

It marriage is
considered as a
contract



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It is against this sacramental nature of a Hindu marriage, that Justice Mahmood defined Muslim-marriage as a civil contract because no religious formalities are necessary to complete the Muslim-marriage. But this may be considered only the legal aspect of a Muslim-marriage. Besides being a civil contract, the marriage in Islam is also a social and religious institution. A court of law may not take into account its social or religious aspects but a curious student of Muslim law must examine also about these aspects.

Without study of all the aspects of the Muslim marriage, its true nature cannot be understood.

Legal Aspect:

Legally, a Muslim marriage is considered as a contract because the elements which constitute a marriage and the manner in which it is completed, is almost similar to that of a civil contract. The contractual nature of a Muslim marriage has been explained on the basis of the following facts: (a) Like contract, the parties to the marriage also must be competent, (b) Like contract, the marriage is not complete without offer, acceptance and free consent of the parties or of their guardians, (c) Like a civil contract, the terms of marriage-contract, within legal limits, may be settled by the parties themselves, (d) Just as there are rules for regulating the rights and duties of the parties upon the breach of a contract, there are also provisions for respective right and duties of husband and wife on divorce or dissolution of marriage. Commenting on the legal aspect of a Muslim-marriage, Ameer Ali observes: “ In the language of law as well as in the common parlance, the formal conclusion of contract is aqd, conveying the same meaning as the term obligation in the Roman law. In fact the aqd is the completion of

contract which commences with the proposal or demand in marriage and ends with the consent". We find, therefore, that the composition of Muslim marriage is similar to that of a civil contract. But only on the basis of the above-mentioned contractual elements, it is not correct to define it as purely a civil contract.

In its form or appearance a Muslim marriage may look like a contract but it is not so in its essence. As is evident from the following discussions, its social aspect is also very important.

Social Aspect:

Nikah is a social institution by which a definite and dignified status has been conferred upon the women. Through Islam the Prophet brought about a reform in the society. No social reform was possible without giving equal status to the females. A definite institution or an established law was, therefore, required to give equality and freedom to the females. With this object in mind, the Prophet introduced Nikah through which the females could be placed on a footing of perfect equality with males. It is, therefore, submitted that Nikah is a well established social institution which gives to the women a separate and dignified status in the society.

That a Muslim marriage is not simply a contract but also a social institution may be explained on the basis of the following arguments: (a) In every Muslim-marriage dower must be given or promised to be given by husband to wife as a mark of respect towards her. In civil contracts a general rule is that there is no liability to pay consideration if it has not been specified or referred in the contract. But, in a Muslim marriage even if the amount of

dower has not been specified, the law requires that something (proper dower) must be paid by husband to the wife as a mark of respect towards her. (b) There is limited polygamy under Muslim law and a person is not allowed to marry with more than four wives at a time. In civil contracts, one may enter into as many contracts at a time as he likes. (c) There is prohibition in the marriage between certain close relatives. Has marriage been purely a civil contract, the relationship of the parties to the marriage would not have been a relevant factor; A brother cannot marry his real sister; but he can legally enter into a contract with his sister for the sale of a house.

(d) Moreover, there are certain circumstances in which the Muslim law disapproves the contract of marriage. For example, a Shia Muslim is not allowed to marry during a religious journey (Haj). Similarly, there are other circumstances which are called the relative prohibitions in marriage. There are no such prohibitions in the civil contracts. The contract by a person for sale of a watch etc. during Haj is perfectly valid, but a marriage during Haj is void under Shia law. From what has been said in the preceding lines, it is clear that marriage among Muslims is not an ordinary contract. More truly, it is a powerful social institution for the uplift of women and, promotes the development of a healthy society, free from evils.

Religious Aspect:

Quran, which is a collection of the words of God, directs every Muslim to marry a suitable woman of his liking. It is, therefore, a religious duty of every Muslim to contract a marriage according to the rules of Islam. A person, who remains bachelor without any reasonable excuse, disobeys the words of God.

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Moreover, marriage is also the tradition (sunnat) of the Prophet. It is believed in Islam that marriage is a Sunnat muwakkidah. This means that it is an act of such a nature that if a person does it he gets religious benefits; if he abstains from doing it, then he commits a sin. Concluding upon the nature of Muslim-marriage, Abdur Rahim observes: “ The Muhammedan jurists, therefore, regard the institution of marriage as partaking both of the nature of Ibadat or devotional acts, and Muamlat or dealings among men.” Therefore, marrying a suitable girl is not only social activity but also a religious duty of every Muslim.

In *Anis Begam v. Mohd. Istafa, n Sulaiman*, C. J. has pointed out that apart from being a contract, a Muslim marriage is also a religious sacrament.

After taking into account all the three aspects, it may be concluded that in so far as the nature of a Muslim marriage is concerned, in form or appearance it is contractual but in essence its nature is undoubtedly socio-religious. A Muslim marriage (i) creates the rights and obligations of the husband and wife; (ii) confers a definite social status on them, and (iii) is also their religious duty.