

Q-1 Elucidate the statement that “According to Muslim Law marriage is not a sacrament but a civil contract.” distinguish between void (batil) and irregular (fasid) marriage and state their Legal Consequences.

Under Muslim Law, a marriage is a religious duty as well as a contract. It is a contract because one party makes an offer of marriage, the other party may or may not accept the offer. The consideration is the dower which the husband is required to pay to his wife. Hamilton says the object of a marriage is enjoyment and the procreation of children.

Conditions for a valid marriage

The following are the necessary conditions for a valid marriage:

(i) both the parties, i.e., the bridegroom and bride should give their consent for marriage;

(ii) there should be at least two witnesses who would personally enquire from the bride as to whether she is willing to marry or not. Dower money should also be explained to her by them. The consent of the boy is also necessary.

Even after marriage the separate entity of the wife is maintained. Her personality is not merged with the personality of her husband. She possesses the power to purchase and sale any kind of property.

Under the Muslim Law marriage is not solemnized only for the sexual enjoyment between two spouses. It is an act of *ibadat*. According to a tradition, the Prophet of Islam said : Men marry for beauty, for ranks, for wealth, for piety, choose piety. He declared marriage is my Sunnat (or order) and those who do not obey it are not my followers. Marriage, under Muslim Law is very much unlike St. Paul's concept of marriage as clearly a concession to the weakness of the flesh.

Shoharat Singh v. Jafri Begum, the Privy Council said that nikah (marriage) under the Muslim Law is a religious ceremony and confers on Muslim women the full status of wife, and children born after it are legitimate. It leads to the upliftment of man and is a means for the continuance of the human race.

Definition.-Marriage is an institution ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity. In Abdul Kadir v. Salima, it was said that marriage among Muhammadans is not a sacrament but purely

a Civil Contract and though solemnized generally with recitation of certain verses from Quran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion. The main aim of marriage is the promotion of day to day family life and the legalization of children.

Its Essentials.-The following are the necessary conditions for the validity of a

Muslim marriage-

- (1) there must be an offer and acceptance;
- (ii) the parties must be of sound mind;
- (iii) they must have attained the age of majority.

(i) Offer and acceptance.-Islamic marriage is very simple. No ceremony is necessary for the validity of marriage. No special rite, formality is necessary. There are, however, certain essentials for the validity of marriage. There should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult.

Option of puberty.- *In Shaib Ali v. J. Nahar* it was held that for seeking relief by a girl, who was given in marriage by her guardian, she must file a separate suit. she cannot claim relief in a suit filed by her husband for restitution of conjugal rights. In *Nizamuddin v. Huseini*, it was held that the wife can exercise the option even in a suit filed by the husband for restitution of conjugal rights.

Soundness of Mind.--A Muslim of sound mind, having attained the age of majority can enter into a contract of marriage. Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians. Tyabji has enumerated the following grounds for annulling the marriage from the side of the wife:

Marriage Age.-Under Muslim law, the bride and the bridegroom must be of sound mind and must have attained the age of majority. The majority is attained at puberty. In the case of a minor, the guardian can give the minor in marriage.

The following persons can become the marriage-guardian:-

- (a) father

- (b) grandfather; and
- (c) any other guardian.

In *Sakina v.F. Sher*, it was held that a minor girl contracting marriage through her father or grandfather could not exercise the option after attaining puberty. This restriction has been removed by the passing of a separate Act. It is necessary for exercising the right of option after puberty that the marriage should not have been consummated.

In *Behram Khan v. Akhtari Begum*, it was said that consummation of marriage before the age of puberty does not deprive the wife of her option. A Muslim male married during minority has not the same right to dissolve or repudiate his marriage.

KINDS OF MARRIAGE

Under Muslim law a marriage can be divided into following three categories-

- (i) Valid (Sahih)
- (ii) Void (Batil)
- (iii) Irregular (Fasid)

(i) Valid marriage (Sahih).-A Muslim marriage is a contract. A marriage which conforms in all respects is valid. There are certain prohibitions laid down for a valid marriage. Sometimes these prohibitions are perpetual and sometimes temporary. If any spouse has neglected to follow perpetual prohibition, the marriage will be void. If the spouse has failed to follow relative prohibition (temporary) the marriage may be irregular.

(ii) Void Marriage (Batil).-A void marriage is no marriage. It is a marriage which does not exist from its beginning. It is called marriage because two persons have undergone the rituals of marriage. But since they lack absolute capacity to marry, just by undergoing ceremonies, they cannot become husband and wife. In the eye of law, they will not be considered as husband and wife from the very beginning. No consequence will follow from such union. In *Rahiman Bibi Saheba v. Mahboob Bibi Saheba*, the Madras High court held that such a marriage is only irregular and the issue is not illegitimate. In *Rashid Ahmed v. Anisa Khatoon*, it was said that a marriage with the wife of another or remarriage with a divorced wife, when legal bar still exists is void. In the case of a void marriage, parties have no status of husband and wife.

Irregular Marriage (Fasid).-Under Muslim law a marriage has been divided not only as legal and illegal but also as irregular (or invalid) and void. Under Muslim law an irregular marriage is a connection between a man and a woman which though not

amounting to a lawful marriage confers the status of legitimacy on the children. The children of such union acquires the right of inheritance. The following are the instances of an irregular marriage-

- (i) a marriage without witness;
- (ii) a marriage with a woman undergoing *iddat*,
- (iii) a marriage prohibited by reason of difference of religion, i.e. a Muslim marrying an idolatress.
- (IV) a marriage with two sisters, or contrary to the rules of unlawful conjunction; and
- (v) a marriage with a fifth wife.

An irregular marriage can be regularised. 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 irregular only. The Ithna Ashari School of the Shias does not recognise the irregular form of marriage. Under the irregular marriage the wife acquires the right of dower money. This is also the duty of the wife to observe *iddat* after separation.

VOID AND IRREGULAR MARRIAGE - DIFFERENCE

Void Marriage	Irregular Marriage
1. A void marriage is no marriage at all. It is illegal. Creates no civil rights and obligations between the parties.	1. An irregular marriage is unlawful for something. The marriage is illegal due to an inherent defect. An irregular marriage is not void ab initio.
2. Prohibition is perpetual and absolute.	2. The prohibition is temporary or relative. The marriage is irregular on account of some irregularity which can be removed afterwards also.
3. The wife is not entitled for dower money.	3. As soon as the marriage has been consummated the wife becomes entitled for dower money.
4. The children conceived and born during the existence of the void marriage are held to be illegitimate.	4. The children conceived and born during existence of the irregular marriage are held to be legitimate.
5. The wife is not under the duty to observe <i>iddat</i> on the dissolution of marriage.	5. In the case of an irregular marriage the wife
6. The wife will not acquire the right of	6. The wife will not be having any right of

inheritance.	inheritance. She will have the right of inheritance. She will have the right of inheritance on the removal of the defect.
7. No right of maintenance will arise out of such union.	7. The wife cannot claim maintenance during iddat period except where the cause of irregularity is the effect of witness. after the removal of defect, she will acquire the right of maintenance.

Suppression of material fact of marriage.-In *Smt. Asha Qureshi v. Afaq Qureshi*, the marriage was performed under Special Marriage Act, 1954. Wife was married before and was a widow at the time of her marriage with respondent. The M.P. High Court held that it was a material fact. It was not disclosed by her to respondent husband. It was held that it amounted to exercise of fraud. The husband was entitled to decree of nullity:

Presumption of Marriage.-Under the Muslim law if the man and woman were living as husband and wife for a long and continuous time, the law will presume that they were living as husband and wife. Similarly if the husband has acknowledged the woman as his wife and there was no legal prohibition in their marriage, the law will presume that they were living as husband and wife. If the husband has acknowledged the children as his legitimate children, it will be presumed that the marriage was valid and children legitimate. If the man was continuously living with a common prostitute and there was no marriage between them, the law will not presume them as husband and wife. The benefit of presumption cannot be given to those spouses whose marriage is prohibited on account of consanguinity, fosterage, affinity etc.

Legal effects of valid marriage.-The following are the legal effects of a valid marriage

- (i) sexual intercourse between the husband and wife will become legal and the children will be legitimate;
- (ii) this is the duty of the wife to obey all the reasonable orders of the husband;
- (iii) after the solemnization of marriage, the wife becomes entitled for dower money. In the case of prompt dower, she can refuse the sexual intercourse with her husband;
- (iv) the wife also becomes entitled for the maintenance;

- (v) the rules of affinity will be applicable to them and they will not be able to marry within the prohibited degrees as prescribed under the Islamic law;
- (vi) immediately after marriage the husband and wife acquire right of inheritance;
- (vii) in case the marriage has come to an end either on account of death of the husband or the husband has divorced her, she is required to observe the period of iddat.
- (viii) the husband and wife can enter into any agreement.
- (ix) the status of wife is not changed even after the marriage.

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Q-2 What is 'Dower' under Muslim Law? Explain the different kinds of dower?

Mahr' (dower) is a gift which becomes due from a Muslim husband to his wife marriage as a token of respect-symbolising his sincerity. The present era is the empowerment of women. The empowerment of women is a worldwide movement leading to substantial changes in the socio-legal systems. Therefore, the role of the previously established institution has been redefined. Recently, the new institutions have come to support the transformation. *Ulemai Deen* who are responsible for interpreting the various provisions of Quran can play very important role in bringing the beneficial changes in the classical law of Muslims. *Mahr* is an important institution of Islamic law which is directly concerned with the empowerment of women. Today, *mahr* has become a subject modern legislation. This has become necessary for the purpose of certainty to the law on the subject.

There are three necessary conditions for a lawful Muslim marriage i.e., offer acceptance and dower. In pre-Islamic period it was an essential condition to the validity of a marriage, that the husband should settle on the wife a certain dower which became her exclusive property. The custom originated in ancient times with the payments which the husbands often made to their wives as a means of support, and as a protection against the arbitrary exercise of the power of divorce.

In Islam, the right of the wife to her dower is a fundamental feature of Muslim marriage. It has pivotal place in the scheme of the domestic relations affecting rights of the spouses at more than one point. It is a debt upon the husband to be paid out of his estate. A marriage can be solemnized even without specifying the dower money. Where the dower is not mentioned the law presumes a consideration in favour of the wife. Again, under the Islamic law the wife acquires an immediate right over the dower, or that portion of it which is 'eligible' in its nature. The dower of a Muslim woman is a settlement in her favour made prior to the marriage contract.

As stated above (*mahr*) is a gift. The subject-matter of gift can be money or any other thing having value, without a higher limit, depending upon the acceptance of the wife. The ownership of the property given as dower (*mahr*) remains with the wife. The grant of absolute ownership of the *mahr* property to the wife manifests the revolutionary measures adopted by Islam to provide Muslim women property rights. The provision of dower also provides equitable marital status. The institution of dower has brought the marrying women to an equal legal position with men in concluding the marital tie after at least in theory.

Tyabji says that '*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.

Subject-matter of dower-According to the classical authorities *mahr* can be any property (mal), monetary or non-monetary, having value. Where it is non-monetary the thing to be given must be certain. *Mahr*, however, cannot be a mere promise to do or to abstain from doing something not enforceable by the Court. The husband's personal services for a determinate period can form a valid subject of *mahr*. Teaching of the Quran or providing any other educational facility to the wife can be a valid subject of *mahr*. The subject-matter of dower, either substantially or as a creation of the law, must be in existence at the time of marriage of the spouses. Under the Shia law, "a husband is fully competent to assign to his wife his own service in lieu of dower. A husband and wife can validly enter into following agreement.

Dower, its Quantum.- Under shariah, the parties to a marriage are free to determine the quantum of *mahr* themselves by mutual consent. There is no hard and fast rule on this point. However, the Hanafis insist on a legal minimum of ten dirhams equivalent to 2.97 gram of silver). The shafis do not insist upon the legal minimum but recommend it. As regards the maximum *mahr*, none of the schools of Islamic law prescribes any limit.

Practice in India

Both Sunni and Shia schools regard excessive dower as improper though not illegal. In India, Sunni Muslims fix the amount of dower at a very high rate. The amount of such a high dower is the symbol of the status of the family. The dower may be fixed at such a high rate that it may not be possible for the husband to pay the same during his life time. In *M. Shahabuddin v. Mt. Umator Rasool*, the Patna High Court said that there is no limit either to the maximum or minimum of the amount of dower, and the early Hanafi lawyers had fixed ten dirhams as the minimum for it and Malikies considered even a smaller amount as permissible. These minimums have become obsolete and the amount of dower depends entirely upon other circumstances.

Widow's Right to claim dower,-In case the wife has asked the court for the payment of dower money, the courts will have to pass order for the entire amount mentioned in the dower deed.

Reasonable Dower.- After the dissolution of marriage, wife can claim her dower money as well as maintenance for her *iddat* period. The amount of dower may be very high or it may be very low. In some cases the husband was having sufficient source of income but the dower money was not sufficient to meet the basic requirement of the wife. In such cases the legislature has power to make law providing that the court will not be bound to award the amount of dower according to marriage deed. Section 5 of the Oudh Laws Act, 1876, provided that the Court is not to award the amount of dower stipulated in the contract of marriage, but only such sum as shall be reasonable with reference to the means of the husband and the status of wife.

KINDS OF DOWER DEBTS

Fixing of Dower after marriage.- Under Muslim law amount of dower money may be fixed either before the performance of marriage or after the performance of marriage. Even if no dower (*mahr*) is fixed at the time of marriage the court may fix *mahr-ul-misl* (proper dower) later on. Section 3 (1) of the Muslim Women protection of Rights on Divorce) Act, 1986 offers the divorcee, an amount equal to the Sum of mahr or dower agreed to be paid to her at the time of her marriage according to Muslim Law. Similarly, the husband can enhance the amount of dower at any time after marriage. The Privy Council has said that if no dower is fixed at the time of marriage it may be fixed later on

Dower may be increased at any time.- The amount of dower may be fixed at time can be settled either before the marriage or after marriage. The husband any increase the amount of dower during the subsistence of marriage Similarly the can wife possesses the power either to relinquish the whole dower debt, or make on abatement her husband's favour.

Specified and Unspecified Dower- The dower amount may be mentioned or may or be mentioned. The dower amount not mentioned is known as proper dower. the dower which has been mentioned may be divided into following two categories:

- (i) Prompt dower (*Mu 'ajjal*); and
- (ii) Deferred dower (*Mu 'ajal*).

Liability of guardian to pay dower

A minor's guardian can lawfully enter into a contract in respect of his ward's dower. Such contract is binding even though it was made after the marriage. The Court

lower. determine whether the amount of dower was extravagant or not in a particular Case.

Mahs-ul-misl (Proper or Customary Dower)

A marriage of Mussalman will not be void merely because the amount of dower was not settled at the time of marriage. The dower may be payable even if the husband has died after consummation of marriage, the dower like that of the woman's equals should be awarded and paid. This may happen even if the marriage was contracted without specifying the dower money. Ameer Ali says that when no dower is fixed at the time of marriage or has not been distinctly specified either before or after marriage or has been intentionally or unintentionally left indeterminate, the woman becomes entitled to what is called the mahr-ul-misl, the dower of her equals, or the customary dower.

The proper dower (*mahr-ul-misl*) is, calculated on the basis of the status of her father's family, age, beauty, place, etc. The social position of the husband and his means carries very little force in determining the amount of dower.

Interpretation of Unspecified Dower. There is no difficulty for the courts if the amount of dower was specified and the language of the document was precise and clear. However, the difficulty may arise where the language of the Nikahnama (marriage deed) is vague and the amount of dower is not specified. In cases where a man settles on his wife a certain chattel the nature of which is described but not the value she is entitled to a chattel of medium value. Imam Shafie says that in such cases the wife should be given customary dower."

Announcement of Dower for self-glorification.-The parties may announce the dower to the public higher to the amount actually settled between the parties. Fat-wai-Alamgiri says that under Hanafi school if a man were to marry a woman for certain Sadaq (dower settled privately) and announcing a large amount in public the subject assumes two aspects-first, when a dower is settled in private, and the parties then enter into the contract of marriage.

Private settlement of Dower.-The husband and wife may settle the amount of dower privately. Later on, they may contract marriage in public on condition that there shall be

no dower to her, the amount settled in private will be her dower. Under Shia law the private arrangement will constitute the lawful dower."

PROMPT (MU'AJJAL) AND DEFERRED (MU, 'AJJAL) DOWER

The term, mu 'ajjal' ordinarily means that which has been given a priority in point of time. The term, mu 'ajjal', means delayed or postponed. Dower is an essential incident of marriage. If it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. It is payable before consummation. But it can be divided into two parts-one is called prompt, payable before the wife can be called upon to enter the conjugal domicile. The other is known as deferred-payable on the dissolution of the contract by the death of either of the parties or by divorce. It is a consideration for sale of property by husband to wife.

In *Meer Meher Ali v. Amani*, it was said that a portion of the mahr should be considered payable at once or on demand, and the remainder on the dissolution of marriage. It may be by way of divorce or on account of the death of either of the spouse. Tyabji says that 'mahr may be prompt or eligible, i.e., payable on the dissolution of marriage or the happening of some specified event. The portion which is payable immediately is called the mahr-i-mu 'ajjal and the other portion is called mahr-i-muwajal.

Prompt dower precedes cohabitation.-if the amount of dower is not fixed or the marriage is performed on the express condition that the wife will not claim any dower, the wife is even then entitled to receive proper dower (mehr-i-misl) from her husband. The wife can refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid to her. It is therefore not correct to say that the right to claim prompt dower does not precede cohabitation and comes into existence along with in.