

MARRIAGE [NIKAH]

• Preliminary

- ✧ Marriage i.e., nikah in pre-Islamic Arabia, meant different forms of sex-relationship between a man and a woman established on certain terms.
- ✧ In pre-Islamic days, women were treated as chattels, and were not given any right of inheritance and were absolutely dependent. It was Prophet Mohammad who brought about a complete change in the position of women.
- ✧ Under the Muslim law marriage is considered as civil contract. After marriage, woman does not lose her individuality. She remains a distinct member of the community; her existence of personality is not merged into that of her husband.

• Definition of Nikah

- ✧ The Arabic word nikah (marriage) literally means the union of the sexes and in law this term means 'marriage'.
- ✧ 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 legalising generation."
- ✧ The Prophet of Islam is reported to have said:
"Marriage is my Sunnah and those who do not follow this way of life are not my followers." → way of Allah and that -
"There is no monkery in Islam." → like a monk.
- ✧ In Shoharat Singh vs Tajri Begum the Privy Council said that nikah (marriage) under the Muslim law is a religious ceremony.
- ✧ According to Justice Mahmood, "Marriage among Mohammedan is not a sacrament, but purely a civil contract".
- ✧ Thus, marriage according to Muslim law, is a contract for the purposes of legalisation of intercourse, procreation of children and 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.

• Objects of marriage

✧ A glossary on Tammizi sets out five objects of marriage -

- [1] the restraint of sexual passion
- [2] the ordering of the family
- [3] the increase of the family
- [4] the discipline of the home in the care and responsibility of wife and children
- [5] the upbringing of virtuous children.
↳ moral

• Nature of Muslim marriage

✧ There are divergence of opinion with regard to the nature of Muslim marriage. Some jurists are of the opinion that Muslim marriage is purely a civil contract - it while others say that it is a religious sacrament in nature.

Muslim marriage is a contract because :

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 such consent should not to be obtained by means of coercion, fraud, or undue influence.
2. Just as in case of contract, entered into by a guardian, on attaining majority, so can 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 agreement which is enforceable by law provided it is reasonable and not opposed to the policy of Islam. Same is the case with a contract.
4. The terms of a marriage contract may also be altered within legal limits ^{to} suit individual cases.
5. Although discouraged both by the holy Quran and Hadith, yet like any other contract, there is also provision for the breach of marriage contract.

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Muslim marriage is not merely a civil contract because :

- (i) unlike civil contract, it cannot be made contingent on future event;
- (ii) unlike civil contracts, it cannot be for a limited time (muta marriage is an exception)
- (iii) unlike civil contract, the analogy of lien cannot be applied to a marriage contract. Secondly, the contract of sale of goods may be cancelled by unpaid seller. He may resell the goods by rescinding such contract, whereas in a contract of marriage, the wife is not entitled to divorce her husband or to remain with a third person if a part of his dower remain unpaid. In sale of goods there are buyer and seller in a contract of sale and the subject matter is goods; whereas, in a contract of marriage, the wife herself is to receive dower and not her parents then who is seller and what has been sold.

• Muslim marriage and Hindu Marriage : Distinction

1. Muslim marriage is a civil contract, whereas a Hindu marriage under the old Hindu law was a sacrament. Under the modern Hindu law marriage is no longer a sacrament; it has not even become a contract, though it has resemblance of both.
2. Payment of consideration in any form is not essential in Hindu law unlike Muslim marriages.
3. According to Muslim law, a woman does not by marriage merge her existence into that of her husband but retains her separate legal status unlike the Hindu wife.
4. Under Muslim law, husband can have as many as four wives at a time, but Section 5 of the Hindu Marriage Act, 1955, prohibits polygamy which was permitted under old Hindu law.

• Essentials of Marriage

