Chapter -- II

CONCEPT OF HINDU AND MUSLIM MARRIAGE
This chapter deals with the concept of marriage under Hindu and Muslim law. The concept of Hindu marriage and Muslim marriage are dealt under separate sections. The first section deals with the concept of Hindu marriage and the second section was concept of Muslim marriage.

i) The Concept of Hindu Marriage:

Marriage is one of the necessary Samskaras (sacraments) or religious rites for all Hindus, what ever the caste, who do not desire to adopt the life of a perpetual Brahmachari\(^1\) or of a sanyasi:\(^2\) The word 'samskara' is formed by uniting the verb “kr” with the word “Sam” and signifies a set of ceremonies or rituals enjoined by the sastras in relation to an individual. The meaning of the word “kr” is ‘imparts’ or ‘effects’. It effects a ‘fitness’ in the person regarding whom, the samskara is performed.

Every Hindu must marry. “To be mother, were women created and to be fathers, men; the Veda ordained that Dharma must be practiced by man together with his wife.”\(^3\) “He only is a perfect man who consists of his wife, himself and his offspring”.\(^4\) “Those who have wives can fulfill their due obligations in this world; those who have wives, truly have a family life; those who have wives, can be happy; those who have wives can lead a full life”.\(^5\)

Thus, Hindus conceived of marriage as a sacramental union, as a holy union. This implies several things. First the marriage between man and woman is of religious or holy character and not a contractual union. For a Hindu, marriage is obligatory for begetting son, for discharge of his debt to his ancestors, and for performing religious and spiritual duties. Wife is not merely a Grihapatni but also Dharmapatni and Sahadharmini. According to Manu, husband and wife are united to each other not merely in this life but even after death, in the other world. Its implication has been that, widow remarriages as a

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\(^1\) Unmarried.
\(^3\) Manu Smriti, ix, 96; cited in Dr. Paras Diwan on Hindu Law, 2\(^{nd}\) edn. 2005, p.547, Orient publishing company, Allahabad.
\(^4\) Ibid.
\(^5\) Mahabharat, Adi Parva, 40-41, ibid.
rule were not recognized in Hindu law. The rule was “once is a maiden given in marriage”. “A true wife must preserve the chastity as much after as before her husband’s death”.

Derrett puts it succinctly thus: “the intention of the sacrament is to make the husband and wife one, physically and psychically for secular and spiritual purposes, for this life and for after lives”.

The Smritis highly eulogized the woman who kept her husband’s bed unsullied even after his death. Though the purabhu (remarried woman) is mentioned by sages, she is mentioned with a reproach. The ideal was that, a widow who remains chaste reaches heaven after her death even though she has no son; a widow who becomes unfaithful to her deceased husband has no claim to his property, not even for maintenance; she may even be ex-communicated.

According to Manu, “wife is a divine institution given by Gods. One should not think that one has obtained her by choice”. Her unity (with her husband) is established by the Vedas. A woman is half her husband and completes him. A woman must be honoured by her father, brother, husband and brother-in-law, who desire their welfare. Where women are honoured, the gods are pleased, but where they are not honoured, no sacred rites yield any reward.

Manu declared that a man who has not taken a wife has not fully perfected his personality and must be regarded as incomplete. His personality is developed and completed only upon the union of his wife, himself and his offspring. This is the significance of unity of personality of man and his wife under Hindu law. Thus according to the grihyasutras, marriage is not a contract

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8. Manu Smriti, v. 151; Yaj, 1.76; Vishnu, xxv. 13-14; cf: Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.547, Orient publishing company, Allahabad.
9. Manu Smriti, V. 169, Yaj; 1. 75; Vishnu, XXX, 17; Parasara, 1V, 26; ibid.
10. Manu Smriti, ix. 95; ibid, p.544.
11. Manu Smriti, ix. 96; ibid. p.545.
12. Manu Smriti, ix.26; ibid.
13. Manu Smriti, iii. 58; ibid.
but a spiritual union, a holy bond of unity. The words with which, the husband addresses his wife after *saptapadi*\(^{14}\) are:

“Into my will, I take thy heart; thy mind shall follow my mind”. Even in the patriarchal society of the Rig Vedic Hindus, marriage was considered as a sacramental union, and it continued to be so in the entire Hindu period, and even in our contemporary world, most Hindus regard their marriage as a sacrament. Manu laid down: “I hold your hand for *saubhagya* (good luck) that you may grow old with your husband, you are given to me by the just, the creator, the wise and by the learned people\(^{15}\). Further, Manu said that,

“Neither by sale nor by desertion, can a wife be released from her husband; this, we understand is the law ordained by the creator in former times\(^{16}\).

“Let mutual fidelity continue till death; this in few words, may be considered as the highest dharma of husband and wife”\(^{17}\).

“Let a man and woman united in marriage constantly be beware lest at any time disunited, they violate their mutual fidelity”\(^{18}\).

Wife is also ‘*ardhangini*’ (half of man). According to *Satpatha Brahmana*, “the wife is verily the half of the husband; Man is only half, not complete until he marries”\(^{19}\). The *Taittiriya Samhita* is to the same effect: “half is she of the husband that is wife”\(^{20}\).

In the Shastra, husband and wife are referred to by several names. The husband is known as ‘*bharti’*, because he is to protect her. On the other hand, the wife is known as ‘*jaya*’, because one’s own self is begotten on her. According to the Mahabharata, by cherishing woman, one but virtually worship the goddess of prosperity herself: by afflicting her, one but afflicts the goddess of prosperity\(^{21}\).

\(^{14}\) Taking seven steps by the bride and the bridegroom jointly before the sacred fire.


\(^{16}\) *Manu Smriti*, ix. 46; ibid.

\(^{17}\) *Manu Smriti* ix, 101; *Manu* iii, 55-76; *Yaj.*,i. 82; ibid.

\(^{18}\) *Manu Smriti*, ix, 102; ibid.

\(^{19}\) *Satpata Brahmana*, v. 1.6.10; ibid. p.546.

\(^{20}\) *Taittiriya Samhita*, iii. 1, 2, 57; ibid.

“A man’s half is his wife: the wife is her husband’s best of friends: the wife is the source of Dharma, Artha and Kama; and she is also the source of Moksha. In the Ramayana, the wife is said to be the very soul of her husband23 she is ‘grihini’ (the lady of the house) in her husband’s house hold; Sachiva (wise counselor), Sakhi (confidante) to her husband and dearest disciple of her husband in the pursuit of art. She is ‘grihalakshmi’, ‘ardhangini’ and samarajyi.

Side by side with this idealized picture of the wife, the Hindu sages hold in clear terms that husband is “the lord and master of his wife, he must be adored and obeyed even if devoid of all virtues”24. “He must be obeyed as long as he lives and the wife should remain faithful to his memory even after his death”25. “He should be worshipped like God even though he is a man of bad character with no qualities”26.

As a rule, marriage was considered to be an indissoluble union. It was only in some exceptional cases, that the sages allowed a woman to abandon her husband and take another. Vasistha said: “A damsel betrothed to one devoid of character and good family or afflicted by impotency, blindness and the like or an epileptic or an infidel or incurably diseased…. Should be taken away from him and married to another”. But this text is confined to betrothal27. Narada and Parasara mention five cases in which, a woman may abandon her husband and take another: a) when the husband is missing, b) when he is dead, c) when he has become an ascetic, d) when he is impotent and e) when he is an out-caste28.

Remarriage was permitted: 1) when a damsel was abducted and not married according to sacred rites and 2) if the husband died before consummation of marriage.

On the other hand, there was no such requirement for the husband. A man was allowed to marry again after the death of his wife without any delay. Kautilya also says that a woman may abandon her husband if he is of bad

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25. Manu Smriti, v. 151; Yaj, 1, 75; Vishnu,xxv, 13-14; ibid.
26. Manu Smriti, I. 15.4-6; Yaj, 1.77; Vishnu, xxv, 13; Katyayana , 886; ibid.
28. Narada, xii, 81; Parasar, x, 26-35; ibid. p.548.
character, if he is absent for a long time, if he has become a traitor or is likely to endanger her life, is an outcaste or has lost his virility.

There is a difference of opinion among the sages whether a wife could abandon her husband in the aforesaid cases in all forms of marriages or whether she could do so only when marriage was in the unapproved form. However, whatever be the text on abandonment of the husband by the wife, the predominant authority is in favour of the indissolubility of marriage.

Manu enjoins on the wife that she should become a patunuvarte i.e., she should follow the same principles as her husband. According to Rig-Veda:

“Be thou mother of heroic children, devoted to the Gods, be thou queen in thy father-in-law’s house hold. May all gods unite the hearts of us two into one.”

Marriage as a sacramental union implies that it is a sacrosanct union. Hindus conceived of their marriage as a union primarily meant for the performance of religious and spiritual duties. Such a marriage can not take place without the performance of sacred rites and ceremonies. Secondly, a sacramental union implies that it is a permanent union. Marriage is a tie which once tied cannot be untied. This implies that marriage cannot be dissolved. Thirdly, the sacramental union means that it is an eternal union. It is valid not merely in this life but in lives to come.

According to Manu, “The husband is declared to be one with the wife. Neither by sale nor by repudiation is a wife released from her husband. Once only a maiden is given in marriage.” Every Hindu is enjoined to marry, to enter the ‘grihasta-ashrama’.

30 Manu Smriti, viii, 228; cited ibid p. 546.
31 Rigveda, ix, 85; ibid.
33 Hindus have divided human life into four ashramas or stages; first is the Brahmacharya ashrama (student ship), the second is the Grihasta ashrama (life of house holder), the third is the Vanaprastha ashrama (life of a recluse) and the last is Sanyasa ashrama (the life of total renunciation of world).
The *Atharva Veda* enjoins that the husband and wife should live in love just as the birds *chakva-chakvi* live.\(^{34}\) A passage in *Yajurveda* runs:

"Knowledge, wealth, power, food and activity and issue, they (husband and wife) should try; he is the ‘samrat’ (endowed with virtue and power), she is ‘swarat’ (self-controlled and knowing), protecting each other. They should together make progress.\(^{35}\)

The wife is not just ‘patni’ (wife) but ‘Dharmapatni’ (partner) in the performances of duties; religious, spiritual and other. Among the Hindus, there are many yagnas (religious and spiritual sacrifices, rites and ceremonies) which a man cannot perform without a wife. That is why, she is called dharmapatni. Thus Manu declared that the due performance of the religious rites, faithful worship, performances of yagnas, the highest conjugal happiness, and the heavenly bliss for ancestors and oneself- all depend upon the wife.\(^{36}\)

According to Vedas, marriage is a union of "bones with bones, flesh with flesh and skin with skin, the husband and wife become as if they were one person."\(^{37}\)

The aim and objectives of this institution is to achieve by cohabitation of man and woman, the supreme values of *Dharma* (i.e. duty according to law and religion), *Arth* (economic effort and achievement), *Kam* (love and procreation) and *purusharth* (i.e. best and noble actions and deeds). These are the material determinants of the concept of marriage. At any rate, the institution of marriage enjoins and obliges both husband and wife to live together under the same roof and by common effort to achieve the good of both.

According to the Hindu sastras, a man’s life is divided into four ashramas known as Ashrama Dharma. The Ashrama Dharma is based on the purusharthas; individual’s striving to attain the ultimate. The theory of purusharthas provides

\(^{34}\) Atharva veda, xvi, 2.64; (According to Hindu mythology, this species of birds is an ideal in life. The male and female live together and if one dies, the other also dies of heart break) cf: Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.532, Orient Publishing Company, Allahabad.

\(^{35}\) Yajurveda, 13.55; ibid.


\(^{37}\) Shyama charam sarkar; vyavastha chandrika, vol.ii, 480; ibid.
the key to the understanding of the individual striving to attain salvation in relation to society.\textsuperscript{38}

These purusharthsas are four: Dharma, Artha, Kama and Moksha. Of these, the dharma pervades through the four ashramas.

\textit{Dharma} is created for the well-being of all creation. All that is free from doing any harm to any created being is dharma for indeed, dharma is created to help all creation, free from any harm.\textsuperscript{39} Dharma is so called because it protects all. Dharma preserves all that is created. Dharma then, is surely the principle which is capable of preserving the universe.\textsuperscript{40}

\textit{Kama} implies desires in man and enjoyment and satisfaction of the life of senses, including sexual desires. Kama thus refers to the totality of the innate desires and drives in man.

\textit{Artha} implies acquisition of wealth and refers to the means necessary to acquire worldly prosperity, such as wealth and power.

\textit{Moksha} means attainment of salvation.\textsuperscript{41}

Dharma controls every thing. Artha and Kama are to be acquired in accordance with dharma. The stability of the universe depends upon dharma. Artha and Kama too depend for their proper management upon dharma. Dharma is the foremost of all. Artha is said to be middling, and Kama is the lowest of the three.\textsuperscript{42}

Dharma is the holder of the balance in terms of which, Artha and Kama have to be dealt with, weighed, practiced and acquired. Therefore, one should conduct their lives in accordance with dharma.\textsuperscript{43} Manu says that good of man consists in the harmonious coordination of the three.\textsuperscript{44}

\textsuperscript{38} Dr. Paras Diwan on Hindu Law, 2\textsuperscript{nd} edn. 2005; p.47. Orient Publishing Company, Allahabad.
\textsuperscript{39} Mahabharat Shanti Parva, 58; ibid.
\textsuperscript{40} Mahabharat Shanti Parva, 59; cf: Dr. Paras Diwan on Hindu Law, 2\textsuperscript{nd} edn., 2005; p.47., Orient Publishing Company, Allahabad
\textsuperscript{41} Ibid. p. 47.
\textsuperscript{42} Ibid.
\textsuperscript{43} Mahabharat, Shanti Parva, 167, 6-9; cf: Dr. Paras Diwan on Hindu Law, 2\textsuperscript{nd} edn. 2005, p.47, Orient Publishing Company, Allahabad.
\textsuperscript{44} Manu Smriti, ii, 224; ibid.
The purusharthas are to be practiced in the four ashramas. The purusharthas are but stages in the journey of life on the way of final liberation. Vyasa says the four stages of life form a ladder or flight of four steps. The ladder or flight is attached to the Brahma. By ascending the ladder, one reaches the *Brahma*. In the social sense, ashramas are stages in life; each stage is a training ground for the individual. From one stage to another, he passes till he attains *moksha*\(^\text{45}\).

The four ashramas are; *Brahmacharya Ashrama, Grihasthya Ashrama, Vanaprastha Ashrama* and *Sanyasa Ashrama*. In one’s early age, one lives in Brahmacharya Ashrama and acquires education. In the Grihasthya Ashrama an individual satisfies his natural desires of enjoyment and pleasure and acquires wealth. In the old age, the individual seeks *moksha*\(^\text{46}\).

With the upanayana ceremony, the young boy is initiated in to the Brahmacharya Ashrama. After completion of his education, he becomes a ‘snataka’ and enters Grihasthya Ashrama. In this stage, the individual fulfills his obligations to his ancestors, to the members of his family and to strangers and Gods.

The objects of a Hindu marriage have been to have offspring, to be able to perform religious rites and sacrifices (which a man can perform only along with his wife) and to have highest conjugal happiness and heavenly bliss for the ancestors and oneself. The achievement of all these objectives is dependent upon the wife\(^\text{47}\).

On the approach of old age, he enters into the *Vanaprastha Ashrama*. In this *ashrama*, he completely becomes detached from the world and worldly life and lives in a forest, a life of utter simplicity and austerity. But he continues to perform the sacrifices. After the Vanaprastha Ashrama, the individual enters the last Ashrama, the Sanyasa Ashrama. It is a life of total renunciation of world.

On marriage, the wife’s introduction into the family become a limb and could not cut herself off simply because her husband who introduced her into the

\(^{45}\) Dr. Paras Diwan on Hindu Law, 2\textsuperscript{nd} edn. 2005, p.47, Orient Publishing Company, Allahabad.

\(^{46}\) Ibid.

\(^{47}\) Ibid, p. 545.
family and with whom, of course, she was more closely connected than with anybody else, departed from this world. He might be dead but the family did not die and she remained as much a part of it as before. Therefore, during the solemnization of the marriage ceremony, the husband pointed out to the wife, the pole star as a symbol of constancy and she prayed “as this pole star is constant, so may I be constant in my husband’s family”.

By taking the specific samskara of marriage, it achieves certain spiritual results at the mystic plane; it creates a socially accepted status between the parties. From that onwards, the unrelated man and woman will be designated as “husband” and “wife” and as a result of it, arise certain mutual rights and obligations on both parties.

With the emergence of status of husband and wife on the completion of the samskara, many consequences, both secular and spiritual occur; some of them perceivable and others suprasensual. At the physical level, the couple surrender themselves to each other and they taste the supreme matrimonial bliss.

The symbolic mergence of the personalities of the husband and wife has obsessed the Hindu mind to such an extent that it is reflected even in other spheres of human activities.

For instance, in the field of art, the symbol of ‘Ardha Nareeswara’ depicting half the body in the form of ‘Lord Shiva’ and the other half, in the form of his consort ‘Parvati’ found everywhere which signifies nothing but the unity of the spouses.

On marriage the wife acquires the gotra and pravara of the husband. A wife has a sapinda relationship with her husband and also gets some specific domestic, economic and sexual status.

Her status as a wife is radically different from her maiden days. As an unmarried girl, she was only a member of her father’s house, but wifehood confers on her, the status of manageress, either immediately or gradually. The most significant change is that, she becomes responsible for carrying on the generation or ‘vamsha’ of her husband. i.e., she gets the status of progenetrix.
She therefore has a right to her husband’s society. It was because of this reason that niyoga was an accepted social norm. This also imposed sexual fidelity on her. Manu says that the husband and the wife should not prove false to each other until their death with regard to Dharma, Artha and Kama.

The desire for male offspring in particular was very natural in all early societies. Male issue was prized both for the continuance of the family as well as for the performance of funeral rites and offerings. The Veda declares: “endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring”. May our enemies be destitute of offspring. “O Agni, may I obtain immortality by offspring.”

According to the Veda, an Aryan is born burdened with three debts. “He owes the study of the Veda to the Rishis, sacrifices to the Gods, and a son to the manes”. “He is free from debt who has offered sacrifices, who has begotten a son and who has lived as a student with a teacher.”

Manu emphasized the Vedic injunction regarding the necessity for a son thus: “Through a son, he conquers the world; through a son’s son, he obtains immortality; but through his son’s grand son, he gains the world of Sun. Because a son delivers his father from hell called ‘PUT’; he was therefore called PUT-TRA (a deliverer from PUT). Yajnavalkya also said: “Because continuity of the family in this world and the attainment of heaven in the next are through sons, son’s sons and son’s grand sons; therefore, women should be loved and protected.”

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48. Niyoga means the begetting of a son on hire by another on the wife of a man who was either dead or impotent or disordered in mind or incurably diseased. The begetting must be by the brother of the dead or impotent person. The son so begotten belonged to the husband of the woman. The custom is obsolete. (K.J. Ayar’s Judicial Dictionary, 13th edn.2001, Butterworths India, New Delhi).


51. Rig veda, I. 21.5. cited in Vas., xvii, 2-4; Vishnu, xv, 45; Manu, vi, 36, 37; ix, 45; ibid.

52. Taittiriya Samhita vi. 3,10,5. cited in Vas., xi, 48; Manu, vi, 35-37; ix. 106,107; xi. 66. ibid.


While it is true that the ancient Aryans longed for offspring, they recognized at the same time, the need for their wives remaining chaste rather than they should have offspring anyhow. The emphasis on the need for male offspring was more than counterbalanced by the instance on the need for morality.55

One of the characteristic features of a Hindu marriage has been that it was more connected with the performance of religious duties and begetting of a son, who enables a man to get deliverance from the sufferings of hell. Marriage was not a contract but an indissoluble tie. It is solemnized once and for all. Marriage amongst Hindus which involves the transfer of dominion over the damsel from the father to the husband and which has always been the foundation of peace and order in any civilized society was, a settled institution with a religious character attached thereto even at the Vedic period.

In Gopal kishan v. Mithilesh kumari,56 the Allahabad High court observed: “The institution of matrimony under the Hindu law is a sacrament and not a mere betrothal. Its context is religious. It is regarded as part of the life of the soul. It is holy spiritual union corresponding to ‘consortium omntum vitae of Rome’, a process by which, the husband and wife become one.

The bride on the seventh step of the saptapadi loses her original gotra and acquires the gotra of the bridegroom, and a kinship is created what is not a mere friendship for pleasure. A Hindu marriage thus performed through any of the modes, namely, Brahma, Daiva, Prajapatya and Arsha57 is regarded as

55. “Many thousands of Brahmanas, who were chaste from their youth, have gone to heaven without continuing their race”. “A virtuous wife who after the death of her husband constantly remains chaste, reaches heaven, though she has no son, just like those chaste men” - Manu, v. 159,160; Vishnu, xxv, 17.

56. AIR 1979 All 316.

57. Brahma: It is gift of the daughter by the father to the bridegroom. According to Manu: ‘The gift of a daughter afterdecking her with costly garments and honouring her with presents of jewels, to a man learned in the Vedas and of good conduct, whom the father himself invites is called the Brahma rite’. (Manusmriti, III, 27; cf: Dr.Paras Diwan on Hindu Law, 2nd edn. 2005, p.570, Orient Publishing Company, Allahabad).

Daiva: According to Manu: ‘The gift of a daughter who has been decked with ornaments, to a priest who duly officiates at a sacrifice during the course of its performance, they call the Daiva rite’. (Manusmriti, III, 28; cf: Dr.Paras Diwan on Hindu Law, 2nd edn. 2005, p.570, Orient Publishing Company, Allahabad).

Prajapatya: According to Manu: ‘The gift of a daughter by her father after he has addressed the couple with the text, ‘May both of you perform together your duties and has shown honour to the bridegroom is called
indissoluble”. It was indeed, as in ancient Rome, an association for life and productive of full partnership, both in human and divine rights and duties\textsuperscript{58}.

The wife was not merely her husband’s helpmate in all worldly affairs but she assisted him in the performance of religious duties, regular sacrifices and helped him to get heaven. Therefore, a legitimate wife is called Dharma-patni—a wife married for the fulfillment of the sacred law\textsuperscript{59}.

The purposes of marriage were to perform religious rites and sacrifices and to procreate children who would extend spiritual benefits to their deceased ancestors by offering funeral oblations and by perpetuating the name and lineage of their forefathers. By giving birth to a male child through a legally wedded wife, every Hindu is discharged of the debt to his father which is technically called as “\textit{Pitirin}”\textsuperscript{60}.

In Shivanandy v. Bhagawanthymma\textsuperscript{61}, it was observed that, marriage is binding for life because the marriage rite completed by saptapadi before the consecrated fire creates a religious tie, and a religious tie once created cannot be untied. It is not a mere contract in which, a consenting mind is indispensable.

According to \textit{Apastamba}, “Marriage was meant for doing good deeds and for attainment of Moksha”. ‘Panigrahana’ enables the male and female to unite in religious ceremonies and to attain the spiritual merits. Therefore, marriage is the basis of social and religious organization and foundation of important legal rights and obligations\textsuperscript{62}.

\textsuperscript{59} Ibid. p.32.
\textsuperscript{60} Ibid.
\textsuperscript{61} AIR 1962 Mad 400.
ii) The Concept of Muslim Marriage:

The Arabic word ‘Nikah’ (marriage) means “the union of sexes" and in law, this means “marriage”\textsuperscript{63}. The term ‘Nikah’ has been used for marriage under Muslim law. ‘Nikah’ literally means “to tie up together”. It implies a particular contract for the purpose of legalizing generation. Nikah in its primitive sense means carnal conjugation.

In Quran, the word Nikah has been used in both senses of sexual connection and of contract of marriage. Quran prohibits Nikah with a woman with whom their fathers had Nikah. Quran says:

“And marry not women whom your fathers married, except what is past: it was shameful and odious, - an abominable custom indeed\textsuperscript{64}. Nikah here means marriage and the last word in the Ayat, Nikah means sexual connection. Thus forbidden is to a son, a woman with whom his father had indulged in adulterous intercourse.

“So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they re-unite; provided they feel that they can keep the limits ordained by Allah, which He makes plain to those who understand”\textsuperscript{65}.

“Nikah” amongst Muslims has been considered as most pious act. In ‘Radd-ul-Mukhtar’ it has been mentioned as “there is no act of devotion that has remained prescribed for us, since the time of Adam, upon him be peace, up to this moment, and which is to be continued in paradise except Nikah (or marriage) and Imaan (or faith)\textsuperscript{66}.

The meaning of marriage is wedlock or the mutual relation of husband and wife or the institution whereby a man and a woman are joined in a special kind of

\textsuperscript{63} Dr. S.R. Myneni- Muslim Law, 1\textsuperscript{st} edn. 2009, p.49, Asia Law House, Hyderabad.
social and legal relationship for the purpose of making a family. In Muslim law, Nikah is a contract for the legalization of intercourse and the procreation of children. Hence Nikah means union of sexes. There is also some object behind this union, which confers the status of husband and wife on a man and woman to marriage and the status of legitimacy on the children born out of such union.\(^\text{67}\)

The Quranic injunctions regarding marriage are: Marriage is recognized as the basis of society. 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. The prophet was determined to raise the status of woman. He asked people to see their brides before marrying them; and thought that nobility of character is the best reason for marrying a woman. It is a contract for the legalization of intercourse and procreation of children\(^\text{68}\).

The objectives of marriage are:
1. to provide legal validity to the sexual relationship of husband and wife.
2. to legalize the children. Without a valid contract of marriage, the intercourse between a man and woman is unlawful.

Marriage legalizes also the children born out of that marriage. Children born out of any union other than a valid marriage are illegitimate.

Legally speaking, Muslim marriage is a civil contract. Therefore, its legal nature is contractual. Besides being a civil contract, Muslim marriage is also a social and religious institution\(^\text{69}\).

**Legal aspect:**

Legally, a Muslim marriage is considered as a contract; because the elements which constitute a marriage and the manner in which it is completed, is almost similar to that of a civil contract. The contractual nature of a Muslim marriage is explained on the basis of the following elements:

1) The parties to the marriage also must be competent.

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\(^{68}\) A.A.A. fyzeey-Outlines of Muhammadan Law, 1999 edn. p.90, Oxford University press, New Delhi.

\(^{69}\) Dr. R.K. Sinha-Muslim Law, 5\(^{\text{th}}\) edn. 2003, p.40; Central Law Agency, Allahabad.
2) The marriage is not complete without offer, acceptance and free consent of the parties or guardians.

3) The terms of marriage contract within legal limits may be settled by the parties themselves.

4) Just as there are rules for regulating the rights and duties of the parties upon the breach of a contract, there are also provisions for respective rights and duties of husband and wife on divorce or dissolution of marriage\textsuperscript{70}.

Therefore, the nature of Muslim marriage is similar to that of a civil contract. But only on the basis of the above mentioned contractual elements, it is not correct to define it as purely a civil contract. In its form, a Muslim marriage may look like a contract; but it is not so in its essence. As is evident from the following arguments, its social aspect is also very important.

**Social aspect:**

The social aspect of Nikah should also be studied to understand its real nature. Nikah is a social institution by which, a definite and dignified status has been conferred upon the women. The Prophet brought about a reform in the society. No social reform was possible without giving equal status to the females. Therefore a definite institution or an established law was required to give equality and freedom to the females. With this object in mind, the Prophet introduced Nikah through which, the females could be placed on equal footing with males. It is therefore submitted that Nikah is a well established social institution which gives to the women, a separate and dignified status in the society. The social institution may be explained on the basis of the following arguments:\textsuperscript{71}

1) There is limited polygamy under Muslim law and a person is not allowed to marry more than four wives at a time.

   In civil contracts, one may enter into many contracts at a time as he likes.

2) In every Muslim marriage, dower must be given or promised to be given by the husband to the wife as a mark of respect towards her.

\textsuperscript{70} Dr. R.K. Sinha-Muslim Law, 5\textsuperscript{th} edn. 2003, p.41; Central Law Agency, Allahabad.

\textsuperscript{71} Ibid.
In civil contracts, the general rule is that, there is no liability to pay consideration if it has not been specified or referred in the contract. But in a Muslim marriage, even if the amount of dower has not been specified, the husband should pay proper dower to his wife as a mark of respect towards her.

3) There is prohibition in the marriage between certain close relatives. A brother cannot marry his sister. But he can legally enter into a valid contract with his sister.

4) There are certain circumstances in which the Muslim disapproves the contract of marriage. For example, a Shia Muslim is not allowed to marry during a religious journey (Haj). Similarly there are other circumstances which are called the relative prohibitions in marriage.

There are no such prohibitions in the civil contracts. But a marriage during Haj is void under Shia law.72

Hence it is clear that, marriage among Muslims is not an ordinary contract. It is a powerful social institution for the uplift of women and promotes the development of a healthy society free from evils.

Religious aspect:

Apart from the Legal and Social aspects, Quran, which is a collection of the words of God, directs every Muslims to marry a suitable woman of his choice. It is therefore a religious duty of every Muslim to contract a marriage according to the rules of Islam. A person who remains bachelor without any reasonable excuse disobeys the words of God. Moreover, marriage is also the tradition (sunnat) of the prophet.73

In Islam, it is believed that marriage is a ‘Sunnat Muwakkidah’. This means that, it is an act of such a nature that, if a person does it, he gets religious benefits. If he abstains from doing it, then he commits sin.74

73 Ibid.
Abdul Rahim observes: “the Muhammadan jurists therefore regard the institution of marriage as partaking both of the nature of ‘Ibadat’ or devotional act and ‘Muamalat’ or dealings among men”.

The sanctity attached to the institution of marriage in the Islamic system has neither been comprehended nor sufficiently appreciated by outsiders. In Islam, marriage is recognized 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 pollution⁷⁵.

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”⁷⁶.

Thus according to Muslim law, marriage is a contract for the purpose of legalizing sexual intercourse and the procreation and legitimation 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.

**Nature of Muslim marriage:**

With regard to the nature of Muslim marriage, there are divergences of opinion. Some jurists are of the opinion that Muslim marriage is purely a civil contract while others say that, it is a religious sacrament in nature.

According to some text writers and jurists, Muslim marriage is treated as a mere civil contract and not a sacrament. This observation seems to be based on

the fact that, marriage under Muslim law has similar characteristics as a contract. For instance:

1) As marriage requires proposal (ijab) from one party and acceptance (qubul) from the other, so is the contract. Moreover, there can be no marriage without free consent and consent should not be obtained by means of fraud, coercion or undue influence.

2) Just as in case of contract entered into by a guardian, on attaining majority be set aside by a minor, so a marriage contract in Muslim law, be set aside by a minor on attaining the age of puberty.

3) The parties to a Muslim marriage may enter into any ante-nuptial or post-nuptial agreements which are enforceable by law provided it is reasonable and not opposed to the policy of Islam. Same is the case with a contract.

4) Like any other contract, there is also provision for the breach of marriage contract.

Describing the nature of Muslim marriage, justice Mahmood in the leading case, observed: “Marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnized generally with recitation of certain verses from the Quran, yet the Muhammadan law does not possibly prescribe any service peculiar to the occasion.”

The prophet is reported to have said, marriage is essential for every physically fit Muslim who could afford it. The prophet says “O assembly of youths, whoever among you is able to have, he should marry, for it is a restraint to the looks and he who is not able let him keep fast”.

The following traditions may also be considered:

“He who marries completes half of his religion; it now rests with him to complete the other half by leading a virtuous life in constant fear of god”.

“There is no mockery in Islam”.

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79. Ibid.
80. Ibid, p.111.
“There are three persons whom the Almighty himself has undertaken to help-
first, he who seeks buy his freedom; second, he who marries with a view to
secure his chastity; third, he who fights in the cause of god”81.

“There is no act of worship except marriage and faith, which has continued from
the days of Adam and which will continue in paradise as well”.

Prophet said that:

“I keep fast and break it. I pray and I sleep and I am married so whoever inclines
to any other way than my Sunnah, he is not of me”.

“This is because marriage elevates the moral and spiritual standard of man.
Nikah is my precept. Those who are unmarried, are the unworthy of the deed”82.

Nikah is considered obligatory to every Muslim, because of its being
continued to be performed by the Prophet Mohammad, and on account of his
rejecting from his followers, one who has no liking for it amongst Muslims, there
is a tradition “Nikah is my Sunnat and one who dislikes my Sunnat is not mine”.

According to the approved opinions, one commits sin by not marrying, and does
a meritorious act for which, he will be rewarded in after life, because by
marriage, he protects himself and the bride from committing adultery, and
procreation of children in modern condition.83

According to Hedaya: “Marriage (Nikah) implies a particular contract used
for the purpose of legalizing children (generations)”84.

Nikah amongst Muslims is a ceremony through which, a man is united with
a woman with the idea of enjoying life together and to produce children. Though
a Muslim marriage is performed through a ceremony in which Qazi (or some
other learned man) reads the fatiha and other Quranic verses, yet non-
performance of the ceremony is no fatal to the validity of the marriage85

82. Ibid p.112.
85. In Habib-ur-Rahman v. Altaf Ali, AIR 1922 PC 159; Sir Ameer Ali said “Marriage may be constituted
without any ceremonial”; cited in Dr. Mohammad Nazmi- Mohammedan Law, 2nd edn.2008, p.32, Central
Law Publications, Allahabad.
Dr. Jang says: “marriage though essentially a contract, is also a devotional act; its objects are rights of enjoyment and procreation of children and regulation of social life in the interest of society”\textsuperscript{86}.

There is a consensus of Muslim jurists that marriage under Muslim law is *Sunnat Muwakkida*. i.e., "the person, who complies with it, is rewarded in the next world, and he who does not, commits a sin"\textsuperscript{87}. Fitzgerald observes, “Although a religious duty, marriage is emphatically not a sacrament, there are no sacraments in Islam, nor it is coverture"\textsuperscript{88}.

The social conditions of the ancient Arab women in Pre-Islamic Arabia were no better than that of animals. They had no legal rights. In youth, they were the goods and chattels of the father. After marriage, the husband became their lord and master. Polygamy was universal. Divorce was very easy and female infanticide was common.

There were no restrictions as to the number of wives by polygamy. Female slavery and concubinage were common. The prohibited degrees of relationship were very narrow and were confined only to close degrees existing at the time when the Islamic laws came into vogue.

Abdur Rahim citing the “Kashfu-i-Ghumm”, tells us of four types of Arabian marriages\textsuperscript{89}:

1) *Regular form of marriage*:

A form of marriage similar to that sanctioned by Islam. A man would ask the father or guardian of the girl to give the hand of his daughter or ward and then would marry her by giving her, dower.

2) *Sexual intercourse for procuring noble child*:

There was a custom that when a man was willing to have a noble child, he would ask his wife to send for a noble and famous man and have intercourse with him. The husband would stay away from his wife until the conception by that

noble man had been taken place. He would only return to her when the pregnancy had been confirmed.

3) *Invitation by a woman to have sexual intercourse:*

Less than ten men would be called by a woman to have sexual relations with her. If conception had taken place and a child was delivered, she had the right to summon all the men and they were bound to come. She would then say, “O so and so this is your son”. This established paternity conclusively and the man had no right to disclaim it.

4) *Prostitution:*

Prostitutes were also common. They used to fix at the doors of their tents, a flag as a sign of their calling. A huge number of men used to visit those prostitutes. If a woman of this class conceived, those men who frequently used to visit her would be assembled and the physiognomists would decide to whom the child belonged. Hence promiscuity was the rule and the sexual unions were loose which resulted into frequent divorces\(^90\).

Few of the conjugal relations described above can be called marriages in the modern acception of the term. It is more appropriate today to consider them as forms of legalized prostitution or of tribal sexual behaviour recognized by custom. The second form of marriage mentioned by Abdul Rahim is similar to the ancient Hindu practice of ‘Niyoga’\(^91\).

When Islam came into being, the females were given due social status and they were regarded as dignified members of the society. The prophet was determined to raise the status of woman. He asked people to see their brides before marrying them, and taught that nobility of character is the best reason for marrying a woman. Through Islam, the prophet brought about a reform in the society. Prophet introduced Nikah through which, the females could be placed on a footing of perfect equality with males.


\(^91\) Niyoga means the begetting of a son on hire by another on the wife of a man who was either dead or impotent or disordered in mind or incurably diseased. The begetting must be by the brother of the dead or impotent person. The son so begotten belonged to the husband of the woman. The custom is obsolete. (K.J. Ayar’s Judicial Dictionary, 13\(^{th}\) edn.2001, Butterworths India, New Delhi).
The main object of a Muslim marriage is the preservation of human race. According to Abdul 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 encouragement of chastity and the promotion of love and union between the husband and wife and of mutual help in earning livelihood”92.

“The objects are the promotion of a normal family life and the legalization of children”93.

From these objects, arise the importance of marriage. The prophet himself gave much significance to this institution. 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…. ”94.

“Marriage was instituted for the solace of life and one of the prime or original necessities of man. It is therefore lawful in extreme old age and after hope of offspring has ceased and even in the last or death illness”95.

Hence the following are the objects of Mohammedan 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.

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