

A STUDY ON TEMPORARY MARRIAGE AMONG MUSLIMS: 'MUTAMARRIAGE'

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CHAPTER-1 INTRODUCTION ON MUSLIM MARRIAGE

India is a democratic and secular State it allows its citizens to follow the religions of their choice and un-codified personal laws and also allow to marry according to their religious specification.

Marriage is the main important social need as it establishes family, and family is the fundamental component of society. Also marriage is the only legal way to accept the indulging of man and women. The concept of Hindu marriage, Muslim marriage, Christian marriage, Parsi marriage systems have their different rules and regulations defined accordingly in their specified acts. Furthermore the act named "The Special Marriage Act" defines the rules and regulations for validity of inter-caste marriage.

According to Muslim norms:-

Before the birth of Islam there were several traditions in Arab. These traditions were unethical in nature and needed to be abolished in the society, Islam did it and brought a huge change in the concept of this tradition of marriage. Some of these traditions were:-

1. buying a girl from giving a fixed amount to her parents,
2. temporary marriage i.e. Muta marriage,
3. marriage with two real sisters together,
4. openness of leaving wife and again accepting her²

Now if we go further and study the Islam, we will find that it mentions complete guidance for all the aspects of living to its followers and this is the beautiful fact about this religion. Prophet Mohammed was born on 29th August, 570 A.D at Mecca. At the age of forty he received his first

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²Lawyersclubindia Article: An Overview of concept of marriage in Muslim law, dt.10.1.2010.

revelation from God and he had laid down the foundation of a new faith and the messages delivered by the Prophet have been contained in the Holy Book of Allah, called “The Quran”. The religion propounded by the Prophet is “Islam” and the persons who follow Islam are “Muslims”. Before this the position of women was very bad. There was no procedure established for marriage. But later it was improved by the policies of Prophet Mohammad. He was the one who prohibited the custom like Muta marriage or temporary marriage. Yet he was not completely successful in his work.

The instructions for marriage are specifically explained in both ‘The Holy Quran’ (the revelation of God to Muhammad, infallible but containing compressed information) and ‘The Hadith’³. So the Prophet ordered its followers to marry for its benefits morally, socially, psychologically.

“Nikah” is an Arabic term used for marriage. It means “contract”. The original meaning of the word Nikah is the physical relationship between man and woman. Nikah means union of sexes. There is also some object behind this union, which confers the status of husband and wife on a man and woman to marriage and the status of legitimacy on the children born out of such union⁴

“A contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations”⁵. It’s a mutual consent between man and woman, to have life together and give birth to children. In „Radd-ul-Mukhtar“ it has been mentioned as “there is no act of devotion that has remained prescribed for us, since the time of Adam, upon him be peace, up to his moment, and which is to be continued in paradise except Nikah (marriage) and Imaan (faith)”⁶

If we legally talk about this concept of marriage, the concept of marriage by Prophet Mohammad came because to provide the legal entity to husband and wife and children born of them. So the children born by them are called legitimate children and if the proper process is not followed then the children are called illegitimate, and illegitimate children are not given all the rights on their parents’ property. Further, the Muslim marriage fulfills all the elements of a civil contract,

³ <https://en.m.wikipedia.org/wiki>

⁴ The Principles of Mohammedan law, 2nd edn. 1998, P.105, Orient Publishing Co.

⁵ Chapter - II CONCEPT OF HINDU, MUSLIM AND CHRISTIAN MARRIAGE, shodhganga.in.

⁶ Radd-ul-Mukhtar, Vol.2 at page 280 (Hizri).

so it can be considered as a contract. The same elements of a civil contract and Muslim marriage are as follows:-

1. The parties to the marriage must be competent.
2. The contract is not complete without offer, acceptance and free consent of the parties or guardians in the same way marriage takes place.
3. There are also provisions for respective rights and duties of husband and wife on divorce or dissolution of marriage.
4. There is limited polygamy under Muslim law and a person is not allowed to marry more than four wives at a time. In civil contracts, one may enter into many contracts at a time as he likes⁷.

Hence it can be established that Muslim marriage is more of contractual nature and husband and wife enters into contract to live together and form a new family by giving birth to legitimate child and regulate social life legally by creating rights and regulations to the family and socially by being a part of society.

The Shia Law recognizes two kinds of marriage, that are:-

- (1) Permanent marriage, and
- (2) Muta (literally means enjoyment or use) or temporary marriage.

The fundamental difference between the two is that in former the term is not specified while in the later it is. Sunnis do not recognize such marriage.

The paper will further deal with Muta marriage i.e. temporary marriage

⁷ Muslim Law, 5th edn 2003, P.41, Central Law Agency, Allahbad.

CHAPTER-2 CONCEPT OF MUTA MARRIAGE

This chapter will deal with the main concept of Muta marriage i.e its meaning, elements, rules, divorce, termination, legal effect, difference between temporary marriage and permanent marriage etc.

2.1 Muta Marriage is a marriage for a fixed period of time. Thus Muta Marriage is a marriage only for sexual enjoyment for a fixed period of time. In the authorities of Sunni, they agreed that this marriage system was permitted by Prophet throughout his lifetime, later on they maintained that in the end it was completely prohibited by him. In comparison to it the Shias maintain that it was not banned by Prophet, and they tried to prove it by various sources of their religion. Having established its legality, they then devote tremendous care and attention to defining its legal status and all the rules and regulations connected with it.⁸

In Arabic dictionaries “Muta” is defined as ‘enjoyment, pleasure, delight’⁹. It may also be called marriage for pleasure. It has already established that Muta marriage is recognized only by Asharia Shias. Muta marriage is also known as Nikah al-Mutah, it is a marriage for a temporary but fixed period with a Muslim female by a male Muslim, with specifying dowar¹⁰. Muta may be defined as a temporary union of male and female for specified duration, on payment of some consideration. As against the permanent or a regular marriage (Nikah), the Muta may be regarded as a temporary marriage. This type of marriage is a private contract which can be done through oral or written process and in that the intention of marriage is done by performing the marriage accordingly and then the acceptance of the contract is done in the same process as performed in the permanent marriages. Both the parties decide the fix time for functioning of their marriage and after that specified time period, the marriage comes to an end and there is no fixed process of talaq or divorce. Here the marriage ends without the process of divorce. This clearly shows that the purpose of such marriage is for pleasure and this marriage is the way of fulfilling the sexual desires. This type of marriage is not valid according to Sunni law.

⁸ Sachiko Murata, Temporary marriage in Islamic law, <https://shiapdfresources.files.wordpress.com>

⁹“The four pillars of Mut'a: the time period (mudda).” Al-Islam.org website. At <http://www.al-islam.org/mutatemporary-marriage-in-islamic-law-sachiko-murata/four-pillars-muta>.

¹⁰ Manzar Saeed, Muslim Law in India, Orient Publishing Company, 2008, p-125.

This marriage was also in practice at pre-Islamic Arab. In Iran, this practice which is referred to as Sigheh is often viewed as a cover for promiscuity or prostitution. Such type of marriage which can last from a few hours to decades though legal is highly criticized¹¹. In the earliest period, it is said that males when the Arabs had to live away from their homes for a continuously long period either for wars or for trade and business journey, 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 children of such unions, temporary marriage was recognized and permitted by the Prophet for some time. But later on, when he felt that this concession was being exploited, he prohibited it absolutely. It is said that Caliph Omar had made an attempt to suppress and condemn the practice of Muta and tried his best to abolish it from the society. Allowing people to publicly register their union through Sigheh is a method of controlling unsanctioned sex.

After that period, the Muta form of marriage is not practiced under any school of Muslim law except the Ithna Asharia Shia law.

The man who belongs to Shia is allowed to perform or to do contract of muta marriage with the women who qualify for marriage with Muslim men as belonging to acceptable religion for this i.e. Kitabia Women or with the women who profess fire worshipping. These males are not allowed to do contract with woman who is follower of other religion. But, the woman who belongs to Shia may not perform the muta marriage with male who is not Muslim. A male (Shia) can do contract of muta marriage many times.

In Muta marriage, all the formalities of muslim marriage such as offer-acceptance etc, have to be there in this.

- **2.2 The ESSENTIALS** for the validity of Muta marriage are explained as:- There are Four Pillars of Muta marriages are explained with compared to permanent marriage¹² which are:-

¹¹ <http://www.economist.com/news/middle-east-and-africa/21611117-official-report-blows-lid-secret-world-sexthrowing>.

¹² Sachiko Murata, Temporary marriage in Islamic law, <https://shiapdfresources.files.wordpress.com>

1. The Formula:- As the marriage is of contractual nature so there is need of offer and acceptance. In permanent form of marriage, there is requirement of declaration from the woman. This should be any of three Arabic formulas that should be as same as employed by the Shia in the permanent form of marriage. After that the acceptance is made by the man and his words or actions must show that the male is satisfied with the declaration. Further it has also established that the persons who perform contract and make the declarations and acceptance must be 'worth of the contract' (ahl al 'aqd). In Muta Marriage this means that those who conclude the contract must be the man and woman themselves, or their representatives (wakil), or their fathers¹³.

2. The Persons:- In the Muta Marriage a man can conclude with Muslim woman. And even women cannot marry a male who is not Muslim. If the man is married and have wife, he cannot contract a muta marriage without his wife's permission. Then also the man does so the contract performed is not valid. The parties must have attained the age of puberty according to Muslim law i.e. fifteen years and must also possess a sound mind. Parents or Guardians cannot contract Muta marriage of any minor. It will declared as void if it has been contracted by guardian or parents.

3. The Time Period (Mudda):- In Muta marriage the period of cohabitation should be fixed (a day, a month, year , years). The time period should be fixed before the marriage and after the marriage is done there are no chances left of its increase or decrease. If the period is not specified , though dower is specified, it should be considered as a permanent union, even if the parties call it a Muta. In addition, the contract follows the intention of those male and female who perform it. Thus, if the time period is not mentioned, the marriage cannot be transformed into a permanent one, since that was not the intention. It will make the marriage permanent if the time period is not mentioned. So to make it temporary the time period should be pre decided. Hence, whenever the contract of mut'a is invalidated because the time period has not yet been stipulated, the contract will be one of permanent marriage.

¹³Ibid

There is no upper or lower limit to the duration of the time period. It makes no difference if the period is extremely long, so that one doubts whether the parties will survive its duration; or if it is extremely short, so that there is no possibility of consummation. In other words, any time period is permissible, so long as both sides are aware of the situation and are satisfied¹⁴.

4. The Dower:- In temporary form of marriage, some dower should be specified otherwise marriage will be void. The contract must mention a dower of known property, whether in cash or kind. The contract of muta does not simply mean that it is exchange of goods rather it is a contract for marriage. If the woman asks for the whole of the dower at the beginning of the marriage, it is valid she can do so. In a situation where a contract is concluded, but before the beginning of the time period the man decides not to go through with the marriage but to 'give back' to the woman the contracted time, she is entitled to one-half the dower. If the woman or the wife who has performed muta marriage about to dies because of the circumstances before the ending of the fixed time period, then her dower will not get decreased but she will get full dower.

Hence, all above mentioned points explain the essentials of Muta marriage in the form of four pillars. From these four pillars for Muta marriage we understand that the main elements for Muta marriage are:- the time period of marriage (for cohabitation) should be decided before the marriage and both husband and wife should agree to it, and dower should be specified or decided at the time of marriage or before the marriage but not after the marriage, otherwise the marriage will be declared as void. It was observed that there is no difference between a Muta in which the period has not been specified and a Muta contracted 'for life'. It was held by the court that a Muta 'for life' is like a Muta for unspecified period, and it must be treated as a permanent marriage (Nikah)¹⁵.

¹⁴ Sharh al-lum'a, v, 245; al-Matajir, Tehran 1352/1973, the book on mut'a

¹⁵ Shahzada Qanum v. Fakhr Jahan, Hyderabad.

There are further rules specified for Muta marriage. After completion of elements one should also follow the rules for Muta marriage. These rules are more relatable to a contract as the marriage is in the contractual form.

- **2.3**The **RULES** are specified as below:-
 1. The persons entering into contract should have attained the specified age i.e the age of puberty, above 15 years.
 2. The contract or marriage should be free from consent of both the sides.
 3. The children born after this marriage should be considered as legitimate child and they have all the rights to inherit the property of either of their parents.
 4. The time period and dower must be mentioned on *nikah nama*. And both should be decided either before the marriage or at the time of marriage, if not then marriage will be considered as void.
 5. In the Muta marriage the males are not restricted to polygamy or to have only one wife but they are allowed to have many wives. There is no restriction on number of wives in Muta marriage.
 6. The cohabitation between the husband and wife married according to Muta marriage is not unlawful, rather lawful.
 7. The parties in Muta marriage i.e husband and wife do not have any right of inheritance mutually.
 8. In Muta marriage divorce is not recognized.
 9. If wife claim maintenance in Muta marriage, she is not entitled to claim in this personal law. But she can claim it under CrPC. i.e under section 125 of it.

10. When the husband does not cohabit in full time period that was decided before the marriage, then the wife is not entitled to full dower, she will get half dower. But if the husband cohabit then she is entitled to full maintenance.
11. Husband should not avoid sexual intercourse for more than four months with his wife in this type of marriage.
12. If a man contract a temporary marriage with a woman, and the time period has not ended yet, he is allowed to do or contract permanent marriage with her.

- **2.4 TERMINATION** of Muta marriage is explained as follow:-

1. The Muta marriage comes to end when the time period decided before the marriage or at the marriage expire or get completed. Then the contract of marriage comes to an end.
2. When either of the party to contract dies or either husband or wife dies then the Muta marriage comes to an end.
3. When husband refuse to cohabit with the wife, then wife has the right to declare to marriage void.
4. When husband gifts the Hiba I Muddat¹⁶ i.e husband gifts the unexpired term of marriage then Muta marriage comes to an end.

- **2.5** The process of **DIVORCE** in Muta marriage is explained as follows:-

According to Ulama there is no divorce take place in Muta marriage¹⁷. The husband and wife married in Muta marriage gets separated from each other after the expiration of decided time period, otherwise the husband returns the remaining time or remaining dower to wife.

¹⁶ Muta Marriage Meaning, WRITINGLAW, www.writinglaw.com

¹⁷ Matajir. II. 301; Masalik, I, 542; Jawahir, v, 173; Riyad. II. 117; Shara'i, II, 125

But the marriage in this form dissolves by-

- a. Death of either party;
- b. On the expiry of the fixed time period;
- c. When the husband leaves the wife before the expiry of fixed time period.

- **2.6** The **LEGAL EFFECTS** related to Muta marriage is discussed as:-

1. In Muta marriage, the cohabitation between husband and wife is lawful.
2. The husband and wife don't have mutual right of inheritance.
3. The children born in Muta marriage are legitimate and have right to inherit the property of both the mother and father.
4. Wife in Muta marriage does not have any right to get maintenance. But under CrPC. Section 125 she can get it.
5. If the husband does not cohabit for the full terms and leaves the wife before the expiry of the terms, then also the wife is entitled to full dower.
6. If the wife leaves the husband, then husband has the right to deduct the dower of the unexpired time period.
7. There is no form of divorce explained in this form of marriage.

- **2.7** The **DIFFERENCE** between Temporary form of marriage and Permanent marriage is :-

1. The temporary form of marriage is called Muta marriage, but permanent form of marriage is called Nikah.

2. The main object of Muta marriage is to have pleasure, but permanent marriage is socio-religious union.
3. In Muta marriage the time period is fixed either before the marriage or at the time of marriage, but in permanent marriage the name already specifies that it is for the full life time.
4. Muta marriage is followed by Shias, while the permanent form of marriage i.e. Nikah is followed by both Shias and Sunnis.
5. In Muta marriage the dower is pre decided otherwise it is a void marriage. In Nikah the dower may not be specified, the marriage does not become void.
6. Divorce is not recognized in Muta marriage but in permanent marriage divorce is recognized for the dissolution of marriage.

CHAPTER-3 STATUS OF MUTA MARRIAGE IN INDIA

This chapter will deal with the present scenario of Muta marriage in India. It will also mention important leading cases that has done further changes in laws regarding Muta marriage and interpreted it and main incidents of Muta marriage.

Temporary “Muta” marriage is practiced today and often arranged by Imams and other Islamic leaders in Europe (the city centre’s where Shia Muslims cluster), America (Shia parts of Dearborn, Michigan), and of course in the Mideast. In Muta marriage the most commonly affected people or the victims are widows and girls who are orphaned, these are sold to old men or to those who don’t respect them and are not proportionate to them for the purpose of marriage. These females are driven to extreme means to pay rent and feed themselves and their children. These types of females are being abused by the men who purchase them and also the Islamic leaders¹⁸.

¹⁸ Does Muta marriage amount to legalization of prostitution? LEGALCRYSTAL-BLOG, www.legalcrystal.com

It is legal in the UK, US and most European countries, since it is just an extra-marital relationship with an associated civil contract. It has no other status in those countries.

As per the data collected from news the status of Muta marriage in India is negative. Majority of Indian Muslim women are against it. The Supreme Court referred to a constitution bench for adjudication for- Mut'a, or temporary marriage, is one of three forms of Muslim marriage – nikah halala and nikah misyar are the others.

Though Sunni Muslims shun mut'a, mistakenly seeing it as prostitution, it is considered legitimate by the Twelver Shia sect, which is predominant in Iran and constitutes 90% of India's Shia population. With the Supreme Court recognising, at least partially, the rights of partners in live-in relationships, it is debatable whether mut'a can be held constitutionally invalid¹⁹.

The Central government is likely to support a PIL challenging the constitutional validity of the practice of polygamy, nikah halala (a requirement for a divorced couple to remarry), nikah mutah and nikah misyar or the short term marriage, in the Muslims. The Supreme Court on March 26 sought the Central government's response on the plea. When the triple talaq was declared as invalid and void or unconstitutional, after seven months of this incident, the former court of India decided to examine or verify the valid nature of these practices of polygamy and certain forms of marriages in the Muslim community and referred the case to a Constitution bench to adjudicate.

The government, has already taken a step against the practice of triple talaq, nikah halala and polygamy on the touchstone of their constitutionality in the Shayara Bano case, is likely to take steps for it, says the sources. Noting the importance of the issue, the top court had said the matter would be heard by a Constitution bench. It is a matter of common understanding that when the government opposed instant triple talaq on the grounds of gender equality and justice, it will oppose nikah halala, nikah misyar, nikah mutah and on the same grounds, said a source in the Union Law Ministry.

When the government filed the affidavit, the challenge was to triple talaq, nikah halala and polygamy but when the matter was taken up for hearing by the Constitution bench, headed by

¹⁹ What is mut'a marriage – and why it may be difficult for India's Supreme Court to invalidate it, scroll.in

then Chief Justice Jagdish Singh Khehar, the issue was narrowed down to the constitutional validity of instant triple talaq only²⁰.

Senior advocates V Mohan Parasaran, V Shekhar, Sajan Poovayy V Shekhar, Sajan Poovayya and lawyer Gopal Sankaranarayanan told the bench that the Constitution bench, which declared triple talaq invalid, had not looked into the other practices whose legality have also been questioned.

They contended that the prevalent practices of polygamy, Nikah Halala, Nikah Mutah and Nikah Misyar were unconstitutional and should be declared illegal. The court passed the order on a batch of petitions challenging Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, for recognising and validating the practice of Nikah Halala, Nikah Mutah and Nikah Misyar as well as polygamy²¹.

A few judgement delivered by the Indian courts have reflected the above mentioned conditions for a temporary marriage. Further observations are made in several cases by certain courts.

In case Mahomed Abid Ali Kumar Kadar vs Ludden Sahiba²², wife is entitled to full dower only if the marriage is consummated, whether they continue to cohabit or not. If the cohabitation ceases through any fault of the woman then she is entitled to only half of the dower but the husband, having paid the dower is not bound to cohabit with the woman. After the dissolution of a Muta marriage, the woman divorced has no right to maintenance. The court held that although at the time of contracting Muta marriage, a dower is fixed; the husband may deduct a portion of the woman's dower if the marriage is not consummated.

In Muta marriage, mainly the cases are on the legitimacy of children. Although there are specified rules for legitimacy of child, yet there are many confusion in it. In case Hasanali Mirja

²⁰Centre likely to oppose polygamy, nikah halala, nikah mutah, New Delhi, June 29, 2018, www.business-standard.com

²¹After triple talaq, SC turns lens on polygamy, nikah, March 28, 2018, THE TIMES OF INDIA.

²²(1887) ILR 14 Cal 276.

And Ors. vs Nushratali Mirja And Anr²³ the court declared plaintiff one the declaration that he was the legitimate son and heir.

Similarly in Sadik Husain Khan vs Hashim AliKhan And Ors²⁴. Court gave the same judgement and the facts were also same.

In Shoharat Singh vs Musammat JafriBibi²⁵ case, the issue raised before the court of law is that whether Muhammad Kazim ever married to Achchhi Bibi, and if so, when, and were there any children of the marriage.

Above mentioned cases explain the status of Muta marriage and also mention the changes brought by court of law in detail.

CHAPTER-4 CONCLUSION

Muta marriage has its own positive and negative sides both. It is another similar practice of Muslims which takes the side more of males than of females. The positive aspects for males are already explained above. We cannot totally say that it is a form of prostitution in Islamic, rather it is a form of marriage in Muslims. And it is not fully confirmed that ban on Muta marriage can bring gender discrimination level zero and promote equality between men and women but the chances of rape can be increased also. It has both sides as already said that it has pros and cons. We can see it in this paper and easily understand the concept. However, this paper gives every freedom to every reader make their personal opinion, either to take it positive or negative. The paper also includes certain important cases which may help one to understand this concept through legal aspect.

²³ AIR 1935 Cal 572, 157 Ind Cas 1091

²⁴ (1916) ILR 38 All 627

²⁵ (1915) 17 BOMLR 13