the Quran, which considers justices as most fundamental moral category, tried to stop abuse of orphan girls’ properties (and this was vitally necessary) on one hand, and injustices to the women who were taken as wives without restriction to any number, and not treated fairly and equitably. This verse thus accomplished two objectives in one stroke—justice to orphans and justice to helpless wives by restricting their numbers to four and requiring an oral responsibility of equal and fair treatment. But, the Quran was aware that this is not the ideal solution as far as women were concerned. Thus in the second verse on polygamy (4:129) it was made clear that it is

219 Ibid
220 Zamakhshari of Al-Kasshshaf (Vol.1 Beirut 1977 pp-496),
not possible to do equal justice to all wives even if one ardently desired and so the man were cautioned not to leave the first wife hanging in the air. Thus, if both the verses are read together—monogamy would be the norm and polygamy a merely permitted measure to meet the given situation.221

Thus the real intention of the Quran, is to ultimately abolish polygamy albeit gradually. It is also to be noted that marrying, orphans to misappropriate their properties was peculiarly and Arab phenomenon, not universal one. And polygamy was permitted by the Quran only in that context. It has also been pointed out by some commentators that the verse 4:3 was revealed after the battle of Uhud when more than 10% of Muslim men population was killed and there were many orphans and widows in the society and they had to be taken care of. Perpetuation of polygamy forever was far from the Quranic intention.

Thus the noted translator of the Quran Abdullah Yusuf Ali also says in the footnote to the above verse (4:3), “The unrestricted number of wives of the ‘Times of ignorance’ was now strictly limited to a maximum of four, provided you could treat them with perfect equality, in material things as well as in affection and immaterial things. As this condition is most difficult to fulfills, I understand recommendation to be towards monogamy.”222

All authorities agree that the following Koranic verses are the foundations of polygamy in Muslim Law: “Ye are never able to do justice between wives even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging in the air. If ye come to a friendly understanding, and practice self-restraint, Allah is oft Forgiving, Most Merciful.”223 On the basis of these verses two, three, or four, and if ye fear that ye shall not act equitably, then once it has been maintained by the progressive Muslim and reformers of Muslim law all over the

221 Zeenat Shoukat Ali. The Empowerment of Women in Islam
223 Holy Quran 4:129
world that the Prophet was in favour of monogamy. The former verse is merely of permissive nature and the latter withdraws even that permission, as it is humanly impossible for a man to treat all his wives alike. However, whatever might have been the intention of the Prophet, the polygamy limited to four wives, to pass an injunction against a Muslim who is about to take a second wife on the ground that he has no ability—even if ability is assessed purely in economic terms—to treat both the wives justly. Nor will a court of law, ordinarily, refuse to pass a decree of restitution of conjugal rights against the wife who refuses to live with her polygamous husband. It is a different matter that now, under the Dissolution of Muslim Marriage, 1939, a wife can sue her husband for divorce on the ground that her husband, who has a second wife, is not treating her equitably, a question of fact which she will have to prove. It is also an entirely different matter that, in fact, very few Muslims in India practice polygamy. All the apologists of polygamy argue that since polygamy is not practiced widely by the Indian Muslims (the same argument was advanced by the Hindu apologists of Law), the legal existence of the institution should be ignored. This author, who propagates controlled polygamy, would not grant, it would be seen as equal freedom or like freedom in similar cases to wives. He says, "the case for any drastic measures, especially such as would fail to accommodate the genuine and viable cases, therefore, does not exist. There is no reason for being unduly excited over this issue (polygamy)". He considers: "Muslim public opinion in this country with regards to any reforms in this respect as superfluous and views all such proposals with suspicion. If fears relate not as much to any reform in this particular matter as to the apprehension that it would open, the gates for further amendments in its personal law which are broadly speaking based on the Shariat.

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224 *Jewari v. Asghari*, 1960 All 694

225 *Muslim Marriage Dissolution Act 1939* S. 2(viii)(II)

226 M. Nejatullah Sidiqi *Restraints on polygamy and Muslim personal law.*
(3) *Marriage with non-Muslim*

A Sunni male can lawfully contract marriage with a Kitabia female, but he is prohibited to marry a non-Muslim or non-Kitabia woman. For example, he is prohibited to marry a Hindu woman. But a marriage against the prohibition is simple irregular, not void *ab initio*.

*Shia law.* – Marriage with any non-Muslim is void.

*Conversion and Bigamous Marriages*—The Constitution\(^{227}\) of India gives every person the freedom to profess and practice any religion; he/she is free to relinquish his/her faith and embrace another faith. However, in view of the diversity of personal laws under different religions, sometimes conversions lead to difficult and anomalous situations. When a man married under monogamous law converts to a religion which permits polygamous marriage, simply to avail of that provision.\(^{228}\)

In *Rakaya Bibi v. Anil Kumar*\(^{229}\) the Calcutta High Court refused to recognize the rights acquired under the new faith. The Court further observed:

“It may be that a court cannot test or gauge the sincerity of religious belief... But a court can certainly find out from the circumstances of a case whether a pretended conversion was a really a means to some further end. It seems to be elementary that if a conversion is not inspired by religious feelings... but is resorted to merely with the object of creating a ground or a right, a court of law cannot recognize it as a good basis for such claim but must hold that no lawful foundation of the claim has been proved”.

There are also cases where courts have ignored the ulterior motive behind the conversion. As remarked by the Lahore High Court in *Sardar Mohammad v.*

\(^{227}\) P.M.Bakshi, *Constitution of India 7th* Ed. Arts 25-28

\(^{228}\) Kusum, *Family Law-I*, Ed.3\(^{rd}\) p.381 Published by LexisNexis Butterworths Wadhwa, Nagpur.

\(^{229}\) (1948) 52 CWN 142 p. 147
Maryan so long as conversion is genuine, ulterior motive and even sordid motives would not affect the question.

Thus the issue of genuineness or otherwise of a conversion, and the rights of the convert under the new faith, has been subjectively dealt with by the courts. The fact remains, however, that instances of men embracing Islam to enter into bigamous relationships are not uncommon.

Sarla Mudgal v. Union of India231 and Lily Thomas v. Union of India232 are very significant cases. The issues raised in Sarla Mudgal case were, whether (a) a Hindu husband married under the Hindu law can, by embracing Islam, solemnize a second marriage; (b) such marriage without having the first marriage dissolved under the law, would be a valid marriage qua the first wife who continued to be a Hindu; and (c) the apostate husband would be guilty of the offence of bigamy under Sec. 494 of IPC, 1860. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage. Thus, it was held that under the Hindu personal law, a marriage continued to subsist even after one of the spouses converted to Islam, consequently, the second marriage of the apostate would be a marriage in violation of the provisions of the Act and an illegal marriage qua his wife married him under the Act, and continues to be a Hindu.

The Court made a distinction between a polygamous marriage by a Muslim under Muslim law and one contracted by a non-Muslim after his conversion to Islam. In the former case, in spite of first marriage, a husband can contract a second marriage. Where a man is already married under monogamous law and then converts

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230 AIR 1936 Lah 666, p. 668, see also David v. Sudha, AIR 1950 Mys 26; Marthamma v. Mannuswami, AIR 1951 Mad 888.
231 AIR 1995 SC 1531; (1995) 3 SCC 635
232 AIR 2000 SC 1650; (2000) 6 SCC 224
to Islam only to contract a second marriage, he cannot escape punishment under Sec 494 of IPC, 1860.233

In India bigamous marriages are now greatly disfavored by the courts. Some High Courts have regarded it as cruelty by the husband and denied on that ground the relief of restitution of conjugal rights.234 The Supreme Court of India has observed that from the point of view of the first wife bigamy is worse than concubinage.235 It has further been twice236 ruled by the Supreme Court of India that a married non-Muslim on conversion to Islam cannot contract a bigamous marriage while his first marriage is legally subsisting.

S.Jaffer Hussain brings out clearly the legal disadvantages resulting from bigamy—one, the wife obtains the right of delegated divorce (Talaq-e-Tafwid) and two, she would be entitled to refuse to rejoin the husband. By recognizing the wife’s right to inflict these consequences on the bigamous husband the courts have played an important role in controlling polygamy. Thus, both pre-nuptial and post-nuptial agreements which gave right to the wife to get a divorce if the husband took a second wife were held to be valid.237 In Saifuddin Sekh v. Soneka Bibi,238 the Assam High Court held the stipulation in Kabin-nama (marriage certificate) that if the husband brought his formerly married wife to stay with him without the second wife’s consent, the latter would have an irrevocable option to divorce him. This right of delegated divorce could be exercised at any time, as the wrong done to her was a continuing one.

233 Kusum, Hindu Law, Annual Survey of Indian law Vol. XXXVI, 2000, pp. 302-303
234 A.A.A.Fyzee, Outlines of Mohammedan Law, revised by Tahir Mahmood
236 Begum Subhana v. Abdul Gafoor, AIR 1987 SC 1103
237 Judicial Interpretation of Islamic Matrimonial Law in India, S. Jaffer Hussain, in Saimuddin v. Latifannessa Bibi, ILR (1919) 46 Cal 141; Sadiqua v. Atuallah, AIR 1933 Lah 685; and Saifuddin Sekh v. Soneka Bibi, AIR 1955 Ass 153.
238 AIR 1955 Ass 153
(Ayatunnesa Beebee v. Karan Ali). Even without such stipulation, the wife has another remedy—successfully warding off a decree for restitution of conjugal rights.

Allahabad High Court held in forceful words in Itwari v. Asghari,

“A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so seeks the assistance of the civil court to compel the wife to live with him against her wishes on pain of severe penalties...she is entitled to raise a question whether the court, as a court of equity ought to compel her to submit to cohabitation with such a husband.”

Tahir Mahmood remarked: “It is irrelevant for cultural identity whether a Muslim can torture his first wife by contracting a bigamous marriage against her wishes and without necessity, or a wife can tease her husband throughout his life by exploiting his inability to pay dower. These and other drawbacks in the existing personal law cannot be considered essential ingredients of the Muslim culture. On the contrary these are stigmatic of the fair name of Islamic civilization.”

The recent case related to the Panchayat Raj Act, 1994 of the State of Haryana. The Act disqualified a person having more than two children from contesting election to the Panchayat. The petitioner contended that the Act violated his right to religious freedom as guaranteed by Article 25 of the Constitution. Disallowing this contention the Supreme Court said that true, (i) the Muslim Law allows a Muslim to marry more than one wife and also permits him to procreate more than two children; other religions also permit more than two offsprings; yet, neither Islam nor other religious ordain the followers to enter into more than one marriage or procreate more than one child. Permission by the religion and/or absence of

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239 ILR (1909) 36 Cal 23
240 AIR 1960 All 684
241 Tahir Mahmood, An Indian Civil Code and Islamic Law, Tripathi, Bom (1976) p. 84
prohibition do not constitute a religious tenet or a religious rule. A practice simply permitted does not by itself constitute an essential order of the religion. No doubt polygamy and multiple children are practices widely in vogue, but they can be restricted or even restrained on the grounds of public order, morality and health and for the purpose of social welfare and reform. Accordingly the limit of two offsprings is not unconstitutional. (ii) the verse on polygamy ordains the husband to do justice to all the wives as a precondition, otherwise ‘marry only one—this is better so that you may not deviate from the right path’; (iii) husband’s right to bigamy may be restricted by a stipulation in the Kabinnama; (iv) the first wife may also stipulate that in case of second marriage without her consent, she can exercise her right of delegated divorce; (v) subsequent marriage entitles the first wife to live separate from the husband; (vi) such bigamy is a valid defence against a decree by the husband for restitution of conjugal rights; she may refuse cohabitation with him; (vii) bigamy entitles her to maintenance allowance, and also to her children.

Some of the consequences of polygamy or bigamy under the penal law have been analysed by Tahir Mahmood thus: A woman desirous of remarriage must not have a living and legally recognized husband. There is no corresponding condition imposed on men. Her second marriage will be void (Batil) at Muslim Law and will attract the application of Sections 494 and 495 of the IPC, 1860. But when her first husband renounces Islam, she exercises her right to delegated divorce, or exercises her option of puberty, the courts would exempt her from the above penal consequences in case of her marrying again. The fifth marriage of a man, while the first four marriages legally persist, is irregular (Fasid) at Hanafi Law and void (Batil) at the Ithna Ashari law. The fifth marriage of Hanafi Muslim being merely ‘irregular’, is not hit by Sections 494 and 495 IPC. However, the fifth marriage of a non Hanafi Muslim man should attract the IPC, since such marriage is void under the law

243 *Hamid v. Emperor*, AIR 1931 Lah 194
244 *Shahulameedu v. Zubaida*, (1970) MLJ (Cri) 569
applicable. The concept of ‘irregular’ (Fasid) marriages is not recognized by every school of Muslim Law.245

Taking the example of ex Deputy Chief Minister of Haryana Sh. Chander Mohan who got converted to Muslim religion after marrying with Ex Asstt. Solicitor General of Punjab and Haryana High Court Chandigarh, Anuradha Bali alias (Fiza Mohamamad after conversion to Islam). On going through the factual position of this case it has been observed that Chand Mohammad has solemnized Nikah after conversion to Muslim faith despite being already married to a Hindu woman having children also. Conversion to other faith does not in itself dissolve marriage tie with his first wife. Secondly the conversion of both Chander Mohan and Anuradha Bali was with malafide intention. Neither Hindu Law nor Muslim Law permits this kind of marriage. Muslims can marry only with the consent of first wife. But it is strictly prohibited in Hindu law. A Hindu can not have more than one wife. Their marriage then divorce and then reconciliation obviously shows their malafide intentions, as came in different daily news paper coverage, even people students with the comments that “Uncle and aunty stop this drama”246 which sort of impression and impact it leaves on future generation is obvious by their reaction even this marriage was not welcomed by youngsters also.

Second kind of example is the marriage of Shoaib Malik a Pakistani cricketer with Sania Mirza, an Indian Tennis Star in April 2010. Shoab Malik was already married with Aisha Sidiqhi of Hyderabad, India. The first marriage of Shoaib Malik was dissolved on the interference of Indian Wakf Board by giving his first wife Ayesha Sidiqhi Mahr (dower) + maintenance for three months of iddat period approximately 15 lacs.247

245 Tahir Mahmood, The Muslim Law Of India 2nd Ed. pp58-59
(4) Marriage Without Witnesses:

_Sunni_ law prohibits a marriage being contracted without competent witnesses. A marriage without witnesses or with incompetent witnesses is, however merely irregular.

_Shia_ law. – Under _Shia_ law, the presence of witnesses is not necessary. A marriage contracted without witnesses is, therefore, valid under the Shia law.

_Nikah by Phone, Video Conferencing and Internet._ Nikah will be valid in case an attorney is appointed for Nikah Proceedings on these electronic media and the two parties make proposal and pronounce consent before their witness on behalf of the attorney. The Nikah involves an aspect of ibadat and requires two witnesses. Therefore, direct proposal of marriage and pronouncement of consent on internet, video conferencing and telephone is not reliable. However, in such an arrangement the witness should have been familiar with the person appointed as attorney or his name with his father’s name and residential address is mentioned at the time of proposal and consent.

(5) Marriage During Iddat:

_Iddat_ is the period which a woman has to undergo after divorce or death of her husband. Marriage with a woman undergoing _Iddat_ is prohibited under Muslim law. According to _Sunni_ law, a marriage with a woman observing _Iddat_, is merely irregular; but according to _Shia_ law the marriage is void. However, the prohibition of marrying a woman during _Iddat_, is temporary prohibition which comes to an end after expiry of the specified period.249

248 Aqil Ahmad, *Mohammedan Law*, 23rd Ed. P.127 (Social Issues decision of Indian Ulema, p. 7 IFA publication)
249 Fyzee: *Outlines of Mohammedan Law*, 3rd Ed., p.102
Valid Retirement (Khilwat-us-Sahiba)—when there is no social, moral or legal intercourse between husband and wife for sometime in privacy under Sunni law, they are said to be in Valid Retirement. If there is a valid retirement, it is presumed that actual consummation has taken place. It is treated equal to the actual consummation for purpose of dower, paternity of the child, and certain prohibitions in marriage etc. and also for purpose of observance of Iddat.250

Shia law—under Shia law, valid retirement is not recognized; it is not regarded as equivalent to the actual consummation. Accordingly, if the marriage is dissolved by divorce, the divorced wife is required to observe iddat where actual consummation has taken place.251

The valid retirement has same legal effect as actual consummation in:

i. Confirmation of mahr.

ii. Establishment of paternity.

iii. Observance of iddat.

iv. The wife’s right of maintenance and residence during iddat.

v. The bar of marriage with the wife’s sister.

But mere valid retirement does not prohibit marriage with the wife’s daughter and in the case of triply divorced couple, remarriage between them is possible after observing Halala.252

2.10.3 Prohibitive Incapacity—It arises in the following cases:

a) Polyandry and

b) A Muslim woman marrying a non-Muslim

250 Rama Kant Sinha, *Muslim Law*, p. 56
251 Ibid
252 Ibid
a) **Polyandry**—It is forbidden in the Muslim law which means woman having more than one husband and married woman cannot marry second time so long as the first marriage subsists as was observed in *Liaqat Ali v. Karimunnissa*,\(^{253}\). A Muslim woman marrying in contravention of this rule shall be liable to be punished under Sec 494, IPC and the issues from such marriage will be illegitimate.

b) **Muslim woman marrying non-Muslim**—A marriage of a Muslim female with non-Muslim male whether he be a Kitabia (Christian, or a Jew) or an Idolater or a fire worshipper is irregular under Sunni law and void under Shia law.\(^{254}\) Pakistan Supreme Court has held in *Ali Nawaz v. Mohd Yusuf*\(^{255}\) that not only marriage with a Kitabia woman is valid but marriage with Jews is valid under various kinds of Shias. However, under the Shia law, a marriage with non-Muslim is void. A marriage between Hindu woman and Muslim man is irregular and not void, (*Imamhuissain v. Jannathi*)\(^{256}\) law as Muslim male cannot contract marriage with idolatress or fire worshippers,(*Shamsudeen M. Illias v. Mohd Salimm M. Idris*).\(^{257}\)

### 2.10.4 Directory Prohibitions or incapacity:

These incapacity or prohibitions are:

1. The doctrine of equality (*kafa'a*).
2. Illicit intercourse and undue familiarity.
3. Pilgrimage.
4. Divorce.
5. Marrying a woman 'enciente'
6. Marriage with a sick man

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\(^{253}\) *ILR* 15 All 396 398

\(^{254}\) Mulla *Mohammedan Law*, 18th Ed pp 287-88

\(^{255}\) All PLD 1963 SC 51

\(^{256}\) *AIR* 2008 254 (Kant)

\(^{257}\) *AIR* 2008 Ker 59
Some of them, as is obvious, are rules of prudence rather than mandatory provisions of law. The Muhammadan law texts abound in moral precepts in addition to strict provisions of law and Justice Mahmood has pointed out the danger of confusing moral and legal obligations:\footnote{258} 'One of the greatest difficulties in the administration of Muhammadan law, as indeed of all ancient systems lies in distinguishing between moral from legal obligations.'

I) *The doctrine of Equality in Marriage (kafa’a).* In spite of Koranic dictum that all *Muslims are brothers*\footnote{259} It was, therefore, recognized by society that in order that a marriage may bear the character of a suitable union of law, the husband must be the equal of the woman in social status\footnote{260}. There was no corresponding provision that the wife should be of equal status with the husband, for by marriage he was assumed to raise her to his own position. The Hanafis, accordingly, hold that equality (kafa’a) between the two parties is a necessary condition in marriage, and an ill-assorted union or a runaway marriage is, under certain circumstances, liable to be set aside by the court.\footnote{261}

In Hanafi law, the following factors must be considered for determining equality:

(i) family, (ii) Islam, (iii) profession, (iv) freedom, (v) good character, (vi) means.

The Shafit’s consider slightly different qualifications.\footnote{262}

*Kafa’a* is not so much a legal prohibition, as a rule of worldly wisdom. In *Jamait Ali Shah v. Mir Muhammad*\footnote{263} It was laid down that a disregard of the rules of

\footnotesize{\begin{itemize}
  \item [258] Ibid.
  \item [259] Kor. xlix, 10.
  \item [260] The Prophet is reported to have recommended marriage with fit spouses; ‘Marry your *equals*’ Muhammad Ali. Manual, 272 (No. 10); Fat. Law 10.
  \item [261] Ameer Ali, II 364; Abdur Rahman, Articles 52, 62-9; Fitzgerald, 54-6.
  \item [262] Fitzgerald, p.55.
  \item [263] (1916) Punjab Record 371 (No 119)
\end{itemize}}
equality does not render the marriage void \textit{ab initio}, and that the court was not justified in dissolving the marriage. On the particular facts of the case, the decision may have been proper, but it is submitted that, as pointed out by Tyabji, in certain circumstances the court exercising the jurisdiction of the \textit{Kazi} has the power to annul such a marriage.$^{264}$

It allows the \textit{kazi} to rescind the marriage (\textit{faskh}) in certain cases of \textit{misalliance}, the true nature of the rule is that it is not an absolute prohibition to marry, but it may be compared to a voidable contract. The rule may be formulated where a woman, being of age, contracts herself in marriage with a man who is not her equal (\textit{ghayr kuf}) without the consent of any of those male relations who would be entitled to be guardians of her marriage (\textit{wali}) if she were a minor, the court, on the application of such relations, has the power to rescind the marriage.$^{265}$ Ameer Ali illustrates this by saying that if a woman were to contract a runaway marriage with a servant of the family, the marriage would be annulled on the application of the \textit{wali}.$^{266}$ Thus the rules of equality in marriage are salutary rules of worldly wisdom which must be carefully considered by a \textit{kazi} exercising his powers of \textit{faskh} (annulment of marriage), and as such, should really be treated as considerations relating to that form of dissolution of marriage known as \textit{faskh} which is applicable only under different circumstances of an individual marrying party.

Under the Hanafi Law, there are six requisites to equality:

\begin{enumerate}
  \item Nasb (family or descent).
  \item Islam.
  \item Profession.
  \item Freedom (free or slave).
\end{enumerate}

\footnotesize
$^{264}$ Tyabji 79.
$^{265}$ ibid
$^{266}$ It should be added that such rescission is at the discretion of the \textit{kazi}, not by the compulsion of law, Ameer Ali, II, 368.
v. Honesty.

vi. Means.


The marriage among inequals remain intact until annulled by the order of the court, because a court alone has the power of canceling marriages on the ground of inequality.

Unreasonable delay by the guardian in instituting court proceedings will not ordinarily deprive him of his right. But if the woman has already borne a child to her husband, then the guardian has no right to have the marriage cancelled, because, according to Radd-ul-Muhtar, “it would damage the interests of the child”. The power of objecting absolutely belongs to the agnates (usahaan) of the woman and not to the uterine relations.\footnote{Syed Khalid Rashid, \textit{Muslim Law}, revised by VP Bhartiya, 5th Ed. p. 71}

The doctrine of \textit{Kafa} is unknown to Shia Law. It is because conditions of equality, according to their doctrines, have reference only to Islam of the husband and his ability to support his wife. Thus, if a Shia woman marries a non-Muslim; her relations may file an application in a court of law for its annulment.\footnote{Ibid.}

2) \textit{Illicit intercourse and undue familiarity}: If a person has illicit intercourse with a woman or commits acts of ‘undue familiarity’, some of the woman’s relations are forbidden to him although he can marry the woman herself.\footnote{Tyabji II p. 38; \textit{Fatimid. Law} p. 107, 117-19.}

3) \textit{Pilgrimage}: Marriage during pilgrimage is void under Shia law. In Ithna ‘Ashari and Shafi’i law a man who has come within the sacred precincts of the Ka’ba and put on the pilgrim’s dress, may not enter into a contract of marriage while on the
pilgrimage.\textsuperscript{270} The Shafeis, Malikis and Hanabalis hold marriage within the sacred territory on a pilgrimage to Mecca but according to Fatwa-i-Alamgiri such marriage is legal.\textsuperscript{271}

4) \textit{Divorce}: When a man divorces a woman, and the divorce is effective as a \textit{triple talaq}, remarriage between them is impossible unless the woman observes 'idda, and (Halala) lawfully marries another husband, the second marriage is consummated, and the second husband lawfully and effectively divorces her.

5) \textit{Marriage with a Woman 'Enceinte}: According to Ameer Ali\textsuperscript{272} it is unlawful to marry a woman who is already pregnant by her former husband.

6) \textit{Marriage with a Sick man}: Marriage with a sick man suffering from vulnerable disease which is likely to be fatal is invalid. If however, he recovers and the marriage is consummated, it is valid.\textsuperscript{273}

2.11 \textbf{CLASSIFICATION OF MARRIAGES:}

Marriages may be classified into three categories according to the Sunni law.

1. Valid (\textit{Sahih})
2. Void (\textit{Batil}) and
3. Irregular.

Under Shia law, irregular marriages are not recognized. A marriage according to Shia law may be classified into following categories.

1. Valid (\textit{Sahih})
2. Void (\textit{Batil}) and

\textsuperscript{270} Ibid, p.57; Fatinid. Law p.123.
\textsuperscript{271} Aqil Ahmad, Mohammedan Law, 23rd Ed p.128
\textsuperscript{272} Ameer Ali Mohammedan Law II, p. 358
\textsuperscript{273} Ibid.
3. Temporary (Muta)

However, it is submitted that, although the common practice is to regard valid, void and irregular as the three kinds of Muslim marriage yet, it may be noted that it is erroneous to call them as different kinds of marriage. As a matter of fact, the only kind of marriage which is accepted to be perfectly lawful and 'correct' is the valid (Sahih) marriage. A marriage which has been contracted in violation of any of the essential legal conditions, is no marriage at all, therefore, it does not constitute any separate category as 'void marriage'. Similarly, an irregular marriage is incomplete till the irregularity is removed. However, the 'temporary marriage' (Muta), under Shia law, may certainly be regarded as a distinct kind of marriage.

2.11.1 Valid (Sahih) marriage:

A marriage which conforms in all respects with the legal requirements is a valid marriage. These requirements are:

1. The parties are competent
2. The consent of the parties, or of their guardian is free
3. The offer and acceptance has been made according to law and
4. There is no prohibition for marriage between the parties.

When all the legal conditions are fulfilled, the marriage is called Sahih or 'correct' that is a marriage in which no prohibitions affect the parties. Prohibitions may be either permanent or temporary. If they are permanent, the marriage is void, if temporary, it is irregular.

References:

275 Sinha Rama Kant, *Muslim Law*, p. 60
276 Syed Khalid Rashid, *Muslim Law*, 5th Ed revised by V.P. Bhartiya,
2.11.1.1 Legal Effect of a Valid (Sahih) Marriage:

1. **Status of parties:** The parties to a valid marriage are called the husband and the wife. The cohabitation between the husband and the wife become lawful.\(^{277}\)

2. **Status of Children:** The child born out of a valid marriage are legitimate and they have right to inherit their parent’s properties.

3. **Mutual Right of Inheritance:** Mutual rights of inheritance between husband and the wife are established. It means after the death of the husband, the wife is entitled to inherit the husband properties and after the wife’s death, husband may also inherit her properties.

4. **Wife’s right to Dower, maintenance and residence:** The wife’s right to claim dower is fully established after the completion of marriage. The valid marriage gives to the wife also right of maintenance from her husband. She also becomes entitled to use the husband’s residence as her own, as she is bound to reside with him.

5. **Observance of the iddat:** After the dissolution of the marriage, the widow or the divorced wife is under an obligation to observe the Iddat, during which she cannot re-marry.

6. **Prohibition of affinity:** Prohibited relationship for purposes of marriage is created between the husband and wife and each of them is prohibited to marry the relations of the other within prohibited degrees.

7. **Marriage Agreement:** If there is any marriage-agreement between the parties, the agreement comes into force on the completion of the marriage provided such agreement is not illegal. At the time of the marriage or on a subsequent date, the husband and wife may enter into an agreement for regulating their marital relations. But if the agreements contain conditions

\(^{277}\) A. Muhammed v. Saiqual Bibi, 7 IC 820.
which are against the principles of Islam or are unreasonable, the agreement is illegal. The following conditions have been regarded as legal conditions and the agreements are binding:

a. The condition that husband shall not contract a second marriage during the continuation of the first.
b. That, a husband and wife shall live in a specific place (matrimonial home).
c. That, a certain portion of the dower shall be paid at once and the remainder on the dissolution of marriage.
d. That, the husband shall not prevent the wife from receiving the visits of her relations whenever she likes.
e. That, the wife would be entitled to separate or fixed maintenance in certain circumstances.278

But the following conditions have been regarded as illegal conditions and the agreements are not binding.

a) If there is condition that husband was to live with wife in her father’s house and breach of it would give wife a right to divorce him, such condition is illegal.279

b) The condition, restraining the husband from making the wife reside with him or requiring that husband would reside at his parents place, is illegal.280

c) Under the Shia law, if a condition is that the wife shall not be entitled to any dower, such condition is illegal281.

278 Moh’d Muin-ud-din v. Jamal Fatima, AIR 1921 All 152; 19 All LJ 675.
280 Khatun Bibi v. Rajjah, AIR 615: 94 Ind Cas 224.
281 Mahbooban Bibi v. Muhammad Amerruddin, AIR 1929 Pat 207.
An illegal agreement does not affect the validity of a marriage, but the conditions itself are void and inoperative.

2.11.2 Void (Batil) marriage:

A marriage which has no legal results is termed as void. A marriage forbidden by the rules of blood relationship, affinity or fosterage is void. Similarly, a marriage with the wife of another, or remarriage with a divorced wife, without observing the strict rules set for this occasion, is void. Following marriages are void.

1. Marriage in violation of absolute prohibitions, like consanguinity or affinity or fosterage
2. Marriage with any lawfully married woman (polyandry being strictly prohibited in Islam)

Under Shia law, in addition to the above mentioned conditions, following marriages are also void.

1. Marriage with fifth wife
2. Marriage during pilgrimage
3. Marriage with any non-Muslim
4. Marriage against the prohibition of unlawful conjunction and
5. Marriage with woman undergoing Iddat.

2.11.2.1 Legal Effect of a Void (Batil) Marriage:

1. Void marriage is void ab initio.
2. It does not create any conjugal right or obligation between parties.
3. The cohabitation is unlawful.
4. The children born out of such marriage are illegitimate.

282 Ibid.
5. The husband and wife do not get mutual rights of inheritance.

6. The wife is neither entitled to the dower nor maintenance.

7. The parties to such marriages are free to live according to their own ways. If the wife or husband marries again, she will not be guilty of bigamy under section 494 of the IPC.

8. No legal action is necessary for the declaration of such marriage as null and void but any person who is interested in getting such a declaration can file a declaratory suit under section 9 of the C.P.C read with section 34 of the Specific Relief Act, 1963.

2.11.3 Irregular (Fasid) marriage:

A marriage may be either lawful or unlawful. Unlawful may be either absolute or relatives. Unlawfulness is absolute or relative. If the unlawfulness is absolute, the marriage is void. If it is relative, it is an irregular marriage.

The following are irregular marriages;

a. A marriage without witnesses;

b. A marriage with a woman undergoing iddat;

c. A marriage prohibited by reason of difference of religion;\(^{283}\)

d. A marriage with two sisters, at the same time; and

e. A marriage with a fifth wife.\(^{284}\)

\(^{283}\) Shamsudeen M. Illias v. Mohd. Salim M. Idris, AIR 2008 Ker 59 very recently the Kerala High Court has held that a marriage of Muslim male with a Hindu woman is invalid — fasid. Such marriage is not void (Batil), only invalid (irregular) and therefore, the offspring of such marriage is legitimate, resulting in entitling the child to inherit the property of the father. The woman however, has no such right in the property of the ‘husband’; yet, on consummation she is entitled to get dower. Even her conversion to to Islam does not change her position as to inheritance. The court also held that such ‘marriage’ can be presumed from prolonged and continued cohabitation and living together under one roof as husband and wife. Earlier the Karnataka HC had laid down similar law in Imamhussain v. Jannathi, AIR (2007) 6 Kar R 243. The Madhya Pradesh HC emphasised that in absence of evidence it cannot be held that irregular marriage between (Muslim male and Hindu woman) became legal on account of conversion of the woman (plaintiff) to Islam—Puniyabi v. Sugrabi, AIR 2008 MP 781 (NOC).
2.11.3.1 Legal Effects of an Irregular (Fasid) Marriage:

1. The cohabitation between the husband and the wife become lawful.

2. The child born out of an irregular marriage are legitimate and they have right to inherit their parent’s properties.

3. The husband and the wife have no mutual rights of inheritance. It means that if the marriage is irregular and the husband dies, the wife is not entitled to inherit his properties. Similarly, husband too is not entitled to inherit the properties of the wife.

4. Before Consummation: An irregular or Fasid marriage has no legal effects unless it is consummated or until the Temporary or Relative Impediments are removed. Either party to such a marriage has a right to terminate it at any time. Any intention expressed to terminate such marriage is enough to make an end to this marriage.

5. After consummation: When the marriage is performed in violation of Temporary or Relative Impediments, even before cessation of these impediments, if consummation of marriage has taken place, then the following legal effects ensue:
   a. After consummation, the wife becomes entitled to Dower. It may be proper or specified whichever is less.
   b. After consummation, on dissolution of marriage either by divorce or by death of the husband, the wife is required to perform Iddat.

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284 The rule is that the bar of unlawful conjunction (mawa bain-al-mahwain) renders a marriage irregular and not void. Since a marriage which is temporarily prohibited may be rendered lawful once the prohibition is removed, such marriage is irregular (fasid) and not void(batil) so is the view of Fatwa-i-Alamgiri, and was followed by Bombay High Court in 1917 in Tajbi v. Mowda Khan, ILR (1917) 41 Bom 485, and further reinforced by the Supreme Court in Chand Patel v. Bismillah Begum, (2008) 4 SCC 774: (2008) 2 SCC (Cri) 490. The court held under Hanafi Law applicable to Muslims in India, such irregular marriage continues to subsist till legally terminated. Wife and children of such marriage would be entitled to maintenance under Sec. 125 of Cr.P.C.
2.11.4 Muta Marriage:

The word *mut'ah* (derived from ‘*istimtaa*’) literally means ‘enjoyment, or ‘have happiness or joy from its use’; and in its legal context may be rendered, according to Heffening, as ‘marriage for pleasure’. It is a marriage for a fixed period for a certain reward paid to the woman. The institution of mutah was fairly common in Arabia both before and at the time of Prophet.\(^{285}\) It seems fairly certain that it was tolerated by the Prophet for some time but all schools of law except one, the Ithna Ashari Shia School, agreed that finally he declared such unions as unlawful.\(^{286}\)

The old Arab custom of *mut’ah* was justified as being useful in times of war and on travels; but even after the prohibition it persisted and was really suppressed and ruthlessly condemned by the Caliph Omar. It is probably for this reason among others that the Ithna Ashari School retains the practice and considers it lawful. Some of the learned and pious among the Shias who take muta wives unto themselves are wont to repeat the dictum of the theologian al-Hurr al-Al-Amili; ‘the believer is only perfect when he has experienced a mut’ah’.\(^{287}\)

Mutah was allowed to enable men who traveled on foot for 100s miles to distant lands to marry women at their new local towns to prevent them from raping and committing fornication and /or adultery and all other sexual evil such as homosexuality.\(^{288}\)

Muta relationship makes a woman neither a wife nor a slave girl of a person, whereas the Quran specially restricts sexual relationships of a person with these two. The particular word used by the Quran in the verse 4:24 translated as “wives” is “azwaj” plural of “zaujah”. In classical Arabic language, a woman with whom a

\(^{285}\) Quran 4:24 is referred for this purpose.
\(^{286}\) *The Reconstruction of Religious Thought in Islam*, M.Iqbal, 1961, London
\(^{287}\) ibid
person had entered into a contract of Muta was called “Mamtuah” of the person, she
was not referred to as the “zaujah” (wife) of the person. The verse is a clear evidence
to the fact that no other relationship besides the one based on Nikah was allowed by
Islam.289

The practice is not very common in India, and in Lucknow and other places
where there is a Shia population as ladies of the better classes do not contract mutah
marriages. In Iran and Iraq mutah generally descends to the level of legalized
prostitution. There is a delightful description of the practice in Iran, where such
unions are termed as sighe, in Morier’s Hajji Baba.290

Before coming to its legal incidents, it is well to remember that this interesting
Arab custom is forbidden by all schools, Sunni as well as Shia, including the Zaidi
and Fatimi school,291 and that it is permitted only by Ithna Ashari Shia authorities.292
According to Ithna Ashari Shia law a mut’ah (or sigher) is a marriage for a fixed
period of time. It may be for a day, a month, a year or a term of years.293 The
essentials of such a union are four: the form, the subject, the period and the dower.294

2.11.4.1 Essentials Of Muta Marriage:

The Muta marriage must be contracted according to the rules prescribed by
Ithna Ashari law. A muta contracted against any of the following legal conditions is
an unlawful union. Essential condition for a valid Muta-marriage may be as under295:-

1. The parties must have attained the age of puberty (fifteen years) and must
also possess a sound mind. Guardians cannot contract Muta of any minor.

291 Khojas and Bohoras consider it unlawful, Da’aim II, 858-59; (1931) 33 BLR, 30; Tyabji 34;
292 Fatimid Laws 95-7
293 Ameer Ali II, 317-18, 398-404; Sircar II, 373-82
294 Baillie II, 42, Sircar II, (Tagore Law Lectures) 373.
295 S.C Sircar II (Tagore Law Lectures),373.
296 Singh R.K, Muslim Law, Ed. 2011, p. 81
Minor’s muta is void even if it has been contracted by a marriage-guardian.

2. The Shia male may contract Muta with any Muslim, Kitabia or a fire worshipping woman, but he has not right to contract muta with the woman of any other religion. Muta with a Hindu woman is void. But Shia cannot contract Muta with any non-Muslim. There is no restriction as to the number of Muta wives. One may contract a muta form of marriage with as many wives as he likes.

3. The consent of both parties must be a free consent.

4. The formalities of offer and acceptance, which are necessary for a regular marriage, are also essential in the Muta form of Marriage. Muta may be contracted lawfully without the witnesses. The muta marriage may be contracted either by the use of the word ‘Muta’ or any of other word signifying temporary marriage.

5. There must not exist any prohibited relationship between the parties.

6. The period for which the Muta is being contracted, must be clearly specified. It may be for a day, for a week or for certain years. As a matter of fact, the fundamental difference between a Muta and Nikah is that, in a marriage if its period has been specified (how long period may be) the marriage becomes a Muta, whereas a marriage without any specific period is always a Nikah. The word Muta in itself does not render a marriage temporary. If a Muta form of marriage has been contracted but it duration has not been specified, it is regarded as a permanent marriage (Nikah). In S.A. Hussain v. Rajamma, a Shia male contracted a muta marriage with a female Harijan converted to Islam. The marriage continued till death of the husband. After death of her husband, wife inherited the properties of her husband. But this inheritance was challenged by the brother of the

296 AIR (1977) Andh. Pra 153
husband on the ground that the marriage was a simply a Muta marriage under which the widow is not entitled to inherit the properties of her husband. A Shia witness confirmed that he has seen the Muta form of marriage between the two, but also said that no period was specified at that time. It was held by the court that a Muta without any specified period is to be treated as a permanent marriage (Nikah). In this case, although the word Muta was used but the term was not specified, therefore, the marriage was treated as permanent marriage under which wife was entitled to inherit her husband’s properties.

In Shahzada Qanum v. Fakhr Jahan, the High Court of Hyderabad observed that there is no difference between Muta in which the period has not been specified and a Muta contracted ‘for life’. It was held by the court that a Muta ‘for life’ is like a Muta for unspecified period, and it must be treated as a permanent marriage. But it is respectfully submitted that fixation of the period by the words ‘for life’ is nothing but to specify the period of a Muta and it can never be regarded as a permanent marriage. Fyzee rightly observes that to equate a ‘Muta for life’ with a regular Nikah is a serious step.

7. The dower (consideration) must be specified at the time of the contract. Where the dower has not been fixed, the Muta-marriage is void. It may be noted that specification of the dower is necessary for the validity of a Muta form of marriage but it is not essential for a permanent marriage (nikah).

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297 AIR (1953) Hyd.6
298 Fyzee, Outlines of Muhammedan Law, Ed.IV, p.120
2.11.4.2 Legal Incidents of Muta Marriage:

Following are the main incidents of Mutah Marriage:

a. Spouses have no right of mutual inheritance, even if one of the spouses dies when muta is subsisting.\textsuperscript{299}

b. The wife of muta marriage is not entitled to any maintenance, but if stipulated in the marriage contract, she is entitled to it during whole of muta, even if husband does not cohabit with her, in the absence of such stipulation, the court has power to award her maintenance under Sec.125 of Cr.P.C.\textsuperscript{300}

c. Where the cohabitation of a man and a woman commences in a muta marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues during the whole period and the children conceived during that period were legitimate and capable of inheriting from their father.\textsuperscript{301}

d. Even if the term of muta marriage was extended for the whole period of cohabitation and that the children conceived during the extended term are legitimate.\textsuperscript{302}

e. No right of divorce is recognized in the case of muta marriage, it is dissolved ipso facto by the expiry of the term, but the husband may at his will put an end to the contract of marriage by a gift of the term (hiba-i-muddat) to the wife, even before the expiry of the fixed time.\textsuperscript{303}

\textsuperscript{299} Shoharat Singh v. Jafri Bibi, (1914) 17 Bom LR 13
\textsuperscript{300} See Luddan v. Mirza, (1882) 8 Cal. 736. This decision is of doubtful authority because as stated in Sharaya-ul-Islam, “the name of a wife does not in reality apply to a woman contracted in Moota” Bailie; II, 304
\textsuperscript{301} Shoharat Singh v. Jafri Bibi (1914) Bom, 17 LR 13
\textsuperscript{303} Supra note 40
f. In case of unconsummated marriage, the woman is entitled to half the dower, and full dower is paid in case the marriage is consummated even though the husband may put an end to muta contract before giving away the unexpired portion of the term. The husband is entitled to deduct a proportionate portion of dower in case the woman leaves her husband before expiry of the term. 304

A man may contract mut’ah with a Muslim, Christian, Jewish or a fire worshipping woman (Majusia), but not with follower of any other religion. 305 But a Shia woman may not contract a mutah with a non-Muslim. Relations prohibited by affinity are also unlawful in temporary marriage. 306

The Privy Council held in Shoharat Singh v. Jafri Bibi 307 that where cohabitation of a man and a woman commenced with a mutah and there was no evidence as to the term of the marriage the proper inference would, in default of evidence to the contrary, is that the mutah continued the whole period of cohabitation.

It was held in Shahzada Qanum v. Fakher Jahan 308 that there is no difference between a mutah for an unspecified period and mutah for life; a permanent nikah marriage for life can be contracted by the use of the word mutah also; specification of the period for which mutah marriage is contracted alone makes a marriage a temporary marriage for the period specified; where the specification of period is omitted, whether intentionally or inadvertently, a permanent nikah marriage results with all the legal incidents of a marriage including the right of inheritance between the contracting parties, and where the period is for life a nikah marriage will result.

304 Mohamed Abid v. Ludden (1887) 14 Cal 276
305 Tyabji Muslim Law, ED II, 34.
306 S.C Sircar II (Tagore Law Lectures) 375
307 (1914) 17 Bom LR 13,
308 AIR 1953 Hyd 6.
A mutah terminates by the efflux of time or by death. On the expiry of the term no divorce is needed. During the period the husband has no right to divorce the wife but the husband may make a ‘gift of term’ (hiba-e-muddat) and thereby terminate the contract without the wife’s consent.\footnote{Tyabji \textit{Mohammedan Law}, p.34; Mulla \textit{Principles of Mohammedan Law}, p.269.}

The dower is a necessary condition for such a union. If it is not specified the agreement is void. Where the marriage is consummated the wife is entitled to the whole amount; if not to half the dower. In case a wife leaves her husband before the expiry of the term the husband is entitled to deduct a proportionate part of the dower.\footnote{Ibid.} On the expiry of the period, where there has been cohabitation a short iddat of two courses is prescribed; where there has been no consummation no iddat is necessary.\footnote{Ibid}

The issues of a mutah union are legitimate and entitled to inherit. In the absence of a specified agreement the husband or the wife does not inherit from the other, but if there is such a stipulation it will be effectual.\footnote{Sircar II, 381; Tyabji 34.} A mutah wife is not entitled to maintenance, for according to the \textit{Shariat al-Islam} ‘the name of the wife’ does not in reality apply to a woman contracted in mutah.\footnote{Baillie, \textit{Digest of Mohammedan Law}, Part II, 344; Wilson, \textit{Anglo Mohammedan Law}, 441; Mulla 269}

It was held in \textit{Syed Amantullah Hussain v. Rajamma,}\footnote{AIR (1977) AP. 153 as cited in \textit{Muslim Law}, R.K. Sinha p.63} by the court that a Muta without any specified period is to be treated as a permanent marriage under which Rajamma was entitled to inherit her husband’s properties.