

Marriage the legal  
guardian (wali) of the  
bride,



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**Marriage or Contract:**

The fundamental concept of individual liberty and responsibility, which is a corner-stone of Muslim jurisprudence, is incorporated in the institution of marriage. In Muslim law, marriage depends upon the free volition of the parties concerned, so does its dissolution, though the wife's volition in this regard is subordinate to that of the husband, since the Muslim jurists subscribe to the notion that of the two partners, the husband, on account of his physical and intellectual superiority, has to play a dominant role, and the wife is, therefore, subordinated to him, so much so that she practically enjoys no marital freedom. Some theories treat the dower as consideration for the alienation of her marital freedom. Wedded as it is to the notion of wife's subordination to the husband, Muslim jurisprudence confers on the husband almost absolute power of divorcing his wife, but denies like freedom to the wife, and consequently, the wife can obtain divorce only when the husband agrees to her proposal, and she either forgoes her dower, or gives him something in return for his consent, to release her from the marital bond. It is in this context that Schacht observed: " Marriage (nikah; zawi the husband; zawaja the wife) is a contract of civil law, and it shows trace of having developed out of the purchase of the bride; the bridegroom concludes the contract with the legal guardian (wali) of the bride, and, he undertakes to pay the nuptial gift (Mahr Sadak) or ' dower' not to the wali as was customary in the pre-Islamic period, but to the wife herself'. Wilson defines a Muslim marriage as " a contract for the purpose of legalizing sexual intercourse and the procreation of children". Fitzgerald goes to the extent of

saying that “ although a religious duty marriage is emphatically not a sacrament. There are no sacraments in Islam.

Nor is it covertures”. Judicially, Mahmood, J. defines a Muslim marriage as a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations, which it creates, arise immediately and simultaneously. The learned judge further observed: “ Marriage among Muhammadans is not a sacrament, but purely a civil contract; and though solemnized generally with recitations of certain verses from the Koran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion”. On the other hand, Abdul Rahim says that a Muslim marriage is both in the nature of Ibadat, devotional act, and muamalat, a dealing among men. Krishna Iyer, J.

concurr with the view. In his paper, “ Reform of the Muslim Personal Law”, he said: ‘ The impression that a Muslim marriage is a mere contract and not, therefore, sufficiently solemn or sacred is another fallacy of the Hindu and Western student”. Human beings, at some stages of the development of the institution of marriage, have attached some sanctity some going to the extent of calling it a sacrament, a permanent union, just as Hindus and Christians did to marriage and to that extent a Muslim marriage, too, may be called an ibadat but the most remarkable feature of Muslim jurisprudence is, that even at the beginning of the development of their juristic thought, they squarely considered the marriage essentially as a civil contract a concept which developed in the western world fully only after the Industrial Revolution. That of the two partners to a marriage, it accorded dominant position to the husband, was but natural at the stage in the development of

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human society which was starkly patriarchal. Thus, it is submitted that in its formation, the Muslim marriage is essentially a contract, though in its dissolution, the dominant position of the husband is recognized.