

Chapter- IV

THE CHANGES IN THE LAW OF MARRIAGE- UNDER MUSLIM LAW

This chapter deals with the changes in the law of marriage under Muslim law. It deals with various kinds of marriages under Muslim law such as *muta* marriage which is a temporary marriage recognized by the *Ithna Asharis* of Shias and permanent marriage (*nikah*) wherein, the conditions of valid marriage and its effects are discussed. It also deals with classification of marriages; such as valid (*sahih*), void (*batil*) and irregular (*fasid*) which contains the conditions under which, a marriage becomes valid, when it becomes void and irregular. The other issues discussed in this chapter are include guardianship in marriage i.e., who can act as guardian in marriage and when the marriage in such cases can be repudiated by the parties and presumption of marriage.

The term “*Nikah*” has been used for marriage under Muslim law. *Nikah* literally means sexual connection. In the language of the law, it implies “a particular contract used for the purpose of legalizing generation”. Among the Arabs, *nikah* is a wide term comprising many different forms of sex relations. But in Mohammedan law, it has a very definite legal meaning. It is a contract for the legalization of intercourse and the procreation of children. Hence “*Nikah*” means union of sexes which confers the status of husband and wife on the parties to the marriage and the status of legitimacy on the children born out of such union.

In pre-Islamic Arabia, the relationship of sexes was in an uncertain state. Regular form of marriage of today was very rare. Instead, there flourished such types of sexual unions which may only be branded as adultery or polyandry or prostitution. They were¹:

- 1) A custom according to which, a man would say to his wife: “send for so and so (naming a famous man) and have intercourse with him”. The husband would then keep away from her society until she had conceived by the man indicated, but after her pregnancy became apparent, he would return to her. This originated from a desire to secure noble offspring.
- 2) A number of men, less than ten, used to go to a woman and have sexual connection with her. If she conceived and was delivered of a child, she would send for them, and they would be all bound to come. When they came and assembled, the woman would address them saying: “you know what was

¹. Syed Khalid Rashid's- Muslim Law; by Prof. V.P. Bharatiya, 5th edn. 2009, p.51, Eastern Book Company, Lucknow.

happened. I was now brought forth a child. O so and so, (naming whom so ever of them she chose), this is your son". The child would then be ascribed to him and he was not allowed to disclaim its paternity.

3) A number of men used to visit a woman who would not refuse any visitor. These women were prostitutes and used to fix at the doors of their tents, a flag as a sign of their calling. If a woman of this class conceived or brought forth a child, the men that frequently visited her house would be assembled, and physiognomists used to decide to whom the child belonged.

In the latter two types of marriage, which differentiates them from ordinary prostitution is the emphasis placed on establishing the paternity of the child born out of such loose sexual unions. Today, no prostitution could legally or customarily establish the paternity of her child in any person, more so in case the person happens to disclaim the paternity.

In addition to these, some other corrupt forms of marriages were:²

- i) A man would purchase a girl from her parents or guardian for a fixed sum.
- ii) *Muta* (temporary) marriages were widely prevalent, so much so that in the beginning of Islam, even the prophet tolerated them as a matter of policy but later on he prohibited them.
- iii) A pre-Islamic Arab was allowed to marry two real sisters at one and the same time.

Islam reformed these old marriage laws in a sweeping and far-reaching way. In Quran, some of the regulations regarding marriage are laid down. The relevant passages are:

"Marry not women whom your fathers married, - except what is past: it was shameful and odious, - an abominable custom indeed"³.

"Prohibited to you (for marriage) are: - your mothers, daughters, sisters, father's sisters, mother's sisters; brother's daughters, sister's daughters; foster- mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in,- no prohibition if you have not gone in;- (those who have been) wives of your sons

². Syed Khalid Rashid's- Muslim Law; by Prof. V.P. Bharatiya, 5th edn. 2009, p.52, Eastern Book Company, Lucknow.

³. Quran, Sura IV, Ayat 22; The Glorious Quran, translated by Abdullah Yusuf Ali, Islamic Book Service, New Delhi.

proceeding from your loins: and two sisters in wedlock at one and the same time, except for what is past: for Allah is Oft-forgiving, Most Merciful:⁴

Prophet Mohammed abrogated those various forms of marriage except the one in which, a dower was paid and the man asked the parents of the woman for her hand. Prophet declared that dower was due to the woman, and is a symbol of respect of husband towards his wife. The consent of woman in marriage was made essential. In this way the position of women was improved by the prophet.

The women of ancient Arabia were not given legal rights. They were treated as animals. Islam reformed the concept of sale of women by making the woman the principal contracting party as well as the object of the contract. Islam improved the position of women. They were also given important rights.

In those days, women were treated as chattels and were not given any rights and were absolutely dependent. It was Prophet Mohammad who brought a complete change in the position of women. He placed women on a footing of almost perfect equality with men in the exercise of all legal powers and functions.

In pre- Islamic Arabia, unlimited polygamy was prevailed. It was only after the advent of Islam that the Prophet introduced limited polygamy which fixed the limit of four wives. It means that a Mohammedan can have four wives at a time. Polygamy of four wives is therefore, legally permissible. Although four wives at a time are permitted, yet the Quran is in favour of monogamy. As a matter of fact, the limited polygamy was allowed because of the social need of that time. In the wars with disbelievers, a large number of male Muslims lost their lives as a result of which, the females outnumbered males in the society. There were several war-widows and orphans to whom nobody was ready to maintain and give protection. Rather, such women were being exploited and children born to them too could not get any social status. To avoid injustice being done to them, Islam permitted 4 wives so that one man could solve the problem of at least 4 females at a time. But in order to avoid any injustice towards such women, this was allowed subject to a very strict condition. Quran lays down this condition in very clear words: "if you fear that you shall not be able to deal justly with orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal

⁴. Quran, Sura IV, Ayat 23; The Glorious Quran, translated by Abdullah Yusuf Ali, Islamic Book Service, New Delhi.

justly (with them), then only one or (a captive) that your right hands possess that will be more suitable, to prevent you from doing injustice”⁵.

Giving equal treatment to two or more wives does not mean only providing them equal food and clothing etc, but it also guarantees them equal love and affection. But, it is not humanly possible to love all the wives equally without any favour to one and prejudice to the other. This was very well apprehended, and the Quran lays down in a subsequent Ayat that:

“You will not be able to equally treat more wives however you may desire so. Yet do not incline altogether towards only one (wife) that the other is left in suspense. And if you do the right and become pious surely Allah is Forgiving, Merciful”⁶

These commandments of the Quran shall be seen in the context of the pre-Islamic Arabian customs which placed no restrictions as to the number of wives. Islam limited the number to four and presented monogamy as an ideal form. In the recent years, the Indian Muslims are infavour of monogamy. Economic stresses, desire to live a decent modern life and spread of education etc, are some of the reasons due to which, more and more educated Muslims in India now prefer to contract only one marriage at a time.

Some of the Muslim countries e.g., Turkey and Tunisia have already made laws for monogamy⁷. In Pakistan, where polygamy of four wives has not been totally abolished, it has been discouraged by making such laws⁸ under which, it is difficult to marry two or more wives. Section 6 of the Muslim Family Law Ordinance, 1961 deals with polygamy and lays down as follows:

No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall, any marriage contracted without such permission be registered under this ordinance⁹.

⁵. Quran, Sura IV, Ayat 3, The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

⁶. The Holy Quran, Sura IV, Ayat, 129; by Dr. A. Majeed A. Auolakh with Urdu Translation of IMAAM-E-AHL-E-SUNNAT Maulana Muhammad Ahmad Raza Khan Bareilvi-Qaadri, Farid Book Depot (Pvt.) Ltd, New Delhi.

⁷. Article 112(1) of the Turkish Civil Code, 1926; and Article 18 of the Tunician Code of Personal Status, 1956; Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.39, Central Law Agency, Allahabad.

⁸. The Muslim Family Laws Ordinance 1961, Section 6.

⁹. Sec. 6 (1) of Muslim Family Law Ordinance, 1961.

An application for permission under sub-section (1) shall be submitted to the chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained there to¹⁰.

On the receipt of application under Sub-Section (2), the chairman shall ask the applicant and his existing wife or wives each to nominate a representative and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for¹¹.

In deciding the application, the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of prescribed fee, prefer an application for revision, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any court¹².

5) Any man who contracts another marriage without the permission of the Arbitration Council shall¹³-

pay immediately the entire amount of dower, whether prompt or deferred, due to existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue¹⁴; and

b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year or with fine which may extend to five thousand rupees or with both¹⁵.

In India, up to four wives are legally allowed to Muslims. But where such Muslim is a government servant, he cannot contract the second marriage without the prior permission of the government¹⁶. The Shia law declares the marriage

¹⁰. Sec. 6 (2) of Muslim Family Law Ordinance, 1961.

¹¹. Sec. 6 (3) of Muslim Family Law Ordinance, 1961.

¹². Sec. 6 (4) of Muslim Family Law Ordinance, 1961.

¹³. Sec. 6 (5) of Muslim Family Law Ordinance, 1961.

¹⁴. Sec. 6 (5) (a) of Muslim Family Law Ordinance, 1961.

¹⁵. Sec. 6 (5) (b) of Muslim Family Law Ordinance, 1961.

¹⁶. Rule 18 of the All India Service (Conduct) Rules; Rule 18 of the Central Civil Services (Conduct) Rules, cited in Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.40, Central Law Agency, Allahabad.

with a fifth wife in the presence of four wives is void. But the Sunni law regards it irregular which may be validated by divorcing any one of the four wives.

1) *KINDS OF MARRIAGE:*

In Pre-Islamic Arabia, just before the advent of Islam, four kinds of marriages were prevalent. All these types of loose sexual unions were forbidden by the Prophet. He also forbade the temporary or Muta marriage. At present there are two kinds of marriages: 1) Permanent marriage (Nikah) and 2) Temporary (Muta) marriage. A normal Muslim marriage recognized by the Sunnis and Shias is a regular permanent union like the English marriage and the Hindu marriage, the contract of Mohammedan marriage comes into effect immediately on the completion of the requisite conditions. The continuity of marriage is broken only when the marriage is dissolved by the husband on using his power of pronouncing '*Talaq*'. But since no term is fixed in normal nikah, the Muslim marriage is a permanent marriage. When the marriage is restricted in its duration for certain fixed period, and for certain amount to be given to the woman by the man, it is called temporary or Muta marriage¹⁷.

Essential conditions:

A Muslim marriage is a civil contract. Hence it should attract all the incidents of contract as any other stipulated in the contract. The essential conditions are-

- 1) There should be proposal or offer (*Ijab*) and acceptance (*Qubul*) made and given at the same meeting;
- 2) The parties to the marriage should have the capacity to marry or to be married; and
- 3) There should not be any impediments to the marriage of the parties.

It is necessary that the parties must be of sound mind, competent to contract and must not be within the Prohibited degrees of relationship. Lunatics and minors of either sex who have not attained puberty that is, have not

¹⁷. Only Ithna Asharis recognizes this form of marriage.

completed the age of 15 years, may be validly contracted in marriage by their respective guardians (wali). If there is proposal from one side and its acceptance on the other, a valid marriage comes into existence, provided the other conditions of a marriage are fulfilled. No writing is necessary.

Sunnis insist on the presence of two adult male witnesses or one male and two female witnesses.

Absence of witnesses renders the marriage irregular which can be regularized by consummation. Witness must be sane, adult (i.e. 15 years) and Muslim. In case of a marriage of a male Muslim with a non-Muslim female, the witnesses may be non-Muslim. Witnesses may be sons of the contracting parties. They may be dumb or blind, but not deaf¹⁸.

The Shias do not insist on the presence of witnesses for marriage. The proposal and acceptance must both be expressed at one meeting. A proposal made at one meeting and an acceptance made at another, do not constitute a valid marriage.

Puberty:

Puberty means the age at which, a person becomes capable of performing sexual intercourse and procreating children. Puberty and majority are one and the same in the Muslim law. Majority, according to Muslim law, is attained on puberty or on reaching the age of 15. Under the Sunni law, a male attains puberty at the age of 12 years and the female at the age of 9 years; but in the absence of any evidence to the contrary, a person of either sex is presumed to have attained puberty at the age of 15 years. According to the Shia law, the age of puberty for male is 15 years and for a female, 9 years.

The Indian Majority Act, 1875 does not apply to Muslims in the matters of marriage, dower and divorce. The Act provides the age of majority as 18 years. So under Muslim law, a person who has attained the age of 15 years is competent to contract a valid marriage at his or her own behalf¹⁹.

¹⁸. Dr. Mohammad Nazmi- Mohammadan Law, 2nd edn. 2008, p.43, Central Law Publications, Allahabad.

¹⁹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.124, Orient Publishing Company, Allahabad.

Mahr or Dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law. Dower is classified in to (i) Specified dower (*Mahr-i-Musamma*) and (ii) Proper (customary) dower (*Mahr-i-Misl*). The Specified dower is again divided into: a) Prompt dower (*Mahr-i-Muajjal*) and Deffered dower (*Mahr-i-Muwajjal*).

The Specified dower is fixed by mutual agreement between the parties to the marriage. When the amount of dower is not fixed under the contract, then the wife is entitled to Proper or customary dower, which is settled by operation of law. Prompt dower is payable immediately after marriage at any time on demand by the wife, while Deferred dower is payable at such time or on the happening of such contingency to which, it deferred; but in every case, it is payable immediately on the dissolution of marriage by divorce or death of either party.

In the marriage ceremonies performed amongst the Muslims, there is exchange of coconuts or betel-nuts; the nikah is read by a *Qazi*. Among the Ithna Asharis, there are usually two moulvis representing the boy and the girl each. The person invited to read the nikah recites the 'marriage sermon' (*khutba-e-nikah*) consisting of extracts from the Quran and Hadis, and at the end of the ceremonies of the evening, all the Muslims present pray for the well-being of the couple. However it must be noted that none of these ceremonies customarily practiced by the Indian Muslims constitutes a legal requirement²⁰.

Though certain social functions and ceremonial rites are performed at the time of marriage, such functions or rites are not legally necessary. If any of these requirements are not fulfilled, the marriage becomes either void or irregular, as the case may be.

The terms are usually embodied in a deed of marriage called "*Kabin Namah*" or "*Nikah Namah*". In the deed of marriage, all the conditions of marriage such as the amount of dower, mode of its payment, questions relating to custody

²⁰. Syed Khalid Rashid's- Muslim law; by Prof. V.P. Bharatiya, 4th edn. 2004, p.55, Eastern Book Company, Lucknow.

of children, or any other conditions which the contracting parties desire to lay down are incorporated²¹.

The consent of the parties to a marriage expressed in the proposal and the acceptance should be free. Consent brought about by force or fraud renders the marriage void. Where the marriage is performed by the guardian without the consent of the daughter, such marriage can be declared void²². Such marriage may be validated by the ratification of the party whose consent has not been taken. Marriage contracted by fraud is void and no dower will be due unless it has been ratified by consummation²³.

a) *Muta marriage: (Tamtaa Tum)*

In Pre-Islamic Arabia, there was a custom whereby the Arab women used to entertain men in their tents. The man entering the tent had to pay some consideration as the entrance fees. There were no mutual rights and obligations between the parties. Any one of them could terminate the union at any time. The children born out of this union belonged to the woman. Infact, it was prostitution and nothing else. The practice was found convenient by the Pre-Islamic Arabs particularly during long travels²⁴.

Slowly, this union got some changes and the fixation of the term of union for some amount to be given to the woman, was made compulsory which acquired the name of Muta. The literal meaning of the Arabic word *Muta'h* is "enjoyment"²⁵ or "use. In original Quranic text, Arabic word "*Tamtaa Tum*" has been used. "To enjoy" means, in Arabic "*istamta-a*"²⁶ It may also be regarded as 'marriage for pleasure'. It is a kind of temporary marriage recognized in the Ithna Asharis of Shia School, but according to the Sunnis, such marriages are void²⁷.

²¹. Dr. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.54, Allahabad Law Agency, Faridabad (Haryana).

²². Mohiuddin v. Khatijabibi 41 Bom LR 1020;cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998 p.125, Orient Publishing Company, Allahabad.

²³.Mohammad Ibrahim v. Ghulam Ahmed 1862 Bom HCR 236; ibid.

²⁴. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.138, Central Law Agency, Allahabad.

²⁵. Qamus Ilyas (Dictionary Arabic to English); cf: Yaweer Qazalbash- Principles of Muslim Law, 2nd edn. p.67, Modern Law House, Allahabad.

²⁶. The Qxford English-Arabic Dictionary Ed. 1984, p.385 and also same meaning has been given in Qamus; cited ibid.

²⁷. Baillie,1,18; The Hidayah, 33; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.112, Orient Publishing Company, Allahabad.

Because according to that School, the marriage contract should not be restricted in its duration and the words used at the time of proposal and acceptance must denote an immediate and permanent union. Thus under Sunni law, a marriage specifically mentioned for a limited period is void.²⁸

When the Arabs had to live away or on trade-journeys, they used to satisfy their sex desires through prostitutes. In order to avoid the development of prostitution in the society and to confer legitimacy upon the children of such unions, Prophet recognized and permitted temporary marriage for some time. But later on, when he felt that this concession was being exploited, he prohibited. Though the Prophet declared such marriage as unlawful, yet it persisted and was later on strongly condemned by the second Caliph, *Omar*. Since the Ithna Ashari Sect of Shias do not accept the first three Caliphs, they continued to retain the institution of Muta marriage²⁹. Since then, the Muta marriage has not been in practice under any School of Muslim law except the Ithna Ashari law.³⁰

From a study of *hadith*, it would seem that Mut'a was a form of legalized prostitution tolerated by the prophet in the earlier days of Islam, but later on, he prohibited it. It is to be noted that, only one School of Muhammadan law, the Ithna Ashari allows such marriages today. Not only the Sunnite Schools but all the other Shiites, notably the Ismailis and Zaydis, consider such marriages illicit.³¹

In the first part of Ayat 24, rules concerning normal permanent marriages have been mentioned and reasonably there was no need to repeat same thing in the same Ayat, as in the present case, which confirms that the quoted portion is related to Muta'h Besides, two other words- 'fornicating' and 'hire' has been deliberately used to provide for temporary marriages in place of fornicating (*zina*) among Muslims where urgency and circumstances demanded, such as during travel and times of war, because sex urge is inherent in humans.

²⁸. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.138, Central Law Agency, Allahabad.

²⁹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.112, Orient Publishing Company, Allahabad.

³⁰. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.62, Central Law Agency, Allahabad.

³¹. Asaf A.A. Fyzee- Outlines of Muhammadan law, 4th edn. P.9, Oxford University Press, New Delhi.

Quran repeatedly commands that a permanent marriage should not be contracted for the sole purpose of enjoyment through lust. This differentiates Muta'h with *Nikah-e-Daimi* (permanent marriage). To make it a perfect contract, dower is compulsorily provided for 'hire'. "Hire" itself signifies the marriage to be for a shorter term than a permanent marriage. Permission to contract a Muta'h protects Muslims from feeling guilty of fornication for life if under certain circumstances, a man has indulged in such an act.³²

The contention of Shia Scholars is that Muta'h is part of *Shariat* and nobody has right to amend *Shariat* except God himself. Even Prophet was not empowered to make amendments in *Shariat*. Besides, they argued that had there been any *Ayat* or *Hadees* to negate the provision of Muta'h? Second Caliph would have mentioned it instead of saying that he was prohibiting it.³³

The permission to contract a Muta'h protects Muslims from feeling guilty of fornication for life if under certain circumstances, a man has indulged in such an act.

Muta is modification of this though it differs from this Pre-Islamic institution in two respects:

- 1) The period or time is to be fixed at the time of entering the Muta.
- 2) Mahr must be fixed in the contract of Muta.

Capacity:

An Ithna Ashari male may contract any number of Muta marriages³⁴ with a female belonging to Islam, Christianity, Jewish religion and fire worshipper but with none else. But an Ithna Ashari female has capacity to contract a valid Muta marriage only with a Muslim and nobody else of other religion³⁵. An Ithna Ashari female who attained the age of puberty has capacity to contract a valid Muta marriage without the consent of her guardian; but if she is minor, she can do so

³². Yaweer Qazalbash- Principles of Muslim Law, 2nd edn. p.67, Modern Law House, Allahabad.

³³. Cited *ibid*.

³⁴. Baillie II, 345; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.112, Orient Publishing Company, Allahabad.

³⁵. Baillie II, 29, 40; *ibid*.

only with the consent of her guardian, otherwise the marriage would be unlawful³⁶.

The consent of both parties must be free. The formalities of offer and acceptance must be observed in Muta. The parties must be of sound mind. The parties should not fall within the prohibited degrees of relationship. The rule of limiting the number of wives to four as regards regular marriage, does not apply to Muta marriage³⁷.

Conditions of Muta:

i) The period for which, the Muta is being contracted, must be clearly specified. It may be of few hours, few days, a few weeks, a few months or a few years.³⁸ It is not necessary that the period of Muta should start immediately on the completion of the contract. It may commence after some gap also.³⁹

ii) In the contract of Muta, the term or duration denotes a period of cohabitation. If the period has been specified (how so long that period may be), the marriage becomes Muta.

iii) Dower must be specified.

iv) If the period of cohabitation is not fixed, but dower is specified, then it will be regarded as a permanent marriage.

v) If the term or duration is fixed but dower is not specified, the Muta marriage will be void⁴⁰.

In *S.A. Hussain v. Rajamma*⁴¹, a Shia male Habibulla contracted a Muta with Rajamma, a Harijan converted to Islam. This marriage continued till the death of Habibulla in 1967. After the death of her husband, Rajamma inherited the properties of her husband. But this inheritance was challenged by Hussain

³⁶. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.48, Allahabad Law Agency, Faridabad (Haryana).

³⁷. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.139, Central Law Agency, Allahabad.

³⁸. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.49, Allahabad Law Agency, Faridabad (Haryana).

³⁹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.110, Orient Publishing Company, Allahabad.

⁴⁰. Ibid.

⁴¹. AIR 1977 AP 152.

(brother of Habibulla) on the ground that the marriage between Rajamma and his brother was simply a Muta marriage under which a 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 Habibulla and Rajamma, but he has also said that no period was specified at that time.

The Andhra Pradesh High Court held that a Muta without any specified period is to be treated as a permanent marriage. Although the word Muta was used, but since the term was not specified, the marriage was treated as permanent marriage (Nikah) under which, Rajamma was entitled to inherit her husband's properties.

In *Shahzada Qanum v. Fakhar Jahan*⁴², the High Court of Hyderabad while distinguishing a Muta marriage and a permanent marriage, observed that; in a Muta marriage, the period of cohabitation is specified, but in a permanent marriage, there is no such fixation of the period of cohabitation. There is no difference between a "Muta for an unspecified term" and a "Muta for Life". Under both the situations, a permanent marriage will be deemed to exist resulting into all the rights and obligations of a permanent marriage. Thus for a Muta marriage to come into force, specification of period of cohabitation along with the dower is must.

Legal effects of Muta marriage:

The following are the legal effects of Muta marriage:

- 1) The cohabitation between the parties is lawful.
- 2) The period for which a Muta is contracted, need not commence immediately from the time when the contract for marriage is concluded⁴³.
- 3) The parties to a Muta marriage are called, the Muta husband and the Muta wife⁴⁴.

⁴². AIR 1953 Hyd 6.

⁴³. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.110, Orient Publishing Company, Allahabad.

⁴⁴. Baillie II, 40, 44 and 97; DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.110, Orient Publishing Company, Allahabad.

- 4) The children are legitimate and have rights to inherit the properties of both the parents in the same manner as the offspring of a permanent marriage. When there is no proof of fixation of the period of cohabitation, but the parties cohabited, then such cohabitation will be deemed as if permanent marriage has been contracted.⁴⁵
- 5) The parties have no mutual rights of inheritance unless there is some express agreement to that effect.
- 6) The wife in a Muta marriage is not entitled to any maintenance under Shia Law; because according to *Shara-i-at-Islam*, the name of the wife does not in reality apply to a woman contracted in Muta⁴⁶, but if there is any agreement between the parties by which, there is some special stipulation to that effect, then the agreement is valid and the wife is entitled to maintenance during the whole term even if the Muta husband not cohabit with her.⁴⁷
- 7) Husband's right to divorce is not recognized; but he can terminate the contract by "making a gift of the term" (*Hiba-i-Muddat*) to the wife before the completion of the fixed period.
- 8) The husband can also terminate the contract by making *Zihar*.⁴⁸
- 9) The parties may also terminate the contract by mutual consent.
- 10) The wife is entitled to get full dower even if the husband does not cohabit her for the full term and leaves the wife before the expiry of the term. But if the wife leaves the husband, then the husband has a right to deduct the amount of dower proportionate to the unexpired period of duration⁴⁹.

⁴⁵. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.114, Orient Publishing Company, Allahabad

⁴⁶. Baillie, II, 344; cited in Aqil Ahmad, Mohammedan Law, 21st edn., 2004, p.140, Central Law Agency, Allahabad.

⁴⁷. DR. Nishi Purohit, The Principles of Mohammedan law, 2nd edn. 1998, p.114, Orient Publishing Company, Allahabad.

⁴⁸. Ibid. p.111.

⁴⁹. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.63, Central Law Agency, Allahabad.

11) Only those agreements which are made at the time of the Muta marriage and are expressly mentioned in the contract, shall be binding; and agreements made subsequent to the contract of marriage may not be effective.⁵⁰

12) If the marriage is consummated, the wife is entitled to get full dower; if the marriage is not consummated, she is entitled to half dower⁵¹.

13) The wife in a Muta marriage is required to observe iddat in case of death of her husband, for a period of four months and ten days. In case of pregnancy, this period is extended till delivery⁵². The period of iddat in case of termination of muta otherwise than by the death of the husband is two menstrual courses if she was menstruating; and forty five days if she was not menstruating. Where there has been no cohabitation, iddat is not necessary⁵³.

14) In Muta marriage, the husband has the right to refuse procreation. That is to say, IZL is allowed, and no permission of the wife is necessary⁵⁴.

15) The Muta marriage comes to an end automatically on the expiry of the term, unless extended, or on the death of either party. The question of husband's right of talaq does not arise⁵⁵.

The practice is not very common in India; and in Lucknow and other places where there is a Shiite population, ladies of the better classes do not contract Mut'a marriages. In Persia and Iraq, Mut'a generally descends to the level of legalized prostitution.⁵⁶

b) Permanent marriage:

A Muslim marriage is a permanent union though the husband enjoys the absolute power of pronouncing unilateral divorce (*Talaq*) at any time, without

⁵⁰. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.114, Orient Publishing Company, Allahabad.

⁵¹. Baillie II, 41; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.115, Orient Publishing Company, Allahabad.

⁵². Baillie II, 44; cited in Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.139, Central Law Agency, Allahabad.

⁵³. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.140, Central Law Agency, Allahabad.

⁵⁴. Ameer Ali, Vol. II.(5th ed.) 401; cited in DR. Paras Diwan- Muslim Law in Modern India, 9th edn.,2005, p.50, Allahabad Law Agency, Faridabad (Haryana).

⁵⁵. The Sharaya, 282; cited ibid.

⁵⁶. Asaf A.A. Fyzee- Outlines of Muhammadan law, 4th edn. p.118, Oxford University Press, New Delhi.

showing any cause, without assigning any reason and without recourse to the court. Since no term is fixed in normal Nikah, the Muslim marriage is a permanent marriage.

Capacity:

Every Muslim who is of sound mind and who has attained the age of puberty is competent to contract a valid marriage. Persons of unsound mind and minors of either sex are also competent to contract a valid marriage by their guardians. The guardians are competent to contract a valid marriage on behalf of the insane or the minors only if they are Mohammedans, of sound mind and have attained the age of puberty.

In Muslim law, there is no prohibition of inter-sect marriages and the Muslims belonging to any sect can inter-marry. Such marriages are perfectly valid and do not imply any change in sect or school on the part of either party⁵⁷. The Shias are very strict as to Inter-religious marriages. Under Shia law, the marriage of a Shia male or female with a non-Muslim is void. The Sunnis do not adopt such a rigid attitude. They take the liberal view that a Muslim male can validly contract a marriage with a Kitabia; but not with an idol-worshipper or a fire-worshipper. The word "*Kitabia*" means a person who believes in a holy book containing revelations. The Christians and Jews fall under this category; but not Sikhs⁵⁸.

Although a Sunni male is not allowed to marry a fire-worshipper or an idol-worshipper, such a marriage is not void but merely irregular. A Muslim female belonging to any School of Sunnis is not allowed to marry a non-Muslim, whether Kitabia or a non-Kitabia⁵⁹.

The Quranic injunction relating to prohibition of marrying an Idolatress is:

"Do not marry unbelieving women (idolaters), until they believe: a slave woman who believes is better than an unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe: a man slave who believes is better than an unbeliever, even though he allure you. Unbelievers do (but)

⁵⁷. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.60, Allahabad Law Agency, Faridabad (Haryana).

⁵⁸. Ibid.

⁵⁹. Ibid.

beckon you to the fire. But Allah beckons by His Grace to the Garden (of Bliss) and forgiveness, and makes His Signs clear to mankind: that they may celebrate His praise”⁶⁰.

Age of Puberty :(bulugh)

Under Muslim law, a person is considered as major if he attains the age of puberty. A minor attains the age of puberty on the completion of 15 years. The age of puberty is an age at which, a person is supposed to acquire the sexual competency. This competency may be ascertained on the basis of the physical features of the boy and the girl. According to *Hedaya*, the earliest possible age of puberty with respect to a boy is 12 years; and with respect to a girl, 9 years⁶¹. Under Sunni law, no male is said to have attained puberty under the age of 12 years and no female under the age of 9 years; but in the absence of any evidence to the contrary, a male or a female is presumed to have attained puberty at the age of 15 years. But according to Shia law, the age of puberty for a male is 15 years and for a female, 9 years⁶².

But according to *Hedaya*:

“The puberty of a boy is established by his becoming subject to nocturnal emission, his impregnating a woman or emitting in the act of condition; and if none of these be known to exist, his puberty is not established, by menstruation, nocturnal emission, or pregnancy; and if none of these have taken place, her puberty is established on the completion of her seventeenth year. The two disciples maintain that upon either a boy or a girl completing the fifteenth year they are to be declared adult; there is also one report of Haneefa to the same effect; and Shafii concurs in this opinion. It is also reported from Haneefa that to establish the puberty of a boy, nineteen years are required.

Some, however observe that by this is to be understood merely the completion of eighteen years and the commencement of the nineteenth and

⁶⁰. Quran, Sura II, Ayat 221, The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

⁶¹. *Hedaya* (Hamilton’s Translation), Ed. II, p.530; cited in Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.43, Central Law Agency, Allahabad.

⁶². DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.123, Orient Publishing Company, Allahabad.

consequently, that this report perfectly accords with the other. Some again affirm that this is not the sense in which the last report is to be received; for there have been other opinions reported from Haneefa on this point, different from that first recited as above, because some authorities expressly say that the puberty of a boy is not counted by years until he shall have completed his nineteenth year. It is to be observed that the earliest period of puberty with respect to a boy is twelve years, and with respect to a girl, 9 years⁶³.

Hence it is concluded that in the absence of evidence, the age of puberty is presumed to be 15 years⁶⁴. The requirement of the age of puberty is essential not only 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 the marriage. After attaining 15 years, a person becomes mature enough to give consent for his or marriage and no consent of the guardian is necessary to validate the marriage.

But according to Maliki and Shafii Schools, the father's power over female children does not come to an end till they are married, since these schools hold the view that it is the marriage which alone emancipates a female child from the patria potestas of the father⁶⁵. The Malikis hold the view that an adult *Thayyiba* (Non-virgin) is free to contract her marriage, but an adult virgin is not. But the Kerala High Court⁶⁶ has held that the marriage of an adult Shafii girl without the consent of her father, or any other guardian in marriage is valid. It was observed that the authority of the father or grand father to act as a guardian of a Shafii girl ceases when she becomes competent to contract; and therefore, the guardianship in marriage ceases when the girl attains puberty.

In *Kammali Abubukker v. Vengatt Marakhar*⁶⁷, it was observed that: "Marriage among Muslims being a contract and the contracting parties being the husband and wife, the consent contemplated in the Shafii School is that of the

⁶³. The Hedaya, 529-30; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.124, Orient Publishing Company, Allahabad.

⁶⁴. Ameer Ali, Mohammedan Law, 1581; cited *ibid*.

⁶⁵. Ameer Ali, Mohammedan Law, II, 343-44; cited in DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.57, Allahabad Law Agency, Faridabad (Haryana).

⁶⁶. *Kamma v. Ethyumma* 1967 KLT 913; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.57, Allahabad Law Agency, Faridabad (Haryana).

⁶⁷. AIR 1970 Ker 277.

wife and not the father or grand father or any other person who acts as wali at the time of marriage. The person who acts as wali merely communicates the consent of the wife to the Kazi who conducts the marriage”.

If a Shia virgin girl who has attained *Bulugh* (majority) wishes to marry, she should obtain permission of her father or paternal grand father although she may be looking after her own affairs. Only on the following situations, permission of father or paternal grand father would not be necessary⁶⁸:

- a) If she is not a virgin.
- b) If she is virgin, but her father or paternal grand father refuses to grant permission to her for marrying a man who is compatible to her in the eyes of Shariat, as well as custom.
- c) If the father and grand father are not in any way willing to participate in the marriage.
- d) If they are not in a position to give their consent, like in case of mental illness, etc.
- e) If it is not possible to obtain their permission because of their absence or such other reasons, and the woman is eager to get married urgently⁶⁹.

Essentials of marriage:

i) Proposal and acceptance:

For the validity of a marriage, it is essential that there should be a proposal (*ijab*) of marriage by or on behalf of one of the parties and acceptance (*Qubul*) of the proposal by or on behalf of the other party, at one and the same meeting. If a proposal is made at one meeting and an acceptance at another meeting, there will not be a valid marriage⁷⁰. The idea behind this requirement is that, the offer and the acceptance must be simultaneous to each other so that they may form

⁶⁸. Yawer Qazalbash- Principles of Muslim Law, 2nd edn. 2005, p.56, Modern Law House, Allahabad.

⁶⁹. Ibid.

⁷⁰. Tyabji, quoting Baillie II, 7; in his Muslim Law, 1968 Ed., p.47; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.125, Orient Publishing Company, Allahabad.

part of the same transaction. Where the offer and the acceptance are isolated, there is no formation of marriage contract.

Mere promise to marry at a future time is no marriage at all⁷¹. The words of proposal and acceptance should be such as to show an intention to establish the conjugal relation. The ceremony of betrothal is merely a declaration to the public that the marriage between the parties will take place in due course of time. However, mere betrothal does not give any right and duty between the parties⁷².

In *Bashiran v. M. Hussain*⁷³, it was held that evidence that the wife gave her consent to the marriage and the husband agreed to the dower constitutes sufficient proposal and acceptance.

In *Ghulam Kubra v. M. Shafi*⁷⁴, it was held that the first requirement of Muslim law is that both the bridegroom and bride should give their consent for the marriage. This consent should be given in one meeting. There should be two witnesses who should personally enquire from the girl as to whether she is willing to marry or not. Qazi should explain marriage to the boy. The consent of the bridegroom is also necessary. Both the parties should hear the words spoken by the other. There must be no ambiguity.

The Quranic injunctions regarding marriage are:

“There is no blame on you if you make an offer of betrothal or hold it in your hearts. Allah knows that you cherish them in your hearts: but do not make a secret contract with them except in terms honorable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah knows that Allah is Oft-forgiving, Most Forbearing”⁷⁵.

⁷¹. Wilson: Anglo Mohammedan Law, 1930 (6th edn.); cited in M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.30, Central Law Publications, Allahabad.

⁷². Zainab v. Abdul Rahman AIR 1945 Pesh 51; *ibid*.

⁷³. AIR 1941 Oudh 284; cited in M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.30, Central Law Publications, Allahabad.

⁷⁴. (1960)64 CWN 756; cited *ibid*.

⁷⁵. Quran, Sura II, Ayat 235; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

The prohibited class:

“Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers such a thing is forbidden”⁷⁶.

Marriage to poor encouraged:

“Marry those among you who are single, or the virtuous ones among your slaves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasses all, and He knows all things”⁷⁷.

ii) Free consent:

In Muslim marriage, consent is an essential element. Two persons are said to consent when they agree upon the same thing in the same sense. Where the parties to the marriage are possessing sound mind and adult, it is their own consent which is required. But if any one of them is minor or an insane, then the consent on his or her behalf must be given by the guardian. For a valid marriage, a consent some how obtained, is not sufficient⁷⁸. The consent of the parties or of their guardians must be a free consent. If the consent has not been given voluntarily and is not free, it is no consent at all. A consent given under compulsion, fraud or mistake of fact is said to be not a free consent⁷⁹.

Fraud:

In a marriage, a fraud is said to be committed where there has been a dishonest concealment of certain relevant facts or a false statement in obtaining the consent for a marriage. If the consent has been obtained by 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

⁷⁶. Quran, Sura XXIV, Ayat 3; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

⁷⁷. Quran, Sura XXIV, Ayat 32; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

⁷⁸. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.48, Central Law Agency, Allahabad.

⁷⁹. Ibid.

or she may either accept the marriage or reject it altogether. Where it is rejected, it becomes void⁸⁰. If it is approved, the marriage continues to be lawful.

In *Smt. Asha Qureshi v. Afaq Qureshi*⁸¹, a wife who was a widow from an earlier marriage, concealed this fact from the prospective husband at the time of marriage with him. It was held that this was a material fact which was not disclosed by the wife at the time of her second marriage and this amounts to fraud. Hence husband is entitled to a decree of nullity.

Under Hanafi law, if the consent is obtained by fraud, the marriage would be only irregular and not void. If the marriage is ratified by consummation etc., the wife is entitled to prompt dower; but if the consummation is against the will of the woman, it would not validate the marriage. Unless such marriage is validated by ratification, no dower would be due and such party may use the option considering the marriage as voidable.

Under Shia law, such marriages where consent was obtained through fraud or compulsion are void; so also under Shafii law⁸².

Compulsion:

When the consent for a marriage is obtained by application of force, coercion, under threats or any other compulsion, it is not free and it can not be said that such a person has intended to what he or she has consented. Under all Schools of Muslim law except Hanafi, if the consent of the parties or of their guardians has been obtained under any compulsion, the marriage is void.⁸³

Under Hanafi law, even if the consent has been given under compulsion, the marriage is valid. This peculiar Hanafi rule may not appeal to a reasonable prudent man but its authority is not doubtful. It is based on the following tradition: Apostle of god said, "there are three things which whether done in joke or

⁸⁰. Abdul Latif v. Niaz Ahmad (1909) 31 All 343; cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.48, Central Law Agency, Allahabad.

⁸¹. AIR 2002 MP 263.

⁸². Yawer Qazalbash- Principles of Muslim Law, 2nd edn. 2005, p.56, Modern Law House, Allahabad.

⁸³. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.48, Central Law Agency, Allahabad.

earnest, shall be considered as serious and effectual; one, marriages; the second, divorce and the third, taking back”⁸⁴.

Mistake of fact:

If at the time of marriage, both the parties or their guardians are under a Mistake of fact relevant to their marriage, the marriage is void, since there is no consent. For example, if there is a mistake as to the identity of the girl to whom the offer has been intended, the marriage is void because there is no formation of lawful contract.

iii) Witnesses:

Among the Sunnis, the proposal and acceptance should be made in the presence and hearing of two adult male witnesses (or one male and two female witnesses). It is not necessary that out of a large number of witnesses attending the marriage, two witnesses should be picked out. But the condition for being a witness is that he or she should be of sound mind, of full age and professing Islam. Under the Shafii law, both the witnesses should be male. Under Shia law, the presence of witnesses is not necessary⁸⁵. Absence of witnesses renders the marriage irregular which can be regularized by consummation⁸⁶.

iv) Mode and form of words:

The contract of marriage should be in unequivocal terms. In other words, the words contained in the proposal and acceptance should be such as to denote an unconditional and immediate effect of marriage. The proposal and acceptance may be made orally, signs or in writing. Generally, when both the parties are present, the proposal and acceptance may be made by words. The dumb persons can express the proposal and acceptance by signs or in writing. If one of the parties to the contract is absent, he or she can express his or her proposal or acceptance in writing.

⁸⁴. Tyabji- Muslim Law; Ed. IV, p.53, citing Mishcat-ul-Massabih;cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.48, Central Law Agency, Allahabad

⁸⁵. Baillie I, 4; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.126, Orient Publishing Company, Allahabad.

⁸⁶. Khambatta v. Khambatta, AIR 1984 Bom 93.

Under Muslim law, there are no specific words used at the time of making the contract. But the words used should be such as to convey the intention of the parties. Usually, the form adopted is: one party will say "I have married myself to you" and the other replies: "I have consented myself to you"⁸⁷. But when the proposal of marriage is made by the bridegroom to the bride's father, then the form adopted is: the bridegroom will say, "Marry your daughter to me" and the bride's father replies, "I have consented"⁸⁸.

According to Ithna Ashari and the Shafii law, the Arabic words "*Taz wiz*" or "*Nikah*" must be used. But according to Hanafi law, the words gift (*hiba*) or sale (*bay*) or transfer (*tamlik*) or any other expression implying a permanent union must be used. The words implying hiring or lending or lending may not be used⁸⁹.

v) Reciprocity:

The offer and acceptance must be reciprocal to each other. That is to say, the acceptance must be exactly for the proposal and nothing else. If the acceptance is conditional or with modifications, it is no acceptance of the proposal. Where a man says: "I offer to marry you on Rs 15,000 as dower" and the acceptance is given by the woman as: "yes, I accept the marriage on Rs.25,000 as dower, there is no reciprocity in the offer and acceptance and the marriage is void"⁹⁰.

vi) At the same sitting:

The offer and the acceptance must have been made at the same sitting. This means that the proposal for the marriage and its acceptance must be made on the same meeting. For example, if both the parties are present at one place but after the offer has been made, the other party leaves the place for some time before accepting it, and then comes back again at that place and accepts the offer, the offer and acceptance are not simultaneous and there is no marriage⁹¹.

⁸⁷. Ameer Ali II, 290; The Hedaya, 25-26; Baillie, 4,5,10,14; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.126, Orient Publishing Company, Allahabad.

⁸⁸. Ibid.

⁸⁹. Tyabji- Muslim Law, 1968 Ed., 5, p.24; *ibid*.

⁹⁰. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.48, Central Law Agency, Allahabad.

⁹¹. Baillie: Digest of Mohammedan Law, Part I, Ed.,II, p.10; cited in Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.49, Central Law Agency, Allahabad.

On the other hand, if both the parties are not at one place but there is proximity or continuity in the offer and the acceptance so that there is one transaction, the marriage is valid. For example, “H sends a messenger or writes a letter to W, offering her marriage. W receives the messenger or reads the letter in the presence of two witnesses, and declares her acceptance of the offer in their presence. This constitutes a lawful marriage”⁹².

vii) Conditional or contingent marriage:

The offer and the acceptance must be made with an intention to marry presently, i.e., with immediate effect. If the offer or acceptance is conditional or depends upon an uncertain future event, there is no valid marriage. A conditional marriage is simply a promise to marry in future. Thus, where X offers to marry Y provided she gets through her examination in the first division, there is no marriage even if Y gets a first division. Again, where X offers to marry Y provided there is no rain in the next month, and even if there has been no rain in the next month, there is no valid marriage.

Ceremonies of marriage:

In Muslim marriages, no religious ceremonies are required for its validity. No special rite or formality is necessary⁹³. But in India, most of the marriages are performed ceremonially. In the customary (*urf*) form of marriage, many ceremonies are performed. But in the legal (*sharia*) form, no ceremonies are required. Only one ceremony called “Nikah” must be performed.

Some of the customary ceremonies are:⁹⁴

- i) The marriage is celebrated, hosted in the bride’s father’s or guardian’s (if the father is not alive) residence.

⁹². Tyabji- Muslim Law, Ed., IV, p.51; cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.49, Central Law Agency, Allahabad.

⁹³. Dr. M.A. Qureshi- Muslim Law, 2nd edn. p.30, Central Law Publications, Allahabad.

⁹⁴. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.126, Orient Publishing Company, Allahabad.

ii) Two days before the fixed day as marriage. *Mehendi* (Henna) is applied on the hands of the bride and the bridegroom at their respective houses. On the same day, ladies sangeet is also arranged.

iii) One day before the marriage, the bride's and the bridegroom's bodies are dusted with powdered turmeric.

iv) On the day of marriage, the bridegroom's party (*Barat*) proceeds. The Barat consisting of a number of people from the bridegroom's side. There the bridegroom takes rest at some place, arranged by the bride's side. There, the bridegroom takes a special bath. *Kalma* is also recited. The bridegroom also reads the Namaz with the help of the Kazi, or the Mulla in some nearby Mosque or at the resthouse only. After this, fragrant oils are used for him and his head is adorned with the Sehra. A coconut and rice in a red cloth are tied on the waist of bridegroom. In the mean time, a Sehra and a well decorated dress is sent to the bride from the bridegroom's side and complete make up is applied.

v) Then the bridegroom garlanded with flowers, riding caparisoned horse, along with the Barat proceeds to the bride's house. A complete hospitality is shown to the Barat.

vi) On the stage, the proposal for marriage by the bridegroom is made in the presence of the Kazi or Mulla and two witnesses (in case of Sunnis) from the bridegroom's side. At the same time, the bride's acceptance or consent is also taken in the presence of two witnesses from her side. Generally, two persons called the agents or the vakils are appointed who act on behalf of the contracting parties. The Kazi or the Mulla reads Fatiha (Quranic Verses). A deed of marriage, called the '*Kabin-Namah*' or '*Nikah-Namah*' is also prepared which contains all the conditions of marriage like the amount of Mahr or Dower and its mode of payment etc.⁹⁵. It may also contain provisions for the maintenance of wife, guardianship of children, delegation of power of talaq or any other conditions which the contracting parties desire to lay down are incorporated. After the completion of the formalities of proposal and acceptance, the ceremony of marriage (Nikah) is completed.

⁹⁵. Ameer Ali II, 287; Bokhari 67-68; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.126, Orient Publishing Company, Allahabad.

vii) Lastly, a feast is also given.

The requirement of law in each marriage is to be distinguished from the ceremonies and customs that prevail⁹⁶. The presence of one or more Wallis (agents) to represent each side is customary. They settle the details of the treaty of marriage. The Kazi is ordinarily present. The Kazi in India is the mere keeper of a marriage register. His function is purely evidentiary. It is a mistake to suppose that he joins the couple in marriage; the marriage takes effect by operation of law on the contract being completed between the parties⁹⁷.

Suit for breach of promise to marry:

In a suit by a Mahomedan for damages for breach of promise to marry, the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under English law, but to a return merely of presents of money, ornaments, clothes and other things⁹⁸. However, in India, the aggrieved party may realize compensation under Section 73 of the Indian Contract Act, 1872 for any loss or damages caused to him by the breach, which the parties knew would be likely to result from such breach⁹⁹.

Suit for enticing away a wife: If a person forcibly prevents or persuades a wife to live apart from her husband, the husband can obtain damages against him¹⁰⁰. Similarly, a person who entices away the wife of a Muslim is also liable¹⁰¹.

Suit for jactitation of marriage:

Jactitation means a false pretence of being married to another. If a man or woman falsely claims to be the husband or wife of another person, the proper remedy is to bring a suit for a declaration that the parties are not married. Such

⁹⁶. Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.92, Oxford University Press, New Delhi.

⁹⁷. Ibid.

⁹⁸. Mulla's- Principles of Mahomedan Law by Hidayatullah, 19th edn. p.244, Lexis Nexis, Butter Worths, New Delhi.

⁹⁹. Yawer Qazalbash- Principles of Muslim Law, 2nd edn. 2005, p.74, Modern Law House, Allahabad.

¹⁰⁰. Muhammad Ibrahim v. Gulam Ahmad (1864)1 Bom HC Rep 236; cited in Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.130, Oxford University Press, New Delhi.

¹⁰¹. Abdul Rahiman v. Aminabai (1934)59 Bom 426; cited in Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.130, Oxford University Press, New Delhi.

an action will lie between Muslims in India¹⁰² and minority of the plaintiff does not bar such a suit¹⁰³.

A suit can be brought by a wife for a declaration under Section 42 of the Specific Relief Act, 1963 that she is the lawfully wedded wife of her husband. Where a second wife brings such a suit, the first wife may be properly joined as a party respondent in the suit, if she alleges collusion between her husband and the second wife¹⁰⁴.

2) *Classification of marriages:*

All the schools of the Sunnis classify marriages into a) *Sahih* (valid); b) *Batil* (void) and c) *Fasid* (irregular). The Ithna Ashari School of the Shias does not recognize the irregular marriage; and therefore, among them, marriages are either valid or void¹⁰⁵.

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 Muslim 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, a marriage in which there is some irregularity is an incomplete marriage which becomes perfectly valid as soon as the particular irregularity is removed. Initially, every marriage is contracted to be a valid marriage. If there is any fundamental legal defect in it, the marriage becomes void. If the defect is in the nature of mere irregularity, the marriage is rendered 'irregular'. However, the

¹⁰². Baillie, I, 20; Mir Azmat Ali v. Mahmud-ul-Nissa (1897)20 All 96; cf: Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.130, Oxford University Press, New Delhi.

¹⁰³. Abdullah Dar v. Mst. Noori, AIR 1964 J&K 60; *ibid*.

¹⁰⁴. Razia Begum v. Anwar Begum 1959 SCR 1111, *ibid*.

¹⁰⁵. DR. Paras Diwan- Muslim Law in Modern India, 8th edn. 2001, p.44, Allahabad Law Agency Faridabad (Haryana).

“temporary marriage” (Muta) under Shia law may certainly be regarded as a distinct kind of marriage¹⁰⁶.

a) Sahih (valid) marriage:

Under all the schools of Muslim law, a valid marriage is that which has been constituted in accordance with the essential conditions prescribed under the law. That is to say, a marriage is valid only where-

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

Every person who is a Mohammadan and who satisfies the above mentioned requirements, has a right to marry and such marriage will be valid or sahih marriage. From a valid marriage, the rights and duties of the husband and wife in the shape of legal effects or consequences flow. These are-

Legal effects of a valid marriage:

In the leading case of *Abdul Kadir v. Salima*¹⁰⁷, Mahmood. J., has discussed the legal effects of a Muslim marriage:

“These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law. I have said enough as to the nature of the contract of marriage¹⁰⁸, and in describing its

¹⁰⁶. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.60, Central Law Agency, Allahabad.

¹⁰⁷. (1886)8 All 149 (F.B.); cited in Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.115, Oxford University Press, New Delhi.

¹⁰⁸. “Marriage in Muhammadan Law is not a sacrament but purely a civil contract—though it is solemnized generally with recitation—from the Koran, yet Mohammedan Law does not positively prescribe any service peculiar to the occasion. That it 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. And though 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 of proposal of the one, and the acceptance or consent of the other contracting parties, or of their natural or legal guardians before competent and sufficient witnesses, and also

necessary legal effects, I cannot do better than resort to the original text of the *Fatawa-i-Alamgiri*, which, Mr. Baillie has translated in the form of paraphrase, at page 13 of his digest, but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible: "The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides, the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her, it imposes submission to him when summoned to the couch; and confers on him, the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjugation of two sisters (as wives) and of those who fall under the same category"¹⁰⁹.

That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law, can not, be doubted; and even regarding the power of correction, the English law seems to resemble the Muhammadan, for even under the former 'the old authorities say the husband may beat the wife'; and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife, personal security which the matrimonial law does not. To use the language of the Lords of the

upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case", (Quoting J.N. Sircar, s TAGORE LAW LECTURES).

"Further, Mahmood, J., quoting Baillie said—the Pillars of marriage, as of other contracts are Ejab-O-Kubool, of declaration and acceptance. The first speech from whichever side it may proceed, is the declaration and the other the acceptance" (Quoting Baillie's Digest on Mohammedan Law—translation of Fatwa-Alamgiri).

"Again on putting emphasis on the contractual aspect of Mohammedan marriage, Mahmood J. quoted the Hedaya.—Marriage is contracted—i.e, to say, is effected and legally confirmed—by means of declaration and consent, both expressed in preterite", (Quoted Charles Hamilton's translation of the Hedaya); cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.105-106, Orient Publishing Company, Allahabad.

¹⁰⁹. Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.115, Oxford University Press, New Delhi.

Privy Council in the case already cited: “The Muhammadan law, on a question of what is legal

cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following: there must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it”. ‘The Court’, as Lord Stowell said in *Evans vs. Evans*, has never been driven off this ground”¹¹⁰.

Now the legal effects of marriage, as enumerated in the *Fatawa-i-Alamgiri*, come in to operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife.¹¹¹

The legal effects of a valid marriage are—

a) *Mutual Rights and Obligations:*

- i) The parties become entitled to inherit from each other.
- ii) Prohibited degrees of relationships are created between the parties.¹¹²
- iii) Sexual intercourse and the procreation of children is legalized.¹¹³
- iv) All conditions (whether made before or at the time of or after the marriage) would be binding on the parties provided that they are not opposed to any law for the time being in force or to public policy or the policy of the Mohammedan law.¹¹⁴

¹¹⁰. Asaf A.A. Fyzee- *Outlines of Muhammadan law*, 9th impression, 2005, p.116, Oxford University Press, New Delhi

¹¹¹. *Ibid.*

¹¹². Baillie, I, 13; cited in B.R. Verma- *Islamic Law*, 6th edn. 1986, p.107, Law Publishers (India) Private Limited.

¹¹³. Baillie, I, 4, 16, 54; Baillie, II, 88; *ibid.*

¹¹⁴. B. R. Verma- *Islamic Law*, 6th edn. 1986, p.107, Law Publishers (India) Private Limited.

b) Rights of the husband and the duties of the wife:

- i) She is bound to observe strict conjugal fidelity.
- ii) She is bound to obey all his legal commands.
- iii) She is bound to allow her husband, conjugal union with her, with due regard to her own health, decency and place. The husband has the right to enjoy all the benefits of marital life.
- iv) She is bound to observe iddat on her husband's death or divorce.
- v) She is bound to reside in his house and to observe "purdah" if necessary.¹¹⁵
- vi) The marriage subjects the wife to the husband's power of restraining her movement, that is to say, the husband can prohibit her from going out and appearing in public. But this power of the husband is subject to the contract to the contrary.
- vii) It confers on the husband, the power of reasonable chastisement and correction when she is disobedient or rebellious.¹¹⁶

Rights of the wife and duties of the husband:

- i) She becomes entitled to her dower and to refuse cohabitation if prompt dower is not paid.
- ii) She becomes entitled to receive maintenance from her husband with due consideration of his capacity. She is not deprived of this right even if she is able to maintain herself out of her so long as she is obedient and adult.
- iii) She becomes entitled to receive an equal treatment and an equal share of the husband's society with any other wife or wives.

¹¹⁵. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.131, Central Law Agency, Allahabad.

¹¹⁶. DR. Paras Diwan- Muslim Law in Modern India, 8th edn. 2001, p.44, Allahabad Law Agency Faridabad (Haryana).

iv) she is entitled to visit and be visited by her parents once on every Friday and by her blood relations within the prohibited degree at least once a year and her parents and children from a former husband with reasonable frequency.¹¹⁷

A challenging problem of a rare kind arose in *Noor Mohammad v. Mohammad Najmuddin*¹¹⁸; in this case, a minor girl was married by her father (guardian) with the defendant. The plaintiff (girl's father) arranged meals for the Barat and paid cash Rs.2000/- to defendants for expenses incurred by them for gas lights, band etc., accompanying the Barat. They claimed also payment for nautch girl, which the plaintiff refused. Defendants and Barat returned leaving the bride back as being angry with the plaintiff for his refusal to pay for the services of the nautch girl accompanying the Barat. The bride was dishonoured and was neglected for two years as defendants took no steps during that period to take her back to the matrimonial home. Later the marriage was repudiated by the bride. The plaintiff filed a suit for the refund of Rs.2000/- and the expenses which were incurred in arranging meals for Barat and other guests.

The court held that the claim of the plaintiff for refund of Rs.2000/- cash for lights, band etc., and expenditure incurred for feeding the Barat could be allowed against the bridegroom as well as his father as that was evidently a non-gratuitous act benefit of which was enjoyed by them. The plaintiff had no legal obligation towards them to incur that expenditure though 'consideration' for that was his daughter's marriage. The court also awarded Rs.3000/- as compensation for the loss of reputation of the plaintiff by the tortuous act of the defendants.

No change of status:

Marriage under Muslim law does not change the legal status of the woman. The English concept of coverture is not recognized in Islam. Her personality is not merged with that of the husband. Even after the marriage, a wife continues to belong to the same school of law to which she belonged before her marriage. That is to say, if a Shia woman marries a Sunni, she continues to be a Shia and is governed by Shia law after her marriage. The husband and wife have

¹¹⁷. Baillie, I, 453-54; Baillie, II, 58; B. R. Verma- Islamic Law, 6th edn. 1986, p.108, Law Publishers (India) Private Limited.

¹¹⁸. AIR 1992 MP 244.

independent right to acquire and dispose of their properties. A Muslim wife has a right to transfer her properties without the consent of her husband. But at the same time, she is not entitled to deal with the properties of her husband without his consent¹¹⁹.

Property of husband and the wife:

The rights over the property of the wife are not affected by her marriage. She has full powers of disposal over the property. The husband does not acquire any interest in it. She has perfect liberty of contract and coverture does not impose any disability upon her¹²⁰. The husband does not acquire any interest in the property of the wife¹²¹.

There is no presumption that property standing in the name of a Mohammedan wife belongs to her husband and is not her property. But once it has been established that the source of money of the transaction flowed from the husband, and that the transaction stood in the name of wife, then the transaction was a benami one and the wife was a mere benamidar. There is no presumption on advancement applicable in India but the wife may set up the plea of advancement and the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so.¹²²

The fact that the husband constructed the building on his wife's land knowing it to be his wife's; it was held that the building also belongs to the respondent¹²³. The husband's property also remains separate. The wife can be convicted of the theft of her husband's property¹²⁴. The husband may also acquire rights by adverse possession¹²⁵. The properties in the house will remain their separate properties. The house would be presumed to belong to the husband¹²⁶. Things appearing to woman would be presumed to belong to the wife and those appertaining to man would be presumed to belong to husband. Things which

¹¹⁹. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.58, Central Law Agency, Allahabad.

¹²⁰. Abdul Kadir v. Salima (1886)8, All.149 at 158; cited in B. R. Verma- Islamic Law, 6th edn. 1986, p.108, Law Publishers (India) Private Limited.

¹²¹. A v. B, ILR 21. Bom 77 at 84; *ibid*.

¹²². Mst. Sardar Jahan v. Mst. Afzal Begum, AIR 1941 Oudh 288 at pp.290-292; B. R. Verma- Islamic Law, 6th edn. 1986, p.108, Law Publishers (India) Private Limited.

¹²³. K.K. Das v. Smt. Amina Khatun Bibi, AIR 1940 Cal 356 at 358; *ibid*.p.109.

¹²⁴. R.v. Khutabai 6 BHCR (Cr.C.)9; *ibid*. p.108.

¹²⁵. Ozeer-un-nissa v. Ramdhan Roy 11 WR16; *ibid*.

¹²⁶. Ma Khatun v. Ma Bibi AIR 1933 Rang 395 at p.398; *ibid*.

may belong to either would be presumed to belong to the husband during his life time, and according to Imam Mohammad, even after his death.

But according to Abu Hanifa, they would be presumed to belong to the survivor except for things relating trade and merchandise, which would be presumed to belong to the husband if he was known to be engaged in such matters. But these presumptions are all subject to proof to the contrary¹²⁷. Such questions may be decided by reference to custom and usage¹²⁸.

Separate individuality:

The individuality of the wife is not merged in that of her husband by the marriage. The husband or wife may file a complaint under Section 499 I.P.C. against each other¹²⁹. In *Abdul Khadar v. Taib Begum*¹³⁰, it was held that, under exception 9 to Section 499 I.P.C, it is not defamation to make an imputation on the character of another, provided that the imputation is made in good faith for the protection of the interest of the person making it or for the public good. Where a Muhammadan husband makes allegations of unchastity against his wife when pronouncing the talaq, it cannot be said that the allegations are made by him for protection of his interest because under the Muhammadan law, no reason need be given for pronouncing the talaq. His case therefore does not fall within the exception 9 so as to protect him from a charge of defamation against him by the wife.

The court further held that, there is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law. Therefore, the English Common law doctrine of absolute privilege cannot prevail in India. It cannot therefore, be said that a wife cannot complain against the husband and vice versa if one defames the other.

Matrimonial conditions:

Marriage under Muslim law is a contractual form. So the parties are allowed to make certain agreements and conditions before or at the time of marriage or

¹²⁷. Baillie, I, 145-146; K.K. Das v. Smt. Amina Khatun AIR 1940 Cal 356; *ibid.* B. R. Verma- Islamic Law, 6th edn. 1986, p.109, Law Publishers (India) Private Limited.

¹²⁸. B. R. Verma- Islamic Law, 6th edn. 1986, p.109, Law Publishers (India) Private Limited.

¹²⁹. *Abdul Khadar v. Taib Begum* AIR 1957 Mad 339 at p.340; *ibid.*p.110.

¹³⁰. AIR 1957 Mad 339; *ibid.*

even after marriage. The parties have to observe the terms which they had settled. But all the terms, conditions or agreements should be legal. It should not violate any law or should not be against public policy or should not be contrary to the provisions of Muslim law¹³¹ 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.

Where the parties are not competent, the agreement may be made on their behalf, by their respective guardians. Such an agreement is binding although the husband and wife are not parties to it. If the agreement contains conditions which are against the principles of Islam or are unreasonable, the agreement is illegal. An illegal agreement does not affect the validity of the marriage, but the condition itself is void and inoperative. Such agreements can not be enforced because they contain un-Islamic conditions.¹³²

If any condition is illegal, the contract of marriage would be voidable unless consummation of marriage has taken place. But on the other hand, if the marriage is consummated, the marriage would not become nugatory and would be valid and the illegal condition would be void¹³³. Some of the illegal conditions are-

1) *As to the choice of residence:* -¹³⁴

A condition that the wife shall have absolute choice of residence is void. Conditions restraining the husband from making the wife reside with him or requiring that the husband would reside at the place of the parents of the wife is void¹³⁵. The wife is not entitled to divorce on that ground, nor can the husband's suit for restitution of conjugal rights be dismissed on that ground¹³⁶.

¹³¹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.142, Orient Publishing Company, Allahabad.

¹³². Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.58, Central Law Agency, Allahabad.

¹³³. Hafizan v. Saidino, AIR 1925 Sind 22; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.142, Orient Publishing Company, Allahabad.

¹³⁴. B. R. Verma- Islamic Law, 6th edn. 1986, p.111, Law Publishers (India) Private Limited.

¹³⁵. Abdul Piroj Khan v. Hussein Bi, (1904)6 Bom LR 728; Khatun Bibi v. Rajjab AIR 1926 All 615 at 616 ibid p.110.

¹³⁶. Imam Ali Patwari v. Arfat-un-nissa, 32 IC 707; ibid.p.111.

In *Nizamul Haque v. Begum Noorjahan*¹³⁷, one Begum Noorjahan was originally a Hindu. She was a posthumous child. Some time after her birth, her mother being helpless married one Ziauddin Mullick, a Muslim. Begum Noorjahan was married to Nizamul Haque on 27th May, 1960, according to Muslim rites. A child was born to her by Nizamul on 12th December, 1960. One of the conditions incorporated in the *Kabin nama* at the time of the marriage was that her husband would live in her house and that accordingly they lived together in Begum Noorjahan's house.

Some time after the birth of the child, the husband began to ill-treat her, so much so that she gave birth to a still-born child on 14th August, 1962 as the result of beating by her husband. On 15th August, 1963, the husband left the wife's house. Her husband was addicted to drinking and was also attached to other women. Noorjahan tried to bring back her husband to her house but failed. Therefore, she was compelled to file an application under Section 488 (new Section 125) Cr.P.C. The condition that the husband would live with the wife at their house was incorporated in the *Kabin nama* in special circumstances.

She explained that, it might not be convenient or comfortable for her to live with her husband's people in her husband's house and that she might be asked by her husband's people to observe strict forms which might have been difficult for her to observe. It was held that, in these circumstances, it can not be said that there was anything in the agreement which was opposed to any law or to public policy or to principles of Mohammedan law. The wife was certainly entitled to recover maintenance from her husband on the basis of such agreement.

The Calcutta High Court held that the husband would live in the wife's house and would not compel the wife to live with him or with his other relations, was valid. In Jammu & Kashmir, there is a well established custom of *Khanadamad* under which after the marriage, the husband was required to live with the wife's parents. The Jammu & Kashmir High Court held that an agreement under which the husband was required to live with the wife's parents was valid¹³⁸.

2) If there is a 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, is illegal.¹³⁹

¹³⁷. AIR 1966 Cal 465 at pp.465, 467.

¹³⁸. Mohd. Khan v. Shamli, AIR 1972 J&K 8.

¹³⁹. Imam Ali Patwari v. Arfat-un-nissa, AIR 1914 Cal 369; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.142, Orient Publishing Company, Allahabad.

- 3) The condition restraining the husband from making the wife reside with him or requiring that the husband would reside at her parents place is illegal¹⁴⁰.
- 4) The agreement in which, the husband is to live with the wife at her father's house was invalid and cannot constitute a defence to a suit for restitution of conjugal rights¹⁴¹.
- 5) Under Shia law, if the condition is that the wife was not entitled to any maintenance at the time when the second marriage of husband took place as she has left the house of her own accord and was living with her parents¹⁴².
- 6) Under Shia law, if the condition is that the wife shall not be entitled to any dower, such condition is illegal¹⁴³.
- 7) That the husband and wife shall have no mutual rights of inheritance.¹⁴⁴
- 8) That the husband and wife would be free to live separately in future without any reasonable cause.¹⁴⁵
- 9) A stipulation negating the husband's freedom for pronouncing divorce.¹⁴⁶
- 10) A condition that the wife will have liberty to live permanently with her parents or leave her husband's residence without any cause.
- 11) A condition limiting the duration of the marriage to specified time under the Sunni law.¹⁴⁷
- 12) A condition that the husband shall prevent her from visiting or receiving the visits of her relations.¹⁴⁸

Some of the legal conditions are-

- 1) There may be an agreement that the wife would be entitled to divorce on the happening of certain contingencies¹⁴⁹.
- 2) There may be a legal condition that the wife shall have the right to leave the husband's house in case of ill-treatment or disagreement¹⁵⁰.

¹⁴⁰. Khatun Bibi v. Rajjab, AIR 1926 All 615; *ibid*.

¹⁴¹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.142, Orient Publishing Company, Allahabad.

¹⁴². Mahmud Ali v. Ghulam Fatima, AIR 1935 Lah 902; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.143, Orient Publishing Company, Allahabad.

¹⁴³. Mahbooban Bibi v. Muhammad Ameruddin AIR 1929 Pat 207; *ibid*.

¹⁴⁴. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.59, Central Law Agency, Allahabad.

¹⁴⁵. Banne Saheb v. Abida Begum AIR 1922 Oudh 251; *ibid*.

¹⁴⁶ Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.132, Central Law Agency, Allahabad.

¹⁴⁷. *Ibid* p.133.

¹⁴⁸. *Ibid*.

¹⁴⁹. Sahra Jan v. Abdul Raoof, AIR 1921 Lah 194; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.143, Orient Publishing Company, Allahabad.

- 3) The wife may be allowed to live in a house of her parent's choice¹⁵¹.
- 4) The agreement that husband would not by his conduct give his wife or her parents and relatives any mental pain¹⁵².
- 5) There may be an agreement that the husband may, in certain contingencies, exercise his conjugal rights at wife's parents' house¹⁵³.
- 6) The condition that the husband could not get any amount of dower relinquished, without the written consent of the wife's relations, would be valid¹⁵⁴.
- 7) There may an agreement that the wife would be entitled to fixed or separate maintenance in certain circumstances¹⁵⁵.
- 8) There may be a valid agreement that the husband would maintain children from wife's former husband or that the wife would be entitled to some special allowance by way of maintenance¹⁵⁶.
- 9) The condition that husband shall not contract a second marriage during the continuance of the first marriage¹⁵⁷.
- 10) The condition that the husband shall not be absent from the conjugal home beyond a specified period¹⁵⁸.
- 11) That, a husband and wife shall live in a specified place¹⁵⁹.
- 12) that, the husband shall not prevent the wife from receiving the visits of her relations whenever she likes¹⁶⁰.
- 13) That the marriage shall not be consummated up to a certain period¹⁶¹.

Consequences of breach:

The breach of valid condition in a marriage contract does not necessarily give the wife, the right to have the marriage dissolved unless such an option is expressly reserved. The result may be that-

¹⁵⁰. Banney Saheb v. Abida Begum AIR 1922 Oudh 251; *ibid*.

¹⁵¹. Mohd. Yasin v. Muntaz Begum AIR 1936 Lah 716; *ibid*.

¹⁵². Samserannessa v. Abdus Samad AIR 1926 Cal 1144; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.143, Orient Publishing Company, Allahabad.

¹⁵³. Mst. Sakina Feraq v. Shamshad Hal AIR 1936 Pesh 195; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.143, Orient Publishing Company, Allahabad.

¹⁵⁴. Mst. Khadija Begum v. Nisar Ahmad AIR 1936 Lah 887; *ibid*.

¹⁵⁵. Mohd. Muin-uddin v. Jamal Fatima AIR 1921 All 152; *ibid*.

¹⁵⁶. Yussoof Ali v. Fyzoonnissa 15 WR 296; *ibid*.

¹⁵⁷. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.59, Central Law Agency, Allahabad.

¹⁵⁸. *Ibid*.

¹⁵⁹. *Ibid*.

¹⁶⁰. Ameer Ali: Mahomedan Law, Vol. II, Ed.III, p.361,362; cited in Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.59, Central Law Agency, Allahabad.

¹⁶¹. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.132, Central Law Agency, Allahabad.

- 1) Restitution may be refused to the husband;
- 2) The wife may have the right to divorce herself in an extreme case;
- 3) Certain rights as to dower may arise;
- 4) The marriage itself may be dissolved ipso facto¹⁶².

b) Batil (void) marriage:

When a marriage is performed in violation of absolute impediments or perpetual impediments, the marriage is batil, null and void; void ab initio. A void marriage is no marriage and no legal consequences flow from it. Neither it confers the status of legitimacy on the children, nor mutual rights and obligations arise from such marriage. It is called a marriage because two persons have undergone the necessary formalities of marriage. But since they totally lack capacity to marry, marriage cannot come into existence between the two¹⁶³.

Thus, a Muslim marriage performed in violation of rules of consanguinity, affinity or fosterage or with another's wife, are batil marriages. There is no process recognized or prescribed in law whereby such marriages can be validated. Since the marriage is void, the parties are free to go their own way. If the wife enters into another marriage, she will not be guilty of bigamy. Third person can take a stand and say that the marriage is void, even though the marriage has not been formally terminated.¹⁶⁴

If either party dies during the period of this union, the other acquires no right of inheritance; but the woman is entitled to dower if void marriage has been consummated. Neither party can enforce any marital obligations against the other, e.g., the man cannot compel the woman to submit to his company. The children of such marriage are not legitimate¹⁶⁵. The parties can separate from each other at any time without divorce and may lawfully contract another marriage¹⁶⁶

Under Shia law, the following marriages are void-

- 1) Marriage in violation of absolute in capacity.

¹⁶². Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.129, Oxford University Press, New Delhi.

¹⁶³. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.51, Allahabad Law Agency Faridabad, (Haryana).

¹⁶⁴. Ibid.

¹⁶⁵. Syed Khalid Rashdi's - Muslim Law by V.P. Bharatiya, 4th edn. 2004, p.60, Eastern Book Company, Lucknow.

¹⁶⁶. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.128, Central Law Agency, Allahabad.

- 2) Marriage with the wife of another person, whose marriage is still subsisting.
- 3) Marriage against the prohibition of unlawful conjugation.
- 4) Remarriage with one's own divorced wife, when there is a legal bar.
- 5) Marriage with any non-Muslim.
- 6) Marriage with the fifth wife.
- 7) Marriage during pilgrimage.
- 8) Marriage with a woman undergoing iddat.¹⁶⁷

Absolute impediments:

Absolute prohibitions in the marriage are mandatory in nature. A marriage contracted in violation of any of the absolute prohibitions is null and void under all the Schools of Muslim law. Therefore for a valid marriage, there 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'. Two persons are said to be within the 'prohibited relationship' if they are related to each other by 1) Consanguinity, 2) Affinity or 3) Fosterage¹⁶⁸.

1) *Consanguinity: (Qurabat)*

Consanguinity means blood relationship. A Muslim cannot marry with any of his or her following relations:

- a) One's own ascendants or descendants how high so ever;
- b) Descendants of one's father and or mother how high so ever;
- c) Brothers or sisters of one's ascendants how high so ever.

a) One's own ascendants and descendants; (ascendants how high so ever and descendants how low so ever):

Father and mother of a person are his or her ascendants. Ascendants of higher degree from the side of father are: father's father, father's father's father, etc., how high so ever. Similarly, ascendants of higher degree from the side of mother are: mother's mother, mother's mother's mother etc., how high so ever. A Muslim is prohibited to marry with any of his or her ascendants how high so ever.

¹⁶⁷. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.128, Central Law Agency, Allahabad.

¹⁶⁸. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.51, Central Law Agency, Allahabad.

That is to say, a man is prohibited to marry his mother, mother's mother etc., of any higher degree. A woman is prohibited to marry father, father's father, etc., of any degree.

Sons and daughters of a person are his or her descendants. Descendants of lower degree are son's son, daughter's son etc., how low so ever. A Muslim is prohibited to marry also with any of his or her descendants how low so ever. Thus a man cannot marry his daughter, daughter's daughter (or son's daughter etc.), in any lower degree.

b) Descendants of one's father and (or) mother; (descendants how low so ever):

A person is a descendant of one's father and mother. The other descendants of one's father and mother are one's real brothers and sisters. Descendants in the lower degree of one's parents are his own sons and daughters and also the sons and daughters of his real brother or sister.

A man is therefore prohibited to marry his real (full) sister or a woman is prohibited to marry her real (full) brother. A man is prohibited to marry not only his real (full) sister but also his consanguine and uterine sisters¹⁶⁹. Similarly, a woman cannot marry her consanguine and the uterine brother.

A man is also prohibited to marry the daughters or grand daughters of his brothers and sisters. He is prohibited to marry also the descendants (ie. daughter's daughter or son's daughter) of his consanguine or uterine brother or sister, just as he is prohibited to marry the descendants of his real brother or sister.

Note: cousins of any category- paternal or maternal and parallel or cross- are not regarded as brothers or sisters; marriage to any of them is lawful¹⁷⁰. i.e. there is no prohibition in the marriage of cousine-brother and sister.

c) Brothers and sisters of one's ascendants, how high so ever:

¹⁶⁹. Where the father and mother of two persons are common, they are called real or full brothers or sisters. If father of two persons is common but mothers are different, they are called consanguine brothers or sisters. On the other hand, if mother is common but fathers are different, such persons are called uterine brothers or sisters.

¹⁷⁰. Tahir Mahmood- The Muslim Law of India, 3rd edn. 2002, p.62, Lexis Nexis, Butter Worths, New Delhi.

A man is prohibited to marry the sisters of his father or mother. A woman cannot marry her paternal or maternal uncle. A woman cannot marry her paternal or maternal uncle.

Note: there is no prohibition in marrying the wife of one's parent's brother¹⁷¹.

Thus, a man is prohibited from marrying-

- 1) his mother or his grandmother how high so ever;
- 2) his daughter, grand daughter how low so ever;
- 3) his sister;
- 4) his sister's daughter;
- 5) his brother's daughter;
- 6) his mother's sister;
- 7) his father's sister.¹⁷²

These seven are mentioned in the following verse of the Quran:

“prohibition to you (for marriage) are:- your mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters; foster-mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in,- no prohibition if you have not gone in;- (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-giving, Most Merciful;”¹⁷³

Any violation of which makes the marriage void.

2) Affinity: (*Musharat*)

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

- a) Ascendant or descendant of one's wife or husband.
- b) Wife or husband of one's ascendant or descendant.

a) *The ascendant or descendant of one's wife or husband:*

(ascendants how high so ever and descendants how low so ever)

¹⁷¹. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.52, Central Law Agency, Allahabad.

¹⁷². Dr. Mohammad Nazmi- Mohammadan Law, 2nd edn. 2008, p.34, Central Law Publications, Allahabad.

¹⁷³. Quran, Sura IV, Ayat 23; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

A Muslim is prohibited to marry his wife's mother or wife's mother's mother of any higher degree. A woman is prohibited to marry her husband's father or husband's father's father of any higher degree.

A man is also prohibited to marry his wife's daughter or wife's grand daughter how low so ever. Similarly, a woman cannot marry her husband's son or husband's grand son, how low so ever¹⁷⁴.

Note: Marriage with wife's daughter or grand daughter prohibited only if the marriage with the wife was consummated¹⁷⁵. Hence a man can marry the descendant of his wife if his marriage with the wife has not been consummated.

b) Wife or husband of one's ascendant or descendants:

(Ascendants how high so ever and descendants how low so ever)

A Muslim is prohibited to marry the wife of his father or grand father of any higher degree. Similarly, a woman cannot marry the husband of her mother or husband of her grand mother etc., the prohibition includes restriction in the marriage of a man with his step-mother (i.e., the other wives of his father, if any, other than his real mother).

A man is also prohibited to marry the wife of his son or wife of the grand son of any lower degree. Similarly, a woman is prohibited to marry the husband of her daughter or grand daughter of any lower degree.

3) Fosterage: (Riza or Relation by milk)

Where a child under the age of 2 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. The reason behind this rule is that, breast feeding to any child, necessary for child's life and development is regarded as the act of giving birth to that child.¹⁷⁶

¹⁷⁴. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.53, Central Law Agency, Allahabad.

¹⁷⁵. Hedaya 23, Baillie, 24-29, 154; cited in Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.122, Central Law Agency, Allahabad.

¹⁷⁶. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.53, Central Law Agency, Allahabad.

“*Fosterage*” means milk-kinship. In its legal sense, it means a child sucking milk from the breast of a woman for a certain time. Fosterage occasioned is of two kinds:

- 1) Where she takes a stranger child to nurse, such child is called foster-child.
- 2) Where she nurses two children; male and female, such children will be foster-brother and foster-sister.¹⁷⁷

In *Quran*, it has been said:

“Prohibited to you (for marriage), foster-mothers (who gave you suck), foster-sisters”.¹⁷⁸

Any person who is prohibited on the ground of affinity or consanguinity is also prohibited by reason of fosterage. Thus a man is prohibited to marry his foster-mother, foster mother’s daughter etc. But there are certain exceptional foster relations with whom a marriage is not prohibited under Sunni law. For example, under Sunni law, there is no prohibition in marrying foster- sister’s mother, foster-brother’s sister, sister’s foster-mother, etc.¹⁷⁹

The concept of milk-kinship is peculiar to Muslim law; since other legal systems do not regard suckling as establishing a legal relationship between the infant who is suckled on the one hand; and the woman who gives suck and her husband on the other. However, Muslim jurists held that, since the infant takes nourishment from the body of the woman who nurses it, its body becomes part of hers, just as it is part of the body of the woman who nourished it in the womb; and that the woman who gives suck thus becomes a mother of the child. Similarly, her husband is considered a father of the child, since he was responsible for the pregnancy which created the milk. The relatives of both are related to the child in the same degree that they would be if the milk parents were the actual parents.¹⁸⁰

If a boy or girl below the age of two and half years is suckled by a woman, it will create a bar of fosterage. The woman suckling will be the foster-mother of the

¹⁷⁷. Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.34, Central Law Publications, Allahabad

¹⁷⁸. *Quran*, Sura IV, Ayat 23; *The Holy Quran*, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

¹⁷⁹. *Hedaya* (Hamilton’s Translation), Ed. II, p.28; cited in Dr. R.K. Sinha- *Muslim Law*, 5th edn. 2003, p.53, Central Law Agency, Allahabad.

¹⁸⁰. *The Law in the Middle East*, Vol. I, at 135; cited in Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.35, Central Law Publications, Allahabad.

child suckled and her husband causing that milk into her will be the child's foster-father. Ascendants and descendants of the foster-mother and her husband, whether by that woman or by another wife will be absolutely prohibited for the child suckled and its descendants.

Fosterage creates a bar to marriage on the following conditions:¹⁸¹

- a) The suckling woman must be at least nine years of age. Suckling by a girl below this age is to be disregarded for this purpose.
- b) Milk must have been suckled in its original condition. If it is frozen or cooked with some food item, it will not create the bar.
- c) If her milk is mixed with animal milk or with some medicine or water, the bar will be created only if it is dominant in the mixture.
- d) If two women's milk is mixed and fed, the bar will be created in respect of both women.
- e) It is necessary that milk should reach the child's stomach. Child's action short of it will not create a bar.
- f) The bar will be created only if milk is either directly suckled or taken out and dropped into the child's mouth or nose, not if it is inserted into the stomach by any other means.

Evidence of two just men or a just man and two just women is essential for proof of fosterage.¹⁸²

All the Schools of Sunnis and the Shias agree that prohibited relationship arises on the basis of fosterage, but they differ in detail. The Shias take the view that foster relationship arises only when the child has been actually nourished at the breast of the foster-mother; in that case, all prohibited relationships arise as they arise on the basis of consanguinity or affinity.¹⁸³ The Sunnis do not go to that extent. They permit a marriage with the foster relations:

- i) Sister's foster-mother;
- ii) Foster sister's mother;
- iii) Foster son's sister;
- iv) Foster brother's sister;
- v) Foster brother's mother;

¹⁸¹. Dr. S.R. Myneni- Muslim Law, 1st edn. 2009, p.64, Asia Law House, Hyderabad.

¹⁸². Ibid. p.65.

¹⁸³. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, pp.62-63, Allahabad Law Agency Faridabad, (Haryana).

- vi) Foster sister's foster mother;
- vii) The mother of paternal uncle or aunt by fosterage;
- viii) Nephew's mother by fosterage etc;
- ix) Foster child's grandmother;
- x) Mother of son's sister by fosterage;
- xi) Daughter of child's brother by fosterage; and
- xii) Foster aunt.¹⁸⁴

Relative prohibitions:

The relative prohibitions are those prohibitions, the compliance of which is not mandatory; but their presence is deemed to be unjust. The rules which are not mandatory are called directory and are without any legal effect. Therefore, a marriage contracted in violation of these prohibitions is merely irregular and not void. As a matter of fact, the violation of any relative prohibition is because of some small irregularity in marriage. As soon as that irregularity is removed, the marriage becomes perfectly valid. Shia law does not recognize an irregular marriage.¹⁸⁵

2) Unlawful conjunction:

A Muslim cannot marry at the same time, two wives who are related to each other by consanguinity, affinity or fosterage, and if we suppose either of them to be a male, they could not have lawfully married¹⁸⁶. But there is no bar to marry two wives who are related to each other by consanguinity, affinity or fosterage, at different times.

Accordingly, a Muslim male cannot marry two sisters or an aunt and a niece at the same time. Even if he marries, the marriage is irregular. To regularize the marriage with the other, he may divorce the former wife. The bar continues only if the marriage is subsisting. But when the marriage is dissolved, no bar terminates¹⁸⁷. A marriage will be considered as continuing until the period of

¹⁸⁴. Dr. S.R. Myneni- Muslim Law, 1st edn. 2009, p.66, Asia Law House, Hyderabad.

¹⁸⁵. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.54 Central Law Agency, Allahabad.

¹⁸⁶. The Hedaya, 29, Baillie I, 31-36, 153; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.130, Orient Publishing Company, Allahabad.

¹⁸⁷. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.130, Orient Publishing Company, Allahabad.

iddat is complete¹⁸⁸. Such marriage is invalid but the children born to them are legitimate.

The Quranic verse relating to prohibition of marriage with two sisters is: “And prohibited to you (for marriage) are two sisters in wedlock at one and the same time”¹⁸⁹.

There is nothing to prevent a person from marrying his wife’s sister after the death or divorce of his wife; but it is unlawful to marry two sisters at the same time or to marry the sister of the wife during the wife’s lifetime¹⁹⁰.

But the Quranic prohibition has been extended by both Hedaya¹⁹¹ and the *Fatwa-i-Alamgiri*¹⁹²; they generalize the proposition thus- “it is not lawful for a man to marry two women within such degrees of consanguinity, affinity or fosterage as would render a marriage between them illegal, if one of them were a man”

This extension of the prohibition has not been accepted by the Shias.

In *Aizunnissa v. Karimunnissa*¹⁹³, the question before the Calcutta High Court was, whether the marriage of a man with two sisters was valid. In this case, Izzatunnissa was married to one Golam Ali after many years he had married her sister Aizunnissa, and while Aizunnissa was still his lawful wife. The daughter Karimunnissa was the issue of the second marriage. On the death of Golam Ali, the dispute about property arose in which, the first wife (widow) Mst.Aizunnissa challenged the validity of the marriage of Golam Ali with Izzatunnissa. It was held that the marriage was void and the children were illegitimate and incapable of inheriting the property.

The court held that, “we ought not to hold that a marriage which is distinctly forbidden by the Quran, which rests on precisely the same basis as a marriage with a mother-in-law or a daughter-in-law, is such a legal and valid marriage that the children are capable of inheriting”

¹⁸⁸. The Hidayah, 30; cited *ibid*.

¹⁸⁹ Quran, Sura IV, Ayat 23; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

¹⁹⁰. Asaf A.A. Fyzee- Outlines of Muhammadan law, 9th impression, 2005, p.107, Oxford University Press, New Delhi.

¹⁹¹. Vol. I, 80; cited in Dr. Mohammad Nazmi- Muhammadan Law, 2nd edn. 2008, p.37, Central Law Publications, Allahabad.

¹⁹². As translated by Baillie in his Digest of Muhammadan Law, Part I, Para 24; cited *ibid*.

¹⁹³. (1895)23 Cal. 130; cited in Dr. Mohammad Nazmi- Muhammadan Law, 2nd edn. 2008, p.37, Central Law Publications, Allahabad.

Consequently, the High Courts of Bombay¹⁹⁴ and Madras¹⁹⁵ and the Chief Court of Oudh¹⁹⁶ have held such marriages to be merely irregular and the children legitimate. The rule may be said to be firmly established in India.

Thus under Sunni School of law, a man cannot marry aunt and niece together. Under Shia law, a valid marriage may be contracted with wife's aunt but one can marry with the niece of his wife only with the permission of the wife¹⁹⁷. The marriage performed in violation of this condition is void.

Under Sunni law, a marriage performed against unlawful conjugation is not void but irregular and the children born out of such union are legitimate.

3) *Prohibitive incapacity:*

The prohibitive incapacity arises in the following cases:

- a) Polyandry, and
- b) A Muslim marrying a non-Muslim.¹⁹⁸

a) Polyandry:

Polyandry means having more than one husband. Muslim law does not recognize the institution of polygamy. A woman can have only one husband at a time. A Muslim woman can marry second time only if her first marriage has been dissolved on account of the death of her husband or she has been divorced¹⁹⁹. Polyandry is forbidden in Muslim law and a married woman cannot marry second time so long as the first marriage subsists²⁰⁰. A Muslim woman marrying again during the life time of her husband is liable to be punished under Section 494 of the Indian Penal Code. In *Budansa v. Fatima Bi*²⁰¹, it was held that the offspring

¹⁹⁴. *Tajbi v. Mowla Khan*, (1917)41 Bom 845; cited in Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.37, Central Law Publications, Allahabad.

¹⁹⁵. *Rahiman Bibi v. Mahboob Bibi* AIR 1938 Mad 141; cf: Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.37, Central Law Publications, Allahabad.

¹⁹⁶. *Mst. Kaniza v. Hasan*, AIR1926 Oudh 231; cited *ibid*.

¹⁹⁷. *Baillie I*, 33; cited in DR. Nishi Purohit- *The Principles of Mohammedan law*, 2nd edn. 1998, p.130, Orient Publishing Company, Allahabad.

¹⁹⁸. Aqil Ahmad- *Mohammedan Law*, 21st edn. 2004, p.126, Central Law Agency, Allahabad.

¹⁹⁹. Dr. M.A. Qureshi- *Muslim Law*, 2nd edn. 2002, p.33, Central Law Publications, Allahabad.

²⁰⁰. *Liaqat Ali v. Karimunnissa* ILR 15 All 396, 398; cf: Aqil Ahmad- *Mohammedan Law*, 21st edn. 2004, p.126, Central Law Agency, Allahabad

²⁰¹. (1914)26 MLJ 260: 23 I.C. 697; cited in Dr. M.A. Qureshi, *Muslim Law*, 2nd edn. 2002, p.33, Central Law Publications, Allahabad.

of such marriages is illegitimate and can not be legitimatised by acknowledgement²⁰².

Section 494 of Indian Penal Code provides that “whoever having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life time of such husband or wife, commits the offence of bigamy”. This Section is not applicable to Muslim husband. But Muslim wives will be governed by this Section. They are not allowed the same liberty as the husbands have been allowed.²⁰³

b) Marriage with a non-Muslim:

A Muslim woman can not contract a valid marriage with a non-Muslim. In *Richard Ross Skinner v. Durga Prasad*²⁰⁴, it was held that a marriage between a Christian man and a Muslim woman according to Muslim rites is not valid. But a Muslim male can contract a valid marriage not only a Muslim woman but also with a Kitabia. The word “*Kitabia*” has been derived from the word “*Kitab*” which means a book. Hence Kitabia is a person who believes in a holy book containing revelations, e.g. the Christians and the Jews fall under this category, but not the Hindus and the Sikhs. A Muslim male is prohibited to marry an idol-worshipper or a fire-worshipper.²⁰⁵

A Sunni male can marry a Shia female and a Sunni female can also marry a Shia male²⁰⁶. Similarly, inter- Sect marriages are also valid. A Shia male may validly marry a Sunni female, and vice versa. Such marriages do not imply any change of Sect or School on the part of either party.

Under Shia law, a marriage between a Muslim male and a non-Muslim female is unlawful and void. Under Shia law, a marriage between a Muslim female and a non-Muslim male is void. However, an Ithna Ashari of Shia Muslim male can validly enter in to a Muta marriage with a Kitabia²⁰⁷. Quran prohibits all unions between a Muslim and idolaters.

²⁰². Liaqat Ali v. Karim-un-nissa (1893)15 All 396; cited ibid.

²⁰³. Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.33, Central Law Publications, Allahabad.

²⁰⁴. 31, All, cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.132, Orient Publishing Company, Allahabad.

²⁰⁵. Cited ibid.

²⁰⁶. Ummatul Fatima v. Ali Akbar AIR 1926 Oudh 521; Aziz Bano v. Mohammed Ibrahim (1925)47 All 823; cited ibid.

²⁰⁷. Baillie 29, 4; cf: Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.34, Central Law Publications, Allahabad.

Marriage between a Muslim male and Hindu female in India has always been tolerated. The Moghul Emperors of India frequently married with Hindu (Rajput) ladies and the issue of such marriages were regarded as legitimate and often succeeded to the imperial throne. For example, Akbar married Jodhabai (a Hindu lady) whose son Jahangir succeeded Akbar²⁰⁸.

A Muslim female can not marry a non-Muslim male, whether he is Kitabia (Christian or Jews) or an idol worshipper or fire-worshipper. According to Sunnis, marriage prohibited on ground of difference of religion is irregular²⁰⁹. Children born out of such union are legitimate. Such an irregular marriage may be regularized by removing the impediment, i.e. by conversion of a non-Muslim in to Muslim. But under Shia law, such marriage is void.²¹⁰

The relevant verse in the Quran is:

“Do not marry unbelieving women (idolaters), until they believe: a slave woman who believes is better than an unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe: a man slave who believes is better than an unbeliever, even though he allure you. Unbelievers do (but) beckon you to the fire. But Allah beckons by His Grace to the Garden (of Bliss) and forgiveness, and makes His Signs clear to mankind: that they may celebrate His praise”²¹¹.

Marriage with Christians:

Every marriage between persons, one of whom is a Christian, must be solemnized in accordance with the provisions of the Indian Christian Marriage Act, 1872 in the presence of a Marriage Registrar appointed under the Act. Any marriage solemnized otherwise than in accordance with such provisions, shall be void. Section 88 of the Indian Christian Marriage Act, 1872 provides:

“Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into”

²⁰⁸. Dr. Mohammad Nazmi- Mohamman Law, 2nd edn. 2008, p.41, Central Law Publications, Allahabad.

²⁰⁹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.132, Orient Publishing Company, Allahabad.

²¹⁰. The Hedaya 30, Baillie, 240-42, 151, 153; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.132, Orient Publishing Company, Allahabad.

²¹¹. Quran, Sura II, Ayat 221; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

Since under Muslim personal law, a Muslim female cannot contract a valid marriage with a Christian male, such a marriage cannot be solemnized under the Act. As a Muslim male may marry a Christian female, so such a marriage must be solemnized in accordance with the provisions of the Indian Christian Marriage Act, 1872.²¹²

A Muslim male or female can contract a valid marriage with a non-Muslim under the provisions of the Special Marriage Act, 1954, but in that case, succession to the property of such persons will be governed by the Indian Succession Act, 1925²¹³. Under Special Marriage Act 1954, all Citizens irrespective of their religion, can marry.

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 he is prohibited to marry a fifth wife. However, marriage with the fifth wife is only irregular under the Sunni law but this irregularity may be removed by divorcing one of them. Under Shia law, marriage with the fifth wife is not merely irregular, but it is void.²¹⁴

In ancient times, before advent of Islam, a man was not restricted from marrying any number of wives. But after advent of Islam, Prophet Mohammad limited the number to four and represented monogamy as an ideal form of marriage. The Shias did not observe any such restrictions as regards temporary marriage (Muta), thus both the Sects tolerate polygamy to this extent, as is evident from the text of the Holy Quran:

“If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one or (captive) that your right hands possess that will be more suitable, to present you from doing injustice”²¹⁵.

Marriage during pilgrimage:

²¹². Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.41, Central Law Publications, Allahabad.

²¹³. DR. Nishi Purohit- *The Principles of Mohammedan law*, 2nd edn. 1998, p.133, Orient Publishing Company, Allahabad.

²¹⁴. Aqil Ahmad, *Mohammedan Law*, 21st edn. 2004, p.123, Central Law Agency, Allahabad.

²¹⁵. Quran, Sura IV, Ayat 3; *The Holy Quran*, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

Under Ithna Ashari and Shafii law, a man who has gone to perform Haj (pilgrimage) and has entered the sacred enclave of Kaba after putting on the pilgrim's dress (*ahram*), may not enter into a contract of marriage²¹⁶. Under Shia, Shafii, Maliki and Hanbali laws, a man while in pilgrim's dress at Kaba, should not marry a woman. The Shia law provides that if such a pilgrim contracts a marriage, such a marriage becomes void and the parties are permanently prohibited to marry each other again. Hence the prohibition on the ground of pilgrimage is absolute under Shia law.²¹⁷

According to Shafii, Maliki and Hanbali law, such marriage is unlawful and invalid. But under the Hanafi law, such marriage is valid. It is lawful for a Muhrim or Muhrimah to inter-marry while in the state of Ihram²¹⁸.

Marriage with a woman undergoing iddat:

Iddat is an Arabic word and its literal meaning is "counting". Counting here means counting the days of possible conception to ascertain whether a woman is pregnant or not²¹⁹. Under Muslim law, when a marriage is dissolved by divorce or death, the woman is prohibited from marrying for a specified period. That period is called "iddat". Therefore, 'iddat' is the term by the completion of which, a new marriage is rendered lawful.²²⁰ It is for the purpose of ascertaining the pregnancy of the wife so as to avoid confusion of parentage.

The relevant verses in the Quran are:

"Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah has created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but

²¹⁶. Syed Khalid Rashid's Muslim Law by V.P. Bharatiya, 4th edn. 2004, p.66, Eastern Book Company, Lucknow.

²¹⁷. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.135, Orient Publishing Company, Allahabad.

²¹⁸. The Hedaya, 30; cf: DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.135, Orient Publishing Company, Allahabad.

²¹⁹. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.54, Central Law Agency, Allahabad.

²²⁰. Hedaya (Gradys ed.) 128; cited in Dr. Mohammad Nazmi- Mohammadan Law, 2nd edn. 2008, p.38, Central Law Publications, Allahabad.,

men have a degree (of advantage) over them. And Allah is Exalted in power, wise”²²¹.

“If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days; when they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner. And Allah is well acquainted with what you do”²²².

“Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their wombs), their period is until they deliver their burdens: and for those who fear Allah, He will make their path easy.”²²³

The object of iddat is to ascertain whether the woman is pregnant or not and to ascertain the paternity of the child²²⁴. After divorce or death of the husband, if the woman re-marries immediately and a child is born within normal course, then there is every likelihood that the conception could be by the former husband and not by the present. Therefore, It would be difficult to establish as to who may be regarded as the father of such a child. To overcome this difficulty, Muslim law provides that where a marriage is dissolved (by divorce or death of the husband), the woman cannot re-marry before the expiry of a specified period called “iddat”. After completion of this period, the possible conception by the former husband would naturally become apparent and visible.²²⁵

The period of iddat depends upon the manner in which the marriage is dissolved. Marriage may be dissolved by divorce or death. Different periods of iddat which a woman is legally required to undergo are as follows:

a) In the case of dissolution of marriage by divorce:

i) Whether marriage is valid or irregular, on the dissolution of marriage by divorce, if the marriage has not been consummated, the wife need not observe iddat.

²²¹. Quran Sura II, Ayat 228; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

²²². Quran, Sura II, Ayat 234; *ibid*.

²²³. Quran Sura 65, Ayat 4; The Holy Quran, translated by Abdullah Yusuf Ali, Ayman Publications, New Delhi.

²²⁴. Syed Khalid Rashid’s Muslim Law by V.P. Bharatiya, 4th edn. 2004, p.66, Eastern Book Company, Lucknow.

²²⁵. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.55, Central Law Agency, Allahabad.

- ii) If the same parties remarry, and the talaq is revocable, then also the wife need not observe iddat.
- iii) When the marriage (whether valid or irregular) has been consummated the wife is subject to menstruation, on the dissolution of marriage by divorce, the wife has to observe iddat for 3 menstrual courses.
- iv) When the marriage (whether valid or irregular) has been consummated the wife is not subject to menstruation, on the dissolution of marriage by divorce, the wife has to observe iddat for 3 lunar months.
- v) The period of iddat shall commence from the date of divorce.²²⁶

If the woman is pregnant at the time of divorce, then the duration of iddat extends till delivery or abortion.²²⁷

b) In the case of dissolution of marriage by death:

- i) If the marriage is valid, (whether consummated or not) and is dissolved by death of the husband, the wife is to observe iddat for a period of 4 lunar months and 10 days. And if she is pregnant at the time of her husband's death, it continues till delivery of the child or 4 months 10 days whichever is longer. For example, if delivery comes off before the expiration of the prescribed period of iddat, then she has to wait until the period of 4 months 10 days. But if miscarriage occurs, the period of iddat shall be 4 months 10 days or until the date of miscarriage, whichever is longer.
- ii) If the marriage is irregular and is dissolved by the death of the husband, the wife shall observe the period of iddat only if the marriage was consummated. Here, valid retirement will be considered equal to actual consummation.
- iii) The period of iddat in case of death of the husband commences from the date of death.²²⁸

c) Death of husband during 'divorce-iddat':

The period of iddat after divorce is 3 months. If the divorced woman is observing divorce-iddat of 3 months and her former husband dies before completion of 3 months, she has to start a fresh iddat of 4 months 10 days from

²²⁶. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.132, Orient Publishing Company, Allahabad.

²²⁷. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.55, Central Law Agency, Allahabad.

²²⁸. DR. Nishi Purohit -The Principles of Mohammedan law, 2nd edn. 1998, p.131, Orient Publishing Company, Allahabad.

the date of husband's death. For example, where after completion of two months of divorce-iddat, the former husband dies, the divorced woman has to observe a fresh iddat of 4 months 10 days. Thus, the total period of iddat in such a case shall be six months ten days.²²⁹

d) Commencement of iddat period:

The period of iddat begins from the date of the divorce or death of the husband; and not from the date on which the woman gets the information of her divorce or of the death of her husband. If she gets the information after the expiry of the period of iddat, she need not observe the iddat again.²³⁰

The Sunni law declares a marriage prohibited on the ground of iddat as irregular but not void.²³¹ But under Shia law, marriage with a woman who is undergoing iddat is void. Under the Sunni law, the impediment ceases after the lapse of the period of iddat.²³² A generally accepted tradition among the Shias is that iddat is not necessary if the woman has passed the age of child bearing or has not attained puberty or if her menstruation is irregular or absent.

Rights and duties when observing iddat:

The rights and duties of the wife observing iddat are:

- 1) During observance of iddat period, the husband is bound to maintain the wife.
- 2) The wife becomes entitled to a deferred dower; and if the prompt dower has not been paid, it becomes payable immediately.
- 3) The wife cannot marry another person until completion of her iddat. And if the husband has four wives including the divorced one, he cannot marry a fifth wife until the completion of the iddat period of the divorced wife.
- 4) In the event of death of either party before the expiration of the iddat period, the other party is entitled to inherit from him or her in the capacity of wife or

²²⁹. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.56, Central Law Agency, Allahabad.

²³⁰. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.56, Central Law Agency, Allahabad.

²³¹. The Hedaya 128-129; Baillie 138, 151, 352-358; Md. Hayat v. Md. Nawaz, AIR. 1935 Lah. 622; cited in DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.132, Orient Publishing Company, Allahabad.

²³². *ibid.*

husband, as the case may be, if the divorce has not become irrevocable before the death of the deceased.

5) if the divorce is pronounced in death-illness and the husband dies before completion of the iddat of the wife, she becomes entitled to inherit from him even if the divorce has become irrevocable prior to his death, unless the divorce has been effected with her consent.²³³

Husband prohibited from re-marrying during iddat:

Since the object of iddat is to ascertain any possible conception from the former husband, the woman who has been divorced is therefore not free to remarry immediately. On the other hand, the husband need not wait and he is free to remarry immediately after the divorce. But in an exceptional case, the husband is also prohibited from remarrying during the iddat of his divorced wife. If a husband has four wives at a time and he divorces any one of them, then he is prohibited to marry again before the expiry of the period of iddat, which his divorced wife is undergoing.

Marriage with a triple divorced woman:

Where a man divorces his wife by pronouncing triple talaq, a re-marriage between them is impossible unless the woman-

- a) Observes iddat,
- b) Lawfully marries another man,
- c) The second husband divorces her, and
- d) She observes iddat again.

Fasid (irregular) marriage:

Under Muslim law, marriages are classified for the purpose of validity in to three kinds; valid, void and irregular. In Muslim law, there are some marriages which are not valid but which are not wholly void. Marriages of this kind are defective or irregular but are not entirely without any effect. Irregular marriage is

²³³. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.126, Central Law Agency, Allahabad.

one which may be regularized by certain attempts or which becomes regular (lawful) after lapse of time.²³⁴

Irregular marriages are recognized only under Sunni law. Irregular marriage is an incomplete marriage. Only the observance of formalities is the basis of determining whether a marriage is valid or not. It is possible that in some cases, only minor formalities were not observed. Under such circumstances, the marriage may not be void but only irregular.²³⁵ The Ithna Ashari School of Shias does not recognize the irregular form of marriages.

An irregular marriage under Muslim law is not same thing as voidable marriage under English law or Hindu law. A voidable marriage is perfectly a valid marriage till it is avoided; and it can be avoided only by either party to the marriage. No third person can take a stand on it. A voidable marriage on its annulment has practically the same consequences as a void marriage. On the other hand, an irregular marriage is not a valid marriage to begin with, but it can be validated and made a fully valid marriage by removing the impediment or by remedying the prohibition.²³⁶

Under Shia law, no marriages are irregular. They recognize only valid and void marriages. Hence marriages that are not valid are void. Those marriages which are irregular under Sunni law are void under Shia law. However, under Shia law, marriage contracted without witnesses is valid.²³⁷

Examples of removing impediments or prohibitions to an irregular marriage are—

- 1) A marriage performed without witnesses may be validated by consummation.²³⁸
- 2) When a Sunni male marries a woman of other religion, the marriage is irregular and can be validated on wife's conversion to Islam.
- 4) When a marriage is prohibited by reason of unlawful conjugation, it can be validated by the termination marriage, which creates prohibition. For example, if

²³⁴. Dr. Mohammad Nazmi- *Mohammadan Law*, 2nd edn. 2008, p.46, Central Law Publications, Allahabad.

²³⁵. Dr. M.A. Qureshi- *Muslim Law*, 2nd edn. 2002, p.38, Central Law Publications, Allahabad.

²³⁶. DR. Paras Diwan- *Muslim Law in Modern India*, 9th edn. 2005, p.45, Allahabad Law Agency Faridabad, (Haryana).

²³⁷. Aqil Ahmad- *Mohammedan Law*, 21st edn. 2004, p.128, Central Law Agency, Allahabad.

²³⁸. *Bashir-un-nissa vs Bunyad Ali*, 50 I.C. 677; cited in DR. Nishi Purohit -*The Principles of Mohammedan law*, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad.

a man marries his wife's sister, the marriage is irregular and can be validated by pronouncing talak on his wife.

5) A marriage by a man who has already four wives, may be validated by death or divorce of any one of the four wives.

6) Where the marriage is contracted by obtaining consent by force or fraud, it can become valid by ratification when the force or fraud is removed.

7) Where the marriage is performed in a state of intoxication, it can be ratified after getting consciousness.²³⁹

Legal effects of an irregular marriage:

1) Before consummation:

A fasid or an irregular 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. Only the words "I have relinquished you" is enough for termination of marriage.²⁴⁰

Spouses may separate from each other without divorce. Neither divorce, nor the intervention of court is necessary. Wife is bound to observe iddat.²⁴¹

2) After consummation:

When the marriage is performed in violation of temporary or relative impediments, even before removal of the impediments, if consummation of marriage has taken place, then the following legal effects will arise²⁴²—

i) On dissolution of marriage either by divorce or by death of the husband, the wife is required to perform iddat of three courses.

ii) The wife becomes entitled to dower. it may be specified or proper whichever is less.

iii) The parties to an irregular marriage have no right of mutual inheritance.²⁴³

²³⁹. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad.

²⁴⁰. Bakh Bibi v. Quim Din, 1934 Lah 907; cf: DR. Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad

²⁴¹. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.129, Central Law Agency, Allahabad.

²⁴². DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad.

²⁴³. Mohd. Shafi v. Mohammed Jiajddin AIR 1992 MP 244; cited ibid at p.146.

lv) The children born out of such marriage are legitimate and inherit the property of both parents.

3) After removal of impediments:

When the temporary or relative impediments are removed and the prohibitions are remedied, all the legal effects of a Sahih or valid marriage will arise.

3) Guardianship in marriage:

Under Muslim law, any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, 1875 and the only matters in which, a Muslim is now entitled to act on attaining puberty are 1) marriage, 2) dower and 3) divorce. And in all other matters, minority continues until the completion of 18 years. Until then the court has power to appoint a guardian of his person or of property or both under the Guardians and Wards Act, 1890 in which case, the age of minority is prolonged until the minor has completed the age of 21 years.²⁴⁴

Every Muslim who is of sound mind and who has attained the age of puberty is competent to contract a valid marriage. Persons of unsound mind and a minor can also contract a valid marriage by their respective guardians.²⁴⁵ Under Muslim law, the ages prescribed for different matters are different. Minor is a person who has not attained the age of majority. The age of majority is not the same in all the matters but is different. Puberty and majority are one and the same.²⁴⁶

In the matters of marriage, dower, divorce and adoption, a person shall be deemed to be a minor till the age of puberty. Under the Sunni law, no male is said to have attained puberty under the age of 12 years and no female under the age of 9 years²⁴⁷; but in the absence of any evidence to the contrary, a male or a female is presumed to have attained puberty at the age of 15 years. But according to the Shia law, the age of puberty for a male is 15 years and for a

²⁴⁴. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.129, Central Law Agency, Allahabad.

²⁴⁵. DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.115, Orient Publishing Company, Allahabad.

²⁴⁶. The Hedaya, 529; cf; DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.317, Orient Publishing Company, Allahabad.

²⁴⁷. The Hedaya, 530; cited *ibid*.

female is 9 years²⁴⁸. Puberty begins with menstruation, which is presumed to commence between the age of 9 and 10.²⁴⁹ Age of puberty is an age at which, a person is supposed to acquire the sexual competency.

The Indian Majority Act, 1875 does not apply to Muslims in the matters of marriage, dower and divorce and adoption- as also the religion or religious usages²⁵⁰. But in other all other matters such as gifts, wills, succession, wakfs, preemption etc., majority will be determined according to the Indian Majority Act, 1875, which has been amended recently in 1999 and there fore, in these areas majority for Muslims is 18 years²⁵¹. The Act provides the age of Majority as 18 years.

The *Hedaya* lays down that “Puberty and Majority in the Muslim law are one and the same”. So, under Mohammedan Law, a person who has attained the age of 15 years, even though a minor under the Indian Majority Act, 1875, is competent to contract a valid marriage at his or her own behalf. The provisions of the Child Marriage Restraint Act, 1929 should also be read with. According to the Child Marriage Restraint Act 1929, marriages of males under the age of 21 years and females under the age of 18 years are prohibited. So if the parties to the marriage are under the age limits prescribed under the Act of 1929, such marriage will not be declared void but it merely lays down certain punishments for a breach of its provisions. It is only a punitive Act²⁵². The Act however not affect the validity of any marriage.

Persons entitled to guardianship in marriage:

The following list of persons can act as guardians in the marriage of minors:

- 1) Father,
- 2) Paternal grand father, how high so ever,
- 3) Brother or other male members of the father’s family,

²⁴⁸. Baillie II, 96; cf; B. R. Verma- Islamic Law, 6th edn. 1986, p.318, Law Publishers (India) Private Limited.

²⁴⁹. B. R. Verma- Islamic Law, 6th edn. 1986, p.318, Law Publishers (India) Private Limited.

²⁵⁰. Tahir Mahmood- The Muslim Law of India, 3rd edn. 2002 (new version) p.145, Butter Worths, Lexis Nexis, New Delhi.

²⁵¹. Tahir Mahmood- The Muslim Law of India, 3rd edn. 2002 (new version) p.145, Butter Worths, Lexis Nexis, New Delhi

²⁵². DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.124, Orient Publishing Company, Allahabad.

4) Maternal uncle, aunt or other maternal relations.

It is to be noted that, first of all, the right of guardianship in marriage is given to the father. In the absence of father, this right passes on to the next guardian in the order of priority. In the absence of any of the above mentioned guardians, a minor's marriage may be contracted by Kazi or an authority of the Government. A guardian appointed by court for the protection of the person or the property of the minor has no right to contract the minor's marriage without the prior permission of the court.²⁵³ On the other hand, a guardian for marriage need not take such permission. He can contract the marriage without permission of the court. Another important point is that, in the presence of a nearer guardian, the remoter guardian has no right to contract a minor's marriage. Where a remoter guardian contracts a marriage of a minor without the consent of a nearer available guardian (unless such nearer guardian is insane or missing) is void²⁵⁴

Under Shia law, the only guardians for marriage are 1) the father, and 2) the paternal grand father, how high so ever. A marriage contracted by any other guardian must be expressly confirmed by the minor on attaining puberty.

Puberty and majority in the Muslim law are one and the same.²⁵⁵ Under Muslim law, a person attains majority at the age of 15 years. Among the Hanafis and the Shias, puberty is presumed on the completion of the 15 years. Among the Malikis, on the completion of the 18 years.²⁵⁶

Recently, in *Abdul Ahad v. Shah Begum*²⁵⁷, A minor girl aged 14 was married to a man who was major. The husband lived in the house of his wife for some time and when he tried to carry his wife with him, the parents refused to send the wife. Therefore, the husband instituted a suit for restitution of conjugal rights against the defendant. The J&K High Court held that, at the time of marriage, the girl was minor and the marriage was contracted during her minority by a person who was not competent to give her in marriage. He was simply a 'wali' (not a guardian). He had not shown at any point of time that he had authority of law to give minor girl in marriage.

²⁵³. *Monijan v. District Judge Birbhum* (1914)42 Cal 351. cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.56, Central Law Agency, Allahabad.

²⁵⁴. *Ayub Hassan v. Mst Akhtari* AIR 1963 All 525.

²⁵⁵. Hedaya 529 (Book XXXV), Chapter II; cf: Dr. M.A. Qureshi, Muslim Law, 2nd edn. 2002, p.126, Central Law Publications, Allahabad.

²⁵⁶. Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.126, Central Law Publications, Allahabad.

²⁵⁷. AIR 1997 J&K 22.

The court further observed that in such circumstances, there was not even a repudiation needed by the minor girl to annul the marriage because the marriage itself had been invalid ab initio.

Puberty means the age at which a person becomes capable of performing sexual intercourse and procreation of children²⁵⁸. Puberty is a physical phenomenon which may be attained by different persons at different ages. It is therefore, a matter of fact at what precise moment a particular person has attained puberty²⁵⁹. Puberty is not a physical phenomenon in the sense used by him. It is true that the structure of the body of the human being differs from place to place. For example, in comparison to an Indian, an Afghan is having definitely good body structure. Afghan boy of 12 years will appear to be of an Indian boy of 15 years. But does not mean that a boy of 12 years has attained the age of puberty.

Before passing of the Indian Majority Act 1875, the age of majority of Hindus and Muslims was determined on the basis of the provisions of their respective personal laws. The persons other than Hindus and Muslims were governed by the rules of English law. However after some time, the law was modified by local Acts and Regulations. In Bengal, the Bengal Regulation Act of 1793 was passed by which, minority with respect to both Hindus and Muslims was limited to the expiration of the fifteenth year.

This limit was later on raised to 18 years. In Bombay, there was the Bombay Minor's Act (XX of 1864) and in Madras, the Madras Regulation Act V of 1804²⁶⁰. Besides, there was also Act IX of 1861 applying to the whole of British India and the European British Minors Act (XIII of 1874) applicable to persons born in United Kingdom. Under the Indian Christian Marriage Act 1872, the age of majority is 21 years.

On account of these uncertainties, the Indian Majority Act, 1875 was passed. After passing of this Act, all the citizens are governed under this Act. However, as regards the matter of marriage, dower, divorce and adoption, the Hindus and Muslims were allowed to be governed by their own laws. Later on,

²⁵⁸. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.116, Central Law Agency, Allahabad.

²⁵⁹. Tahir Mahmood- The Muslim Law of India, 1980 edn. p.161, Butter Worths, Lexis Nexis, New Delhi.

²⁶⁰. Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.126, Central Law Publications, Allahabad.

the ancient Hindu law was codified by Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956²⁶¹.

According to the Indian Majority Act 1875, when a person completes the age of 18 years, except where a guardian of the person has been appointed to him under the Guardians and Wards Act or he is a ward of the court of wards in which case, the period is extended to 21 years²⁶². But Section 2 of the Indian Majority Act makes an exception to the applicability of the Act itself in certain matters namely; marriage, dower, divorce and adoption. In respect of these matters, the Act provides that a person though below 18 or 21 as the case may be, could personally enter into contracts notwithstanding the provisions of Section 11 of the Indian Contract Act 1872, if only he is a major according to the law to which, he is subject, i.e., Hindu law for Hindus and Mohammedan law for Muslims and Indian Succession Act for the rest.²⁶³

Malikis and the Shafiis hold the opinion that, a girl even though a major, can not contract a valid marriage herself without the consent of her guardians or a wali only. A *thayyiba* (whether a virgin or not) can enter into the contract of marriage herself, but an adult virgin can not. A *thayyiba* is a woman who has sexual intercourse with a man (presumably therefore a widow or divorcee).

Hanafis hold the view that the guardian's power of giving the child of both sexes in marriage comes to an end when the child attains the age of puberty. According to the Maliki and the Shafii Schools, the father's power over female children does not come to an end till they are married, since these schools hold the view that it is the marriage which alone emancipates a female child from the *patria potestas* of the father.²⁶⁴

In *Kamma v. Ethyumma*²⁶⁵, the Kerala High Court has held that the marriage of an adult Shafii girl without the consent of her father or any other guardian in marriage is valid. The authority of the father or grand father to act as a guardian of a Shafii girl ceases when she becomes competent to contract and therefore, the guardianship in marriage ceases when the girl attain puberty.

²⁶¹. *ibid.* p.127.

²⁶². Section 3 of the Indian Majority Act, 1875.

²⁶³. Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.128, Central Law Publications, Allahabad.

²⁶⁴. Ameer Ali, II, 343-44; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.57, Allahabad Law Agency, Faridabad, (Haryana).

²⁶⁵. 1967 KLT 913 cited *ibid.*

In *Kummali Abubukker and others v. Vengatt Marakkal*²⁶⁶, it was held that, marriage among Muslims being a contract and the contracting parties being the husband and the wife, the consent contemplated in the Shafii Sect is that of the wife and the father or grand father or any other person who acts as wali at the time of marriage. The person who acts as wali merely communicates the consent of the wife to the Kazi who conducts the marriage.

In *Abdul Ahad v. Mst. Shah Begum and others*,²⁶⁷ held that a marriage of a minor girl even contracted by wali is invalid ab initio. In this case, a minor girl aged 14 years and studying 8th class was married to a man who was major. The husband lived in the house of his wife as Khana Damad for some time and when he tried to carry his wife with him, her parents refused to send his wife. Therefore, he sought a decree for Restitution of Conjugal Rights and also for perpetual injunction against the respondents.

Bilal Nazki, J. has observed: "I do not want to interfere in the findings of the learned District Judge who has come to a definite conclusion that the girl was minor at the time of Nikah. This conclusion is final and this court can not interfere in this conclusion in the second appeal. This court feels it proper to add that the marriage of the respondent no.1 (wife) had been contracted during her minority by a person who was not competent to give her in marriage. Mohd. Assadullah who is shown to be the "wali" has not shown at any point of time what authority of law he had to give respondent no.1 in marriage during her minority. Therefore in my view, there was not even a repudiation needed by respondent no.1 to annul the marriage because the marriage in itself had been invalid. For these reasons, this appeal is dismissed and the judgments and decree of the District Judge is upheld with the addition that the marriage contracted between the parties was invalid *ab initio* and shall not bind the parties. The suit of the plaintiff accordingly gets dismissed".

Where a guardian in marriage is incapacitated to exercise the right of giving the child in marriage of account of mental illness or because he has become a *Ghibat-ul-munkata*²⁶⁸ or he has been sentenced to a long term of

²⁶⁶. AIR 1970 Ker 277.

²⁶⁷. AIR 1997 J&K 22.

²⁶⁸. *Ghibat-ul-munkata* is one who has gone away to a distant place.i.e.,being removed to a city far away from the route of the caravans or not visited by the caravans more than once a year. In the modern law, it should mean that person whose whereabouts are not known by those persons who would have naturally

imprisonment, then the next wali in order of guardianship may give the child in marriage. When a minor child has two guardians equal in degree, e.g., two paternal uncles, then the marriage contracted by anyone of them is valid.²⁶⁹

If both have arranged the marriage with two different persons, then the contract prior in time will be void. If both the contracts are contemporaneous, then both of them will be inoperative, till the child on attaining the age of majority, declares anyone of them as first. A marriage contracted by a remoter guardian in the presence of a nearer guardian is not invalid. The nearer guardian may ratify it; otherwise the marriage will be invalid. But the right of ratification of marriage by the guardian may be lost on account of his latches.²⁷⁰

Repudiation of marriage:

Under Muslim law, where a minor was contracted in marriage by the father or grand father, has no option to repudiate the marriage on attaining puberty unless the contract is to the manifest disadvantage of the minor or has been fraudulently or negligently entered into.²⁷¹

According to Rudd-ul-Muhtar, "if the marriage is in all aspects suitable, the bride and bridegroom are equally matched in rank, position and age, and there is no deformity or evil habits on one side or the other, the dower is not unreasonably low, in such a case, the minor on attaining puberty, has no option; for it is presumed that all these circumstances combining the love which a father or grand father bears to his children or grand children must have actuated him in making his choice, which ought not to be set aside at the mere caprice of the young people after they attain the age of puberty."²⁷²

Ameer Ali takes the view that, in these cases, the marriage is subject to the ratification of the minor, which may be express or implied.²⁷³ The courts in India have allowed the right of repudiation of marriage to girls even when they have been married by father or grand father. In *Aziz Bano vs. Mohammad*

known about them for a period of one year or more. cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.58, Allahabad Law Agency Faridabad, (Haryana).

²⁶⁹. Baillie, I, 49; the Hedaya, 699; cited *ibid.* p.59.

²⁷⁰. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.59, Allahabad Law Agency, Faridabad, (Haryana).

²⁷¹. Hedaya, p. 37; Baillie, Vol. I, p. 50; cf: Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.147, Central Law Publications, Allahabad.

²⁷². The Rudd-ul-Muhtar, II, 502; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.112, Allahabad Law Agency, Faridabad, (Haryana).

²⁷³. The Rudd-ul-Muhtar, II, 371; cited *ibid.*

Ibrahim²⁷⁴, the Allahabad High Court held that a Shia girl given in marriage by her father to a Sunni male has a right of repudiating such marriage on attaining the age of puberty, unless she has ratified it impliedly by consummation or otherwise she has a right of repudiation because such marriage would be repugnant to her religious sentiments and was disadvantageous for her.²⁷⁵

Similarly, the wife was held to be entitled to repudiate the marriage if the husband was convicted of theft and was also being tried for enticing away another woman²⁷⁶. Mere exercise of the option of repudiation did not ipso facto dissolve the marriage; but confirmation by the court was required although a decree was not required.²⁷⁷

Thus, if the father or the father's father has acted carelessly, wickedly, fraudulently or negligently or where the minor is married to a lunatic, impotent or to a person of unsound mind or to an idiot or the marriage is to the manifest disadvantage of the child or to a person who is not equal in rank, the child has the right of repudiating the marriage. Ameer Ali takes the view that, in these cases the marriage is subject to the ratification of minor, which may be express or implied.²⁷⁸

On husband's repudiation of marriage or option of puberty, the marriage will stand cancelled. No decree of the court is required for its cancellation. The position will be the same as if no marriage has taken place. After passing of the Dissolution of Muslim Marriage Act 1939, on wife's repudiation of marriage, the marriage will stand cancelled only if a decree of the court for its cancellation is passed. Otherwise, the marriage will not be dissolved.²⁷⁹

1) *Option of Repudiation by a Minor Male:*

A minor male on attaining puberty, has a right of repudiating the marriage when he is given in marriage by his father or grand father only if the father or grand father has acted:

²⁷⁴. AIR 1925 All 720; cf: DR. Nishi Purohit -The Principles of Mohammedan law 2nd edn. 1998, p.225, Orient Publishing Company, Allahabad.

²⁷⁵ *ibid.*

²⁷⁶. Zubaida Begum v. Falak Sher AIR 1940 Sind 145; cited *ibid.*

²⁷⁷. Ghulam Sakina v. Falak Sher AIR 1950 Lah 45; cf: DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.225, Orient Publishing Company, Allahabad.

²⁷⁸. Ameer Ali, II, 371; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.112, Allahabad Law Agency, Faridabad (Haryana).

²⁷⁹. DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.229, Orient Publishing Company, Allahabad.

- i) Carelessly, or
- ii) Negligently, or
- iii) Fraudulently, or
- iv) Wickedly, or
- v) For disadvantage of the minor.²⁸⁰

Thus, if a minor male is married to a lunatic, insane, impotent or idiot, such marriage may be repudiated by the minor only after he attains majority.

According to *Rudd-ul-Mukhtar*.²⁸¹

“if the marriage is in all respects suitable, the bride and bridegroom are equally matched in rank, position and age, and there is no deformity or evil habits on one side or the other, the dower is not unreasonably low, in such a case, the minor on attaining puberty, has no option; for it is presumed that all these circumstances combining the love which a father or grand father bears to his children or grand-children, must have actuated him in making his choice, which ought not to be set aside at the mere caprice of the young people after they attain the age of puberty.”

Hence, the minor has a right of repudiating such marriage after attaining puberty only if some fraud or carelessness is committed in contracting the marriage. But this right is available only if the minor has not ratified such marriage after attaining puberty. According to Ameer Ali, marriage may be repudiated by a minor on attaining majority but subject to his ratification which may be express or implied.²⁸²

The right of repudiation may be exercised on attaining majority, unless ratified.²⁸³ Thus, if a minor male on attaining puberty, clearly expresses that he has nothing to do with such marriage or he does not accept this marriage as valid because the girl is of unsound mind, then the marriage stands repudiated. Some times, the conduct of the minor also shows his unwillingness to accept the marriage contracted by his father or grand father. The right of ratification is not

²⁸⁰. Baillie I, 74, *Sibt Ahmad v. Amina Khatun* AIR 1929 All 18; DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.229, Orient Publishing Company, Allahabad.

²⁸¹. The *Rudd-ul-Mukhtar*, II, 501; cited *ibid*.

²⁸². Ameer Ali, *Mohammedan Law*, II, 371; cf: DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.224, Orient Publishing Company, Allahabad.

²⁸³. *Aziz Bano v. Muhammed Ibrahim* AIR 1925 All 720; cited *ibid*.

lost by delay. Payment of dower or consummation of marriage is the implied forms of ratification.²⁸⁴

2) *Option of Repudiation by a Minor Female:*

Before passing of the Dissolution of Muslim Marriage Act 1939, a minor female given in marriage by her father or grand father could not repudiate such marriage in any circumstances.²⁸⁵ But if a minor girl was given in marriage by any guardian other than the father or the grand father, she had the right of repudiating the marriage. But the courts in India, in few cases, allowed the right of repudiation of girls even when they were given in marriage by the father or grandfather.

In *Aziz Bano v. Mohammad Ibrahim*,²⁸⁶ the court held that a Shia girl given in marriage by her father to a Sunni male has a right of repudiating such marriage on attaining puberty, unless she has ratified it impliedly by consummation or otherwise. She has a right of repudiation because such marriage would be repugnant to her religious sentiments and was disadvantageous for her. Similarly, if the husband was convicted of theft and was also being tried for enticing away another woman, the wife was held to be entitled to repudiate the marriage.²⁸⁷

So, in case of marriage contracted by the father or grand father, the right of repudiation by a female on attaining puberty was limited; but unlimited in the cases of marriage contracted by a guardian other than a father or grand father. After coming in to force of the Dissolution of Muslim Marriage Act 1939, a considerable change in the position of females regarding repudiation of marriage. Section 2 (vii) of the Act of 1939 runs as follows:

“A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on the ground that she, having been given in marriage by her father or other guardian repudiated the marriage before attaining the age of eighteen years provided that the marriage has not been

²⁸⁴. Baillie I, 50-51; DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.224, Orient Publishing Company, Allahabad.

²⁸⁵. Baillie, I, 50, 51 cited *ibid* at p.225.

²⁸⁶. AIR 1925 All 720 cf: DR. Nishi Purohit- The Principles of Mohammedan law 2nd edn. 1998, p.225, Orient Publishing Company, Allahabad.

²⁸⁷. *Zubeda Begum v. Vazir Mohammad* AIR 1940 Sind 145 cf: DR. Nishi Purohit- The Principles of Mohammedan law 2nd edn. 1998, p.225, Orient Publishing Company, Allahabad.

consummated". This Act gave unlimited power to a female to repudiate her marriage whether contracted by her father or grandfather or by any other guardian during her minority.

Option of puberty: (khyar-ul-bulugh)

A minor who is given in marriage by a person other than her father or grandfather, has a right to repudiate the marriage on attaining majority without showing any cause. This absolute right of the minor of repudiating marriage on attaining puberty is called "option of puberty". Under Shia law, a marriage of a minor contracted by any person other than the father or grand father is ineffective until ratified by the minor after attaining puberty or by father or grandfather.²⁸⁸

The option of puberty is subject to the following limitations:²⁸⁹

- a) The option should be exercised immediately on attaining puberty. But the option continued till the time when she came to know of the marriage even though puberty was attained and the marriage had been consummated.²⁹⁰ This continues to be position in respect of Muslim males; but in respect of Muslim females, the Dissolution of Muslim Marriage Act, 1939 lays down that the option may be exercised before the girl attained the age of 18 years, even though puberty has been attained.
- b) The marriage should not have been consummated. Here, the consummation must have taken place with the consent of the wife.²⁹¹ If marriage is consummated without the consent of the wife, the wife had the right to exercise her option of puberty. Such consummation would not amount to her ratification. The courts by judicial legislation have mitigated some of the hardships inherent in the rigid applications of these limitations.

In *Ghulam Sakina v. Falak Sher*²⁹², it was held that where the marriage of a minor female was solemnized and consummated before she attained the age of 15 years, this did not amount to consummation within the meaning of Section 2 (vii) of the Act. This Act gave unlimited power to a female to repudiate her

²⁸⁸. Baillie II, 6, 9, 12; Mulka Jehan v. Mohd Uskurreo 26 WR 26; cf: DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.228, Orient Publishing Company, Allahabad.

²⁸⁹. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.113, Allahabad Law Agency, Faridabad (Haryana).

²⁹⁰. DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.228, Orient Publishing Company, Allahabad.

²⁹¹. Abdul v. Amina bai, (1935)59 Bom 426; cited ibid.

²⁹². AIR 1950 Lah 45, cf: DR.Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.113, Allahabad Law Agency, Faridabad (Haryana).

marriage contracted whether by her father or grandfather or by any other guardian during her minority.

Consummation of marriage with her consent after attaining the age of 15 years but before attaining the age of 18 years amounts to implied ratification. Similarly, acceptance of dower also amounts to implied ratification. As per Section 2 of the Dissolution of Muslim Marriage Act 1939, for the exercise of the option of repudiation, a regular suit must be filed and a decree of the court is also required.

The position of a minor male or female regarding the exercise of the option of puberty is different.

1) Option of puberty by a minor male:

A minor male after attaining puberty, has a right to repudiate his marriage contracted by his guardian other than his father or grandfather without showing any cause for his repudiation. Such right is called “option of puberty”.

Though a change in the right of option of puberty by a female has been changed by the Dissolution of Muslim Marriage Act 1939, yet the position of the male is not affected. He has the right to exercise his option of puberty till he ratifies it expressly or impliedly by consummation of marriage or the payment of dower²⁹³.

Under Shia law, a marriage of a minor contracted by any person other than the father or grandfather is ineffective until ratified by the minor after attaining the age of puberty or by father or grandfather.²⁹⁴

According to Hedaya, “the right of option of puberty continues of attaining puberty, till marriage is not ratified either expressly or impliedly. The right is not lost by mere delay²⁹⁵”.

2) Option of puberty by a minor female:

Before passing of the Dissolution of Muslim Marriage Act 1939, a minor female contracted into marriage by a person other than her father or grandfather, had a right to repudiate the marriage on attaining puberty without showing any

²⁹³. Baillie I, 51; cf: DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.227, Orient Publishing Company, Allahabad.

²⁹⁴. Baillie II, 6,9,12; Mulka Jehan v. Mohd. Uskurreo; cited ibid at p.228.

²⁹⁵. The Hedaya, 38; cited ibid.

cause. There was no time limit for the exercise of option on attaining puberty.

The courts held that the minor wife does not lose her option of puberty if she does not know that she has the right after she comes to know of it.²⁹⁶ The courts also held that delay in the exercise of the option of puberty may be condoned even on account of non-acquiescence²⁹⁷.

After passing of the Dissolution of Muslim Marriage Act 1939, the position of a minor female has undergone a substantial change. The difference between the position of minor female regarding exercise of her option of puberty before and after passing of the Act of 1939 are as follows:

1) Before passing of the Act of 1939, the marriages contracted by the father or grandfather were not to be repudiated, though could be repudiated in the case of marriage contracted by a guardian other than the father or grandfather, which amounted to option of puberty.

But after passing of the Act of 1939, all marriages can be repudiated without any cause. Father and any other guardian are put on the same level.

2) Before passing of the Act, the option could be exercised by those minor females on attaining puberty, whose marriage had been contracted before she attained the age of puberty.

But after passing of the Act of 1939, option can be exercised in case of marriages contracted before she attains the age of 15 years, but not before attaining puberty.

3) Before passing of the Act, the option by a minor female was to be exercised immediately on attaining the age of puberty; but if she had no knowledge of her marriage or of the option of puberty, then till she had knowledge.

But after passing of the Act, she can exercise the option up to the age of 18 years, irrespective of her attaining the age of puberty or having the knowledge.

4) Before passing of the Act of 1939, a decree of the court was not required; confirmation by the court was sufficient.

²⁹⁶. Bismilla v. Nurmad (1921)44 All 61; Aysha v. Mohd. Yunus AIR 1938 Pat 604 ; DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.227, Orient Publishing Company, Allahabad.

²⁹⁷. Husani v. Jivani AIR 1924 Lah 385; Khanoo v. Bhag AIR 1925 Lah 66; cf: DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998, p.227, Orient Publishing Company, Allahabad.

But after passing of the Act, a decree of the court is required. Otherwise, the marriage will not be dissolved. Under the Act, no limitation period for obtaining a decree of the court regarding option is prescribed.

The courts have taken the view that the minor wife does not lose her right of repudiation of marriage if she does not know that she has the right, and therefore, she can exercise the right after she has come to know of it. Further, she can exercise the right within a reasonable time after she became aware of it²⁹⁸.

The courts have gone to the extent that delay in the exercise of the option may be condoned even on account of non-acquiescence²⁹⁹. In *Abdul vs. Aminabai*³⁰⁰, it was held that, the consummation must have taken place with the consent of the wife.

On husband's repudiation of marriage or option of puberty, the marriage will stand cancelled. No decree of the court is required for its cancellation. The position will be the same as if no marriage has taken place.

4) *Presumption of marriage:*

A marriage may be proved directly or indirectly. The question of marriage is one of fact, and has to be proved by direct evidence, e.g., calling witnesses present at the time of marriage or producing the Nikahnama (marriage deed). Thus, the direct evidence is the best evidence, as it needs no explanation. Some times, direct evidence is not available as a Muslim marriage often takes place without any ceremony. In the case of absence of direct evidence, the marriage may be inferred from circumstances. This is called presumption of marriage³⁰¹.

Indirect proof of marriage is presumption of marriage is presumption of marriage and such presumption arises only if the marriage is not performed in violation of any of the prohibitions. Presumption of a valid marriage arises even

²⁹⁸. *Bismilla v. Nur Md.* (1921)44 All 61; *Aysha v. Md. Yunus* 1938 Pat 604; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.113, Allahabad Law Agency, Faridabad (Haryana).

²⁹⁹. *Khanoo v. Bhag* 1935 Lah 66; *Husani v. Jiwani* 1924 Lah 385; cited *ibid.* DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.113, Allahabad Law Agency, Faridabad, (Haryana).

³⁰⁰. (1935)59 Bom 426; cited *ibid* at p.114.

³⁰¹. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.133, Central Law Agency, Allahabad.

though there is lack of some formalities of a marriage. A valid marriage is presumed in the following cases:³⁰²

- 1) When there is consummation of marriage which is presumed from a valid retirement.
- 2) When a man acknowledges a child of a woman as his legitimate child, a presumption of a valid marriage between the man and the mother of the child arises.
- 3) When a man acknowledges that a woman is his wife.
- 4) When there is a continuous and a prolonged cohabitation of a man and a woman.

1) *Consummation of marriage:*

The consummation of marriage cures the deficiency of any deficiency of any requirements. Such consummation is presumed from a valid retirement.

Valid Retirement: (khilwat-al-sahiha)

Under Sunni law, if the husband and the wife are together for sometime in privacy and there are no social, moral or legal restrictions in their intercourse, they are said to be in valid retirement. A valid retirement raises a presumption of consummation of marriage for the purposes of dower, paternity of the child, certain prohibitions in marriage etc., and also for purposes of the observance of iddat.³⁰³

“Under the Hanafi and the Maliki law, a presumption of consummation is raised from the retirement of the husband and wife into nuptial chamber under circumstances which lead to the natural inference of matrimonial intercourse- But when there is some legal, moral or physical impediment to such intercourse, no presumption is raised and the retirement is not valid. For example, when the parties are observing the obligatory fast of *Ramzan* or either husband or wife is suffering from an illness which prevents connubial relationship or a third (“Discreet”) person is present in the room though he may be blind, the retirement

³⁰². DR. Nishi Purohit-The Principles of Mohammedan law 2nd edn. 1998p.135, Orient Publishing Company, Allahabad.

³⁰³. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.56, Central Law Agency, Allahabad.

into the nuptial chamber does not give rise to the presumption of consummation”³⁰⁴

According to *Tyabji*:

“Where the husband and wife are together by themselves in a place where, if they so desire, they are secure from observation and where there is no indecency, law or health to prevent them having sexual intercourse, they said to have validly retired”³⁰⁵.

The essential requirement for a valid retirement to be presumed as actual consummation of marriage, that there should not be any impediment which prohibits any marriage. According to Hanafis and the Malikis, a valid retirement raises a presumption of consummation of marriage and the consummation of marriage raises an indirect proof or presumption of marriage. The Shafis and Shias do not agree with the Sunnis and the view that valid retirement is equal to actual consummation of marriage.³⁰⁶ These Schools insist that it is only actual consummation of marriage which gives rise to marital rights and obligations.³⁰⁷

A valid retirement is equal to actual consummation for the following purposes-³⁰⁸

- 1) For confirmation of Dower.
- 2) For the observation of iddat.
- 3) For establishment of paternity.
- 4) For prohibiting marriage by the husband with a fifth woman.
- 5) For the right of maintenance and residence of wife during the period of iddat.
- 6) For prohibiting marriage by the husband with the wife’s sister.
- 7) For the observance of time in the repudiation of marriage.

Actual consummation is necessary in some cases. A valid retirement is not presumed to be equivalent to actual consummation of marriage for the following purposes-³⁰⁹

³⁰⁴. Ameer Ali, II, 323; cf: DR. Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998p.136, Orient Publishing Company, Allahabad

³⁰⁵. Tyabji- Muslim Law, 1968 edn. Section 81; cited *ibid*.

³⁰⁶. Baillie II, 74, 160; cf: DR. Nishi Purohit -The Principles of Mohammedan law, 2nd edn. 1998p.136, Orient Publishing Company, Allahabad.

³⁰⁷. DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.56, Allahabad Law Agency, Faridabad, (Haryana).

³⁰⁸. Durr-ul-Mukhtar, 67, 100, 101; cited *ibid*.

³⁰⁹. Ameer Ali II, 324; cf: Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998p.137, Orient Publishing Company, Allahabad.

- 1) For impairing virginity (i.e., if a man retire with a virgin and then divorces her, she frequently be deemed to marry as a virgin).
- 2) For prohibiting the daughter of a woman.
- 3) For the validity of a remarriage between the parties in the case of divorce.
- 4) For the purpose of revoking repudiation and inheritance (i.e., if a talaq is pronounced before consummation, it becomes irrevocable and the wife cannot inherit for husband's property after his death but after actual consummation of a marriage (not valid retirement) if a husband pronounces talaq, such talaq may be revoked during the period of iddat and the wife will inherit husband's property after his death).

Under Sunni law, divorce iddat is necessary even if actual consummation could not be proved but a valid retirement has been established.

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 only where actual consummation has taken place between them.³¹⁰

2) *Acknowledgement of paternity: (Ikrar-e-Nasab)*

The acknowledgement of paternity is in the nature of a declaration by the father that a child is his legitimate child. It is not a process of legitimation of an illegitimate child³¹¹.

Legitimacy and legitimation:

Legitimacy is the fact of a child being legitimate under the Muslim law. It is the status of a child resulting from certain facts about the relationship between his parents. If the legitimacy of a child is in doubtful but not disproved, acknowledgement of its father whether express or implied confers upon it, the status of legitimacy.³¹² Thus, legitimacy is a status which results from certain facts. If a child is proved to be illegitimate, no acknowledgement can legitimize it. Hence, acknowledgement is a mere declaration of the child's legitimacy; a status which it has always had since birth.

³¹⁰. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.56, Central Law Agency, Allahabad.

³¹¹. DR. Paras Diwan, Muslim Law in Modern India, 9th edn. 2005, p.120, Allahabad Law Agency, Faridabad, (Haryana).

³¹². Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.201, Central Law Agency, Allahabad.

Legitimation is a proceeding which creates a status which did not exist before. It is a process to confer legitimacy upon one who was never a legitimate child, is unknown in Muslim law.³¹³ In the proper sense, there is no legitimation under Muhammadan law.

In *Habibur Rahman Chowdhury v. Altaf Ali Chowdhary*,³¹⁴ one Habibur Rahman claiming to be the son of Jewess Mozelle Cohen by Nawab Sobhan of Bogra and affirming the marriage of Mozelle Cohen with Nawab and acknowledgement of his sonship by the deceased Nawab, sued Altaf Ali Chowdhary, the deceased Nawab's daughter's son and other for a share of inheritance.

The court held that the plaintiff having failed to prove that the deceased Nawab acknowledged him as his son or married Mozelle Cohen, could not be regarded as natural son of the deceased and his suit must fail. The court further held that "Legitimacy is a status which results from certain existing facts. Legitimation is a process which creates a status which did not exist before. In the proper sense, there is no legitimation in Mohammedan law. Examples of legitimation properly so called may be found in other systems, e.g., adoption of Hindu Law".

In *Mohammad Khan v. Ali Khan*,³¹⁵ the Madras High Court observed that the doctrine of acknowledgement could be invoked only where the factum of marriage or the exact time of the marriage could not be proved and not to cases where the lawful union between the parents of the child was not possible as in the case of incestuous intercourse or an adulterous connection and where the marriage necessary to render the child legitimate was disproved.

In *Mohammad Azmad v. Lalli Begum*,³¹⁶ it was observed that the acknowledgement may be express or implied. There need not be any proof of an express acknowledgement but that an acknowledgement of a child by a Mohammedan as his child may be inferred from his having openly treated as such.

An express or implied acknowledgement by a Muslim who has attained majority and of sound mind is doubtful in his legitimate child or that the mother of

³¹³. Ibid.

³¹⁴. AIR 1922 PC 159; *ibid*.

³¹⁵. AIR 1981 Mad 209.

³¹⁶. (1881)9 IA 8; cf: DR. Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998, p.308, Orient Publishing Company, Allahabad.

the child is his lawfully wedded wife, confers the status of legitimacy on such child.³¹⁷

Basic principle of the doctrine:

The basic principle of the doctrine of acknowledgement is that the Muslim Jurists discountenanced the recognition of the issues which are the fruits of an adulterous relationship, incest and fornication. When the child is known to be illegitimate or proved to be the child of another or the woman is within the prohibited degrees of relationship or the woman is married to another man or she is a prostitute, no amount of acknowledgement will render the child legitimate.

The doctrine applies only in cases of uncertainty as to legitimacy, and in such cases acknowledgement has its effect. The doctrine of acknowledgement is applicable only where either the fact of the marriage itself or the exact time of its occurrence is neither proved nor disproved.

A child conceived during a valid marriage of its parents will be legitimate. An irregular marriage for the purpose of legitimacy is deemed to be a valid marriage and the children conceived during its subsistence will be legitimate.³¹⁸

The acknowledgement of paternity is generally made by the father. A mother can also be the acknowledger, but a condition has also to be fulfilled for the validity of an acknowledgement by the mother.

- i) Such acknowledgement must be confirmed by her husband, or
- ii) The heirs of the husband must be opposed, (in case the husband is dead), provided that the child was born during the period of iddat or during the period of gestation prescribed by Mohammedan Law.³¹⁹

Only a major person of sound mind can make a valid acknowledgement. An acknowledgement made by a minor or an insane person is not valid.³²⁰ A dumb person may make a valid acknowledgement by signs.³²¹

The acknowledgement may be express or implied. There need not be any proof of an express acknowledgement but that an acknowledgement of a child by a Muslim as his child may be inferred from his having openly treating as such.

³¹⁷. *ibid.* p.302.

³¹⁸. Baillie, I, 405, *The Hedaya*, 503; cf: DR. Nishi Purohit -*The Principles of Mohammedan law*, 2nd edn. 1998, p.303, Orient Publishing Company, Allahabad.

³¹⁹. Baillie, I, 410,411; cf: : DR. Nishi Purohit-*The Principles of Mohammedan law*, 2nd edn. 1998, p.308, Orient Publishing Company, Allahabad

³²⁰. Baillie, 406; cited *ibid.*

³²¹. Baillie, II, 155; cited *ibid.*

The following conditions are necessary for a valid acknowledgement:

i) The paternity of the child should be doubtful. i.e., it should be proved nor disproved that the child is illegitimate. If the child is known to be illegitimate, it cannot be acknowledged to be legitimate.

Mohammad Alladad v. Mohammad Ismail,³²² is a leading case on acknowledgement of paternity. In this case, Moti Begum was married to Ghulam Ghaus. But the exact date of their marriage with reference to the birth of Md. Alladad, their first son, was not certain. Later on, Moti Begum and Ghulam had four other issues, including Md. Ismail. Facts on the record suggested beyond reasonable doubt, that Moti Begum cohabited with Ghulam Ghaus for a considerable number of years during which, Md. Alladad would have been born. She was always treated by Ghulam Ghaus as his lawful wife and there was no impediment which would render their marriage unlawful.

The facts also suggested that, Ghulam Ghaus acknowledged and treated Md. Alladad as his son. Similar acknowledgements were made for Mohd. Ismail and other children of Ghulam Ghaus. After the death of Ghulam Ghaus, Mohd. Alladad wanted his share through inheritance, claiming himself to be the eldest son of his father. But Mohd. Ismail and other three children of the deceased Ghulam Ghaus argued that Mohd. Alladad was born prior to the marriage of Moti Begum with Ghulam Ghaus and it was not certain as to who was the father of Mohd. Alladad. And he argued that Mohd. Alladad was only a step son of Mohd. Ghulam Ghaus and no right of inheritance.

The full bench of Allahabad High Court held that, there was no proof that Mohd. Alladad was an offspring of Zina (illicit intercourse). Although there was no proof of paternity of Mohd. Alladad, but since there was no legal impediment in the marriage of Ghulam Ghaus with Moti Begum and since they lived as husband and wife for a considerable number of years, the existence of marriage during the birth of Mohd. Alladad may be presumed. Moreover, as Ghulam Ghaus always accepted Moti Begum as his wife and Mohd. Alladad as his son, Mohd. Alladad had the status of an acknowledged son and as such, the right of inheritance together with Mohd. Ismail and other children of the deceased.

³²². ILR (1888)10 All 289 cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.114, Central Law Agency, Allahabad.

Mahmood J. said: "The Muhammadan law of acknowledgement of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or the adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either the fact of marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy. And in such cases, acknowledgement has its effect. But that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child".

ii) The acknowledgement of paternity by a person must not only be an acceptance of the child as his son or daughter; it should also be to the effect that he has accepted the child as his legitimate child for all purposes including inheritance. There must be clear intention on the part of the acknowledger that he has not only accepted to become father of the child but also accepted the child as his legitimate child.³²³ A casual acknowledgement of paternity not intending to confer the status or legitimacy will not be enough. The intention to confer the status of legitimacy must be clear³²⁴.

iii) The person acknowledged must not be the offspring of adultery, fornication or incest (zina).³²⁵ An offspring of zina is one who is born either without marriage, or of a mother who was the married wife of another, or of a void marriage.³²⁶ Thus where the legal marriage between the acknowledger and the mother of the acknowledged person is not possible at the time when the child could have been conceived, then such a child is a child of zina and cannot be acknowledged as a legitimate child. Thus, in all those cases where the marriage of the acknowledger and the mother of the acknowledged person would have been void had it taken place, the child cannot be validly acknowledged as a legitimate child.

³²³. Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.115, Central Law Agency, Allahabad.

³²⁴. *Abdool Razak v. Aga*, (1893) 21 IA 56; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.122, Allahabad Law Agency, Faridabad (Haryana).

³²⁵. Baillie, 411; cf: DR. Paras Diwan- Muslim Law in Modern India, 9th edn. 2005, p.122, Allahabad Law Agency, Faridabad, (Haryana).

³²⁶. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.205, Central Law Agency, Allahabad.

In *Rashid Ahmad v. Mt. Anisa Khatun*,³²⁷ the child acknowledged was the issue of marriage between the divorced persons. The husband had repudiated the marriage in talaq-ul-biddat form and no intermediate marriage and divorce of the woman took place. Thus the marriage was void. Hence no valid acknowledgement can be made.

Similarly, where the acknowledger's marriage with the mother of the person acknowledged was within the prohibited degrees (prohibitions might be on the ground of consanguinity, affinity or fosterage), the marriage being void, no valid acknowledgement can be made. But if the marriage is irregular, the child will be legitimate.

iv) The ages of the acknowledger and the acknowledged person should be such that they appear to be the father and the child. There must be such difference in the respective age of the acknowledger and the child which conforms to a father-child relationship.³²⁸ If the acknowledger is equal in age or is younger to the acknowledged person, the acknowledgement of paternity would be void because they would not appear to be father and child. According to Baillie, the acknowledger must be at least twelve and half years older than the person acknowledged.³²⁹

v) An acknowledged child on attaining the age of discretion, can repudiate the acknowledgement or may confirm it by its acquiescence. But for the validity of acknowledgement, confirmation is not necessary. In the case of an infant or an insane person, no assent is required; but his interests should not be adversely affected.³³⁰

vi) The acknowledgement must not be repudiated by the acknowledged person.

Once an acknowledgement is made, it cannot be revoked.³³¹ And any subsequent retraction or denial by the acknowledger cannot affect the legitimacy of the child.

Legal effects of Acknowledgement of Paternity:

³²⁷. AIR 1932 PC 25 cited *ibid*.

³²⁸. *Habibur Rahman v. Altaf Ali* (1921)48 IA 114 cf: Dr.R.K. Sinha- Muslim Law, 5th edn. 2003, p.115, Central Law Agency, Allahabad.

³²⁹. Baillie: Digest of Mohammadan Law, Part I (1957), p.411; cited *ibid*.

³³⁰. Baillie, I, 408, II, 289; cf: DR. Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998, p.310, Orient Publishing Company, Allahabad.

³³¹. *Asharof Dowlah v. Hyder Hussain* (1886) 11 MIA 94 cf: Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.206, Central Law Agency, Allahabad.

The legal effects of a valid acknowledgement of paternity are-

- 1) The child so acknowledged becomes the legitimate issue of the acknowledger.
- 2) As a legitimate child, the child is entitled to inherit the properties of the acknowledger, its mother and other relations.
- 3) Acknowledgement of paternity also establishes a lawful marriage between the child's mother and the acknowledger. As a result, she gets the status of the wife of the acknowledger and she too is entitled to inherit the properties of the acknowledger.

Adoption in Islam:

Muslim law does not recognize adoption. But in the pre-Islamic Arabia, adoption was common. The Arabs of those days used to adopt other's sons; but the object of the adoption was neither religious nor to accept an adoptee as member of adoptive father's family as it was under the old Hindu law and Roman law.³³² The only object of adoption by the pre-Islamic Arabs was to strengthen their man-power for wars with their enemies.

In *Muhammad Allhdad Khan v. Muhammad Ismail*,³³³ Mahmood J., said, "There is nothing in the Mohammedan Law similar to adoption as recognized in Roman and Hindu system."³³⁴ The Mohammedan law does not recognize adoption as a mode of filiation". According to Tyabji, "it must have been a source in those unsettled times, to have sons, real or adopted, able to bear arms....."³³⁵ But Quran expressly prohibits adoption as a mode of accepting other's child as one's own. As a result, adoption is now un-Islamic.

In connection of adoption, the Quran says: "Allah has not made for any man two hearts in his (one) body: nor has He made your wives whom you divorce by Zihar your mothers: nor has He made your adopted sons your sons.

³³². Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.116, Central Law Agency, Allahabad.

³³³. ILR (1888)12 All 289; cf: Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.206, Central Law Agency, Allahabad.

³³⁴. The object of adoption in the classical Hindu law was to have a son who could offer pandas and thereby confer spiritual benefits to the adoptive father after his death. At present, adoption is a well recognized institution of the modern Hindu law; but it has been secularized by the Hindu Adoptions and Maintenance Act, 1956. In the Roman law, adoption was one of the methods of acquiring control over the children included in the adoptive father's family.

³³⁵. Muslim Law, Ed. IV, pp.199-200; cf: Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.116, Central Law Agency, Allahabad.

Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the truth, and He shows the (right) way”.³³⁶

“Call them by (the names of) their fathers: that is juster in the sight of Allah. But if you do not know their father’s (names, call them) your Brothers in faith, or your Maulas. But there is no blame on you if you make a mistake therein: (what counts is) the intention of your hearts: and Allah is Oft-Returning, Most Merciful”.³³⁷

In 1972, the Adoption of Children Bill was introduced in the Parliament in order to make an uniform law of adoption applicable to all the citizens of India regardless of their religion. However, this Bill was withdrawn by the Government in 1978 and could not be passed.³³⁸

Some local enactments such as the Oudh Estate Act, 1869 provided for adoption by Muslim “Talukedar”. Adoption among certain sections of Muslims was prevalent also under their customary laws. The Shariat Act, 1937 has now abrogated all the customs and usages. But in respect of adoption, wills and legacies, Section 3 of the Shariat Act, provides that these three matters would be regulated by customary laws; unless a Muslim expressly declares that in these matters too, his rule of law should be the Muslim law.

In *Maulvi Mohammad v. Mahboob Begum*,³³⁹ the Madras High Court has held that if in fact, the custom of adoption is prevailing; it can be pleaded and proved. If such custom or usage is proved, there is no need of any declaration to be made under Section 3 (1) of the Shariat Act, 1937 by any one concerned so as to rule out the existence of customs of adoption. Thus, the formal declaration by the parties concerned is not necessary and that if such custom or usage is prevailing and has been proved, it would be deemed that the parties have impliedly accepted the application of that custom.

But where Shariat Act is not applicable, a Muslim may adopt under the customary law, if it prevails. For example, in Jammu and Kashmir where the Shariat Act is not applicable, adoption by a Muslim under the customary law is

³³⁶. The Holy Quran, Sura 33, Ayat 4, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

³³⁷. The Holy Quran, Sura 33, Ayat 5, translated by Abdullah Yusuf Ali, edn. 2004, Ayman Publications, New Delhi.

³³⁸. Aqil Ahmad- Mohammedan Law, 21st edn. 2004, p.206, Central Law Agency, Allahabad.

³³⁹. AIR 1984 Mad 7.

valid.³⁴⁰ Thus the existence of local custom regarding adoption in Pinar Parwarda, etc. has been recognized by virtue of the Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977.³⁴¹

Before Islam, adoption was a common practice among Pagans. Islam has completely prohibited adoption. Truth is truth and cannot be altered by adopting sons. What is aimed at is to destroy the superstition of erecting false relationships to the detriment or loss of true blood relations.³⁴² As such, in pure Islamic law, adoption is not recognized.

In 1972, the Adoption of Children Bill was introduced in the parliament to enact a uniform law of adoption applicable to all citizens of India irrespective of their religion. But this Bill could not be passed and was finally withdrawn by the Government in July, 1978.³⁴³

Though acknowledgement of paternity has some similarities of adoption, yet there is a lot of difference between the two. An acknowledgement of paternity is made when the paternity of the child is unknown; but in adoption, the father of the child must be known and it is he who gives the child in adoption. In adoption, the child is the son of his father adopted by some other person; but in acknowledgement, the acknowledger may be the father of the acknowledged child. In adoption, the child is shifted to another family; but no such change exists in acknowledgement.³⁴⁴

3) *Acknowledgement of marriage:*

When a man acknowledges that a woman is his wife, a presumption of marriage may arise. But the only condition is that such union should not be prohibited under any provisions. Similarly, if a man refuses to acknowledge a woman as his wife, the marital relationship is negated and the presumption of marriage is rebutted.³⁴⁵

³⁴⁰ Khatji v. Abdul Razak AIR 1977 J&K 44.

³⁴¹ Mohd. Akbar v. Mohd. Akhnoon AIR 1972 J&K 105 (FB).

³⁴² Abdullah Yusuf Ali- Glorious Quran II, p.1103-Notes; cf: Yawer Qazalbash- Principles of Muslim Law, 2nd edn. 2005, p.153, Modern Law House, Allahabad.

³⁴³ Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.117, Central Law Agency, Allahabad.

³⁴⁴ DR. Nishi Purohit -The Principles of Mohammedan law, 2nd edn. 1998 p.313, Orient Publishing Company, Allahabad.

³⁴⁵ Feteah Muhammed v. Abdul Rahman AIR 1931 Lah 223; cited *ibid* at p.137.

In Commissioner of Income Tax, Andhra Pradesh vs Nawab Mir Barkat Ali Khan,³⁴⁶ an affidavit filed by the assessee before the Income Tax Officer, the assessee asserted that except for one Pasha Begum, the ladies whose names were mentioned in the affidavit were not his wives though they enjoyed a special status as “ladies of position” in his place. In the case of Ja, Firman was issued by the assessee referring to the lady as “lady of position”. The assessee’s declaration made on the occasion of the demise of the lady is a strong piece of evidence to show that he had never married her and that she was only a lady of position.

The court held that the principles of acknowledgement cannot be brought into application in such circumstances. There was no unequivocal or categorical acknowledgement by the assessee that these were his wives.

In Mohammad Amir v. Vakil Ahmad,³⁴⁷ plaintiff 5 and Haji had been living as husband and wife for 23-24 years openly and to the knowledge of all their relations and friends. Plaintiffs 1-4 were the children born to them. Plaintiff 5, Haji and the children were all staying in the family house and all the relations including defendant 1 himself treated plaintiff 5 as a wife of Haji and plaintiffs 1-4 as his children. There was thus sufficient evidence of habit and repute. Haji more over purchased a house and got the sale deed executed in the names of plaintiffs 1 and 2 who were described therein as his sons. The evidence which was led by defendants 1-5 to the contrary was discarded by the High Court as of a negative character and of no value. Even when the deed of settlement was executed between the parties, plaintiff 5 was described as the widow and plaintiffs 1-4 were described as the children of Haji. All these circumstances raised the presumption that plaintiff 5 was the lawfully wedded wife and plaintiffs 1-4 were the legitimate children of Haji.

4) Continuous and a prolonged cohabitation:

Where there has been a prolonged and continuous cohabitation as husband and wife, in the absence of direct proof, a presumption arises that there

³⁴⁶. AIR 1991 SC 331 at pp. 333, 334.

³⁴⁷. 1952 SCR 1133.

was a valid marriage.³⁴⁸ Mere cohabitation will not be sufficient. It must fulfill the following conditions-

- a) The cohabitation must be a prolonged one.
- b) The parties have been cohabiting as husband and wife.
- c) They should not come within prohibited degrees.
- d) The woman should not be a prostitute or a concubine.

In *Gazanfar Ali v. Kaniz Fatima*, Privy Council held that where a woman is a prostitute, cohabitation however prolonged, can never give rise to the presumption of marriage.

The cohabitation should be of such a nature and under such circumstances that a reasonable inference is naturally drawn that the cohabitation was as man and wife, without obstacle or impediment to a valid marriage between the two, i.e., where a woman is admittedly a prostitute, no such presumption will arise, unless there is a valid marriage solemnized between the two.³⁴⁹

- e) The woman must have been treated as his wife and she has been recognized as such with intention and knowledge of giving her, the status of wife.

The continued cohabitation by itself may not be sufficient; but there must be circumstances from which, it could be reasonably inferred that it was cohabitation as between husband and wife and there was treatment tantamount to an acknowledgement of the fact of marriage and of the legitimacy of the children. The presumption of marriage may also be made if a person acknowledges either that the woman is his wife or that any children born to the woman are his children.³⁵⁰

Before advent of islam, women were treated as animals and chattels and were not given any rights. Their position was like slaves. In those days, unlimited polygamy was prevailed. After advent of islam, so many changes were brought in the sphere of marriage. It gave females, a dignified status in the society. Islam reformed the old marriages and now there is only one form of marriage, known as nikah in it, dower was made compulsory and the consent of woman in

³⁴⁸. M.P. Tandon- Muslim Law in India, 10th edn. 1994, p.80, Allahabad Law Agency, Allahabad.

³⁴⁹. *Fatima Bibi v. Mohd. Mohideen* 1971 (1) MLJ 451; cf: DR. Nishi Purohit-The Principles of Mohammedan law, 2nd edn. 1998, p.138, Orient Publishing Company, Allahabad.

³⁵⁰. *S.A. Kaiser v. Noor Sahan* 1980 CRLJ 611; cf: M.P. Tandon- Muslim Law in India, 10th edn. 1994, p.80, Allahabad Law Agency, Allahabad.

marriage was made essential. In the recent years, the Indian Muslims are infavour of monogamy. Economic stresses, desire to live a decent modern life and spread of education etc, are some of the reasons due to which, more and more educated Muslims in India now prefer to contract only one marriage at a time.

Some of the Muslim countries e.g., Turkey and Tunisia have already made laws for monogamy³⁵¹. In Pakistan, where polygamy of four wives has not been totally abolished, it has been discouraged by making such laws³⁵² under which, it is difficult to marry two or more wives. In India, up to four wives are legally allowed to Muslims. But where such Muslim is a government servant, he cannot contract the second marriage without the prior permission of the government³⁵³. It strengthened the position of Muslim females. It gave females, rights on par with males in relation to the law of marriage, which is a welcome change.

³⁵¹. Article 112(1) of the Turkish Civil Code, 1926; and Article 18 of the Tunician Code of Personal Status, 1956; Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.39, Central Law Agency, Allahabad.

³⁵². The Muslim Family Laws Ordinance 1961, Section 6.

³⁵³. Rule 18 of the All India Service (Conduct) Rules; Rule 18 of the Central Civil Services (Conduct) Rules, cited in Dr. R.K. Sinha- Muslim Law, 5th edn. 2003, p.40, Central Law Agency, Allahabad.