



YBN UNIVERSITY

Established by the Act of Government of Jharkhand Act 15, 2017
Gazette Notification No. 505, Dated 17th July 2017
As per Section 2(f) of UGC Act. 1956



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CHAPTER 2

MARRIAGE

Ch, 2,1 Marriage* (Nikah) ...

Nikah is a contract for the legalisation of intercourse and the procreation of children'. Ameer Ali defines marriage as institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity'. In *Abdul Khadir Vs Salima*, the court held that the marriage is not a sacrament but purely a civil contract. The marriages are remarkable for their extreme simplicity.

Formalities:

Declaration or offer on the one side.

Acceptance by the other.

Presence of witnesses.

The words must indicate with reasonable certainty that a marriage has been contracted.

The proposal and acceptance **must be in one meeting.**

Ch. 2,2 Valid Nikah

(i) **Capacity** : Every Muslim of sound mind who has attained majority can enter into a contract of marriage. The majority is obtained at puberty. This is fixed at 12 for a boy and 9 for a girl. On behalf of the minors marriage consent may be given by the guardians.

If the Muslim is married during his minority with the consent of the guardian, the minor has a right to repudiate such marriage on attaining majority, This is called the *Option of Puberty*.

In the case of a girl married during her minority, she can get the marriage dissolved if she can prove that

(a) she was married during her minority with the consent given by .father or guardian.

(b) that the marriage took place before she attained the age of 15 and

(c) that the marriage has **not been consummated**.

A boy who is married during his minority may also exercise his option of puberty. In 1929, the Child Marriage Restraint Act was made, and according to it the minimum age is fixed at 21 to the boy and 18 to the girl. (ii) Disabilities: **Number:** A Muslim can take any number of wife & subject to a maximum of 4, But a Muslim women can marry only one husband. If a Muslim marries the 5th wife, such a marriage is irregular.

(a) Persons belonging to different Muslim sects may inter-marry. Each spouse retains the status of marriage, that is, the school is retained. The Hanafi Muslim may marry a Kithabiyya. But a Muslim woman cannot marry except a Muslim. Kithabiyya means persons belonging to any *divine book*, that is, it refers to Christians (Bible), Jews or a fire-worshipper.

(e) *Relationship* : Blood relationship is the third restriction. A Muslim is prohibited from marrying persons who are connected by blood. Ex. : His mother, his daughter, his sister, his niece, his aunts etc. If this rule is violated the marriage becomes void. The other restriction is prohibition on grounds of affinity. A man is prohibited from marrying certain persons who are relations by affinity example ascendants or descendants of his wife. If this rule is violated the marriage is void,

(HI) *Fosterage*: A Muslim should not marry his foster mother, or her daughter or his foster sister; the marriage becomes void.

(iv) *Unlawful conjunctions*: The Muslim is prohibited from taking two wives at the same time who are related by blood, affinity or fosterage. That is, a man cannot marry two sisters at the same time.

(v) *Idda or Iddat* (meaning: Numeration): When a marriage is dissolved by "death or divorce the wife is prohibited from marrying for certain specified time. This period is called Idda. The object of Idda is to ascertain whether the wife is pregnant or not.. In fact, every system of personal law has prescribed such a period of 'waiting'. It is a continence imposed on the ground of getting

her secluded and making her abstain from luxuries.

After consummation of marriage if the marriage is dissolved by divorce the duration of Idda is three courses (months) or, if the woman is pregnant, till delivery. But if the marriage is dissolved by death of the husband, the period of Idda is 4 months and 10 days or if the woman is pregnant; until delivery,

If the marriage is not consummated Idda is to be observed in case of death but not in case of divorce. A marriage with a woman under Idda is prohibited .Exception : Marriage with divorced husband.

(vi) Dower;

Dower is essential [Refef: Dower (Mehtar)] ' •(///) *Other conditions* : Certain prohibitions have been imposed as in the doctrine of equality. Some rules of prudence have also been imposed.

(vii) Consequences of Valid Marriage :

1. The spouses get the status as husband and wife; The children are legitimate and get a right in the property.
2. Wife gets the right to Mehtar when marriage is completed.
3. Wife gets the right to maintenance.
4. Wife should follow "Iddat."
5. Wife and husband may retain the sect even after marriage.
6. Wife or husband cannot after divorce marry certain relations.

Ch. 2,3 Classification of Marriage

Marriages are classified into valid, void and irregular marriages.

1. *Valid Marriage: (Sahih)*

If all the legal conditions are fulfilled there is a valid marriage.

2 *Void Marriage: (Batil)*

This is not a marriage at all. Violation of rules of blood relationship, affinity or fosterage results in making the marriage void.

The children are not legitimate and there is no process to legalise such a union, The marriage with the wife of another is also void.

The void marriage is an unlawful connection which produces no mutual rights and obligations between the parties. Hence no question of dower unless there has been consummation. **If one dies the other cannot inherit the property. The marriage is void *ab-initio*.**

.3. *Irregular Marriage : (Fasid)*

If the prohibitions of the marriage which are perpetual are violated the marriage becomes void. But if a temporary prohibition is violated it becomes irregular.

The marriage without witnesses. Or

- (a) the marriage with a woman under Idda.
- (b) The marriage prohibited on the ground of religion, i.e., non- kitabiyyah.
- (c) Marriage with 5th wife
- (d) The marriage with two sisters etc.

The children of irregular marriage are legitimate.

Ch, 2,4 Muta Marriage (Temporary Marriage)

Muta literally means 'enjoyment or use'. Hence, Muta marriage is a marriage for pleasure. It is a marriage for a fixed period, for a certain-

. award paid to the woman. This was prevalent even during the time of Prophet, but, now, all schools of law, except the Ashari Shite, have made this unlawful.

This type of marriage was justified as it was useful in times of war or on travel. It was condemned later by Omar Khalif. In India this is not common. It is in Persia and Arabia.

Essentials

According to Ahari Shite Law a Muta is a marriage, for a fixed period i.e., it may be for a day, a month, a year or number of years. The essentials can be understood under the following :

1. The form. .
2. The subject
3. The period
4. The dower

1. *The Form:* There must be a proper contract. Therefore, offer and acceptance are necessary.

2. *The Subject:* A man (Muslim) might contract Muta with a Muslim, Christian, Jewish or a fire worshipping woman but not with the follower of any other religion. Relations prohibited by affinity cannot contract in Muta marriage. A man may contract Muta with any number of women. In *Jafri Bibi's* case the Privy Council declared that where a co-habitation commenced with a Muta and there was no evidence as to the term, the presumption was that the Muta continued during the entire period of co-habitation.

3. *The Period*: The period may be for one day, one month, one year or for a number of years. A Muta terminates by efflux of time or by death. On the expiry of the term he may make a gift and terminate the contract (with or without wife's consent).
4. *Mehar (Dower)* : Is a necessary condition of Muta. If it is not specified the agreement is void. If the marriage is consummated she is entitled to the entire amount, if not, only to half the mehar. In case the wife leaves the husband before the period, he is entitled to deduct proportionately.
5. **Consequences**: The children born out of Muta marriage are legitimate and are entitled to inherit. A Muta wife is not entitled to maintenance because the word wife does not, in reality, take a Muta wife. The remedy is S. 125 Cr. P.C. Iddat is for two courses. No inheritance. No question of divorce arises.

Ch. 2.5 Mehar (Kanya Shulka)

In Muslim law of marriage, mehar is essential. In a way it adds to the prestige of wife. It may be money or immovable property.

In Abdul Khadir Vs Salima, the court upheld the right of the wife to mehar if the marriage had been consummated.

1. **Nature** . The claim of the wife or widow for the unpaid portion of Mehar is an unsecured debt. It is an actionable claim. It is due from the husband or his estate. She may recover or the heirs may recover, If the husband refuses to pay prompt dower the guardian may refuse to send the minor wife to the husband's place.

The wife may refuse to the husband, his conjugal rights. After consummation the husband cannot refuse to pay the mehar.

2. **Legal Status** : Mehar is not only the right of the wife, it adds to her prestige and saves her in times of distress, or on divorce or death of

husband. Further, it acts, as a check on the power of husband's right to "talak". Mehar may be definite "fixed" or indefinite ("not fixed").

Definite : Mehar may be fixed orally or in writing (meharnama); it may be fixed, before, during or soon after marriage. **indefinite** : Generally mehar is fixed as above, but if not so fixed at the time of marriage, the wife may get the amount fixed through court.

Mehar may be any amount; or immovable property or usufruct of property like rent etc. Any increase in amount or property is allowed but reduction is void.

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3. Two kinds'.

Prompt mehar and deferred mehar.

Prompt mehar: Husband agrees to pay immediately, as per marriage contract. If he so agrees, it becomes payable when the wife demands. She may claim the amount with interest or refuse consummation.

Deferred Mehar: In the marriage contract, the amount or property is fixed as mehar, but if it is to be given when marriage is dissolved or on the happening of a contingent event, it is called deferred mehar. If wife dies, her heirs may claim, the mehar. On husband's death or divorce, she may sue and recover.

4. Widow's Right to Retention

Mehar is a personal right of the widow. As such she has a right to hold the property until the amount is fully paid. This is called the right to retention of property. The leading case is **Mina Bibi Vs. Chowdri Ahmad:**

H died leaving his wife W who took possession of H's property. After a few years, some heirs of H filed a suit for their share in the property.

The trial court decreed possession of property to the heirs, but fixed certain sums to be paid by them to W towards her mehar. No money was paid. W gifted the property to K. **Held gift was bad.** But, W had the right to retain the property until the mehar amount was fully paid. As she had .gifted, she has no possession, Hence, heirs need not pay.

5. Essentials of Right to Retention ;

- (i) Wife should be in possession of property with consent of husband.
- (ii) She may exercise this right against the heirs of the deceased husband, (iii) She is entitled to the use or benefits of property like rents etc., when she is in possession.
- (iv) She has no title to property ; hence she cannot transfer or sell.

The Supreme Court in Kapur Chand Vs Khader Unnissa has held that the widow has no right to transfer or sell the property,

Ch. 2.6 Divorce

The Prophet said 'With Allah, the most detestable of all things permitted is Divorce'.

Classification: Divorce

(i) By death of a spouse, (ii) By husband:

- (a) Talaq (repudiation)
- (b) Ila (vow of continence)
- (c) Zihir (injurious assimilation)

(iii) By the wife :

- (a) Talaq-e-Tafwid (delegation of power to divorce).

(iv) By common consent :

(a) Khul (redemption) (b)
Mubaraa (Mutual freeing).

(v) By Judicial process :

(a) Lian (mutual imprecation) (b)
Faskh (Judicial rescission)

(c) Under Muslim Marriage Dissolution Act 1939.

Ch. 2,7 Talaq:

Means literally to release an animal from a tether i.e., to free the wife from the bondage of marriage.

Hence in law Talaq is an absolute power of the husband to divorce his wife at all times.

The Muslim husband must be of sound mind. The divorce operates from the date of pronouncement of Talaq. The presence of wife is necessary; giving of notice is not essential. The words must clearly indicate the intention to dissolve the marriage. He may declare 'I divorce my wife, X forever and render her haram for me',

Hanaf i Law prescribes no form. But according to Asharl Law, Talaq must be **in the presence** of two male witnesses. There are different types of Talaqs.

Talaq may be revocable or irrevocable. Revocable is approved form. Irrevocable is disapproved form,

(/) Approved farms (Talaq ul Sunnst) :

1. **Talaq ehsan:** One pronouncement of Talaq is made by husband

during the period of Tuhr (purity) i.e., when she is between two menst

rual courses, plus abstinence during 'Idda'. This may be revoked during Idda i.e., three months from the date of declaration. It may be express or implied. Redemption of conjugal relationship is implied revocation.

After the period of Idda, the divorce becomes irrevocable.

Talaq is a cruel word. Hence, repetition is not necessary.

2. **Hasan Form** : This is an approved form. There are three successive pronouncements during three consecutive periods of Tuhr with abstinence thereof.

The procedure is:

- (i) During Tuhr, the husband pronounces Talaq.
- (ii) During the second period of Tuhr, he pronounces again Talaq—there should be complete abstinence by husband, (iii) After this, during the third period of Tuhr he pronounces Talaq.

This is final and binding. Divorce becomes complete and irrevocable.

Disapproved forms

1. **Triple declaration:**

Three declarations made during Tuhr.

In one sentence Talaq Talaq Talaq. It is lawful though it is sinful according to Hanafi. Other schools do not approve this form.

Jurist Ameer Ali, says King Humayun seems to have initiated this as, it was advantageous to him.

2, **Single irrevocable declaration:** This is also not approved.

Legal effect

(i) When divorce is irrevocable marital intercourse becomes unlawful. (ii) If the husband or wife dies during Idda with revocation each is entitled to inherit from the other.

(iii) If the divorce is irrevocable neither of them can inherit from the other.

(Jv) **Wife is entitled to maintenance during *Idda*.**

Ch.2.8 Zihar;

Zihar is a form of divorce by the husband. It means injurious assimilation. This is very rare in India and of no practical importance.

Here the husband swears that 'to me the wife is like the back of my mother' or she is my sister. If he intends to revoke this declaration, he, must pay money by way of expiation or fast for a certain period.

If he abstains for four months, the wife may get a decree of divorce from the court.

This was in existence in pre-Islamic Arabia, It is an archaic form of oath.

Tyabji says that Zihar has no significance in Indian law courts. But, Sn. 2 of the Shariat Act 1937 has recognised Zihar.

ILA: Husband takes oath to abstain from sexual intercourse. He should follow this for four months. Among Shia's, thna Asharia school, the wife should get a decree if divorce is to be effective.

Ch. 2.9 Khul and Mubaraa

These refer to dissolution of marriage by common consent. The Fatawa Alamgiri says when spouses cannot perform their duties, the woman could release herself by giving up some

property, i.e., consideration. In return, the husband gives her a "Khula". This results in dissolution of marriage,

Conditions:

(i) Mutual consent of husband and wife, essential. (ii) Some iwad (consideration) should pass from wife to husband.

If the desire comes from the wife it is Khul (to take off).

But, if divorce is made by mutual aversion (or consent) it is mubaraa (freeing mutually). In Khul, the wife begs to be released and the husband agrees for a consideration. In Mubaraa both agree and hence, each is happy being rid of the other.

Certain formalities are to be observed according to Hanafi Law and Ithna Ashari Law. The husband H proposes the dissolution of the marriage and the wife accepts in the same meeting. No form is prescribed. This contract dissolves the marriage.

Similarly in respect of consideration, in Khul, the wife makes some compensation to the husband or gives up a part of her Mahr. Legal effects :

- (i) The marriage becomes dissolved.
- (ii) Idda is to be observed wife and **children have a right to maintenance,**

Ch. 2.10 Dissolution of Muslim Marriages Act 1939

This Act was passed in 1939 to enable a Muslim married woman to get a divorce decree by filing a suit against her husband, as earlier there was no such law to enable wife to get a decree except for impotency of husband or imputation of unchastity to wife by her husband.

Further it aims at removing doubts as to the effects of conversion of a Muslim woman on her marriage tie. The Act became operative from 17-3-1939.

Apostacy :

Before this Act, apostacy from Islam,, dissolved the marriage. But Sn. 4 of this provided that either renunciation of Islam or conversion to any other religion by the wife, *will not ipso facto* dissolve the marriage.

However apostacy of the Muslim husband operates as a complete and immediate dissolution of marriage,

It provides for the following grounds to the wife :

- (i) Husband's whereabouts unknown for above four years
 - (ii) Husband's failure to maintain his wife for-two years (Hi) Impotency of the husband (iv) His insanity
 - (v) His cruelty
 - (vi) Imprisonment of husband for seven years (vii) Failure to observe marital obligations (viii) Any other ground recognised by Muslim law
- Grounds Explained:**

(i) **Unheard of:** If husband is unheard of for four years or more, his wife may file a suit, and, get a decree. This comes into operation after six months and marriage gets dissolved. If the husband within this six months, presents himself, and agrees to fulfil marital responsibilities the court may not dissolve the marriage.

(ii) **Maintenance:** if the husband fails to maintain his wife for two years or more, the wife may file a suit. If for a reasonable cause, the wife is living separately for two years, the court may give a decree.

(iii) **Impotency;** Before 1939, this was also a ground for dissolution of marriage. The Act has retained this ground.

(iv) **Insanity:** If the husband is suffering from insanity, leprosy or venereal disease, the wife may get a decree. The duration is not fixed -by the Act. The court decides.

(v) **Cruelty:** This is another ground. It may be physical or mental. Attributing unchastity and scolding again and again with vulgar language, is mental cruelty. The court decides what is cruelty.

(vi) **Imprisonment:** If the husband is convicted for seven years or more, and confirmed by the highest appellate court, the wife may claim for a decree.

(vii) **Marital duties:** If the husband for three years has failed to follow marital duties, the wife may get a decree

viii) Other grounds :

a. False allegation of unchastity to wife

b. option of puberty

-----these are also available to the wife.

A decree may be granted to the wife on proof of anyone of the above grounds.