

## Marriage Muslims

### 1. Absolute Incapacity or Prohibition: arises from:

(a) Consanguinity

(b) Affinity

(c) Fosterage

a) Consanguinity means blood relationship and bars a man from marrying:

1. His mother or grandmother how highsoever,
2. His daughter or grand-daughter how lowsoever,
3. His sister whether full, consanguine or uterine,
4. His niece or great niece how lowsoever,
5. His aunt (fathers sister, mothers sister) or great aunt, how highsoever, whether paternal or maternal A marriage with a woman prohibited by reason of consanguinity is void. Issues from such marriage are illegitimate.

b) Affinity prohibits a man from marrying:

1. His wife's mother or grand-mother how highsoever
2. His wife's daughter or grand-daughter how lowsoever
3. Wife of his father or paternal grand-father how highsoever
4. Wife of his son or son's son or daughter's son how lowsoever A marriage with a woman prohibited by reason of affinity is void.

c) Fosterage means when a woman other than its own mother has suckled a child under the age of two years, the woman becomes the foster-mother of the child. A man may not, for instance, marry his foster-mother or her daughter, or his foster sister.

### Exceptions

Under the Sunni law, there are a few exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage may be contracted with:

1. Sister's foster mother, or
2. Foster's sisters mother, or
3. Foster's sons sister, or
4. Foster brother's sister.

The Shia jurists place fosterage and consanguinity on the same footing and refuse to recognize the exception permitted by the Sunnis. The above mentioned prohibitions on account of

'consanguinity', 'affinity' or 'Fosterage' are absolute and the marriages contracted in contravention of these rules are void.

## **2. Relative Incapacity or Prohibition:**

Springs from cases which render the marriage invalid only so long as the cause which creates the bar exist. The moment it is removed, the incapacity ends and the marriage become valid and binding. The following are the cases:

- a. Unlawful conjunction,
- b. Polygamy, or marrying a fifth wife.
- c. Absence of proper witnesses
- d. Differences of religion
- e. Woman undergoing IDDAT
- f. Unlawful conjunction: means contemporaneously marrying two women so related to each other by consanguinity, affinity or fosterage, which they could not have lawfully intermarried with each other if they had been of different sexes. Thus a Muslim cannot marry two sisters, or an aunt and her niece.

Under the Shia Law, a Muslim may marry his wife's aunt, but he cannot marry his wife's niece without her permission. Marriage prohibited by reason of unlawful conjunction is void under Shia Law.

1. Polygamy or marrying a fifth wife: means plurality of wives, i.e. marrying a fifth wife. It is unlawful for a Mohammedan to have more wives than four.

A Muslim woman cannot marry more than one husband. If a woman marries a second husband, she is liable for bigamy under Sec.494, Indian Penal Code and the issues of such a marriage are illegitimate.

In India no Muslim marrying under or getting his marriage registered under The Special Marriage Act, 1954 ,can marry a second wife during the lifetime of his spouse.

- c. Absence of proper witnesses: It is essential amongst the Sunnis that at least two male witnesses or one male or two female witnesses must be present to testify that the contract was properly entered into between the parties. The witnesses must be of sound mind, adult and Muslim.

In Shia Law, a marriage contracted by the spouses themselves or their guardians in private are held valid. Presence of witnesses is not necessary.

- d. Differences of religion: A Sunni male can marry a Muslim female (Of any sect) or a Kitabia . Marriage with the Kitabia , i.e. a woman who believes in a revealed religion possessing a Divine Book viz Islam, Christianity and Judaism is valid under the Sunni Law. But he cannot marry an idolatress or a fire-worshiper. A marriage, however with a idolatress or a fire worshiper is merely irregular in Sunni Law, but void in Shia Law. A

Muslim woman cannot marry any man who is not a Muslim, whether he is Kitabia (i.e. man believing in a revealed religion possessing a divine book) or not. According to Mulla, a marriage between a Muslim woman and Non-Muslim male is irregular. But according to Fyzee, such a marriage is totally void.

Under Shia Law, no Muslim, whether male or female can marry a non-Muslim in the Nikah form.

Thus a marriage between a Muslim and a non-Muslim can only take place under The Special Marriage Act, 1954.

- e. Woman undergoing Iddat : Iddat is a period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband to remain in seclusion and to abstain from marrying another husband.

Under Sunni Law marriage with a woman undergoing Iddat is irregular and not void. But under Shia law marriage with a woman who is undergoing Iddat is void.

### **3. Prohibitive Incapacity:**

It arises in the following cases:

1. Polyandry
2. A Muslim woman marrying a non-Muslim
3. Polyandry: means the fact of having more than one husband. Polyandry is forbidden in the Muslim system and a married woman cannot marry second time so long as the first marriage subsists.
4. Muslim woman marrying a Non-Muslim: A marriage of a Muslim female with a non-Muslim male, whether he be a Christian, or a Jew or an idolator or a Fire-Worshiper is irregular under Sunni Law and void under Shia Law.

### **5. Directory Incapacity:**

This may arise from:

1. Marrying a woman 'enceinte': It is unlawful to marry a woman who is already pregnant by her former husband.
2. Prohibition of divorce: When the marriage is dissolved by the pronouncements of divorce three times, re-marriage is prohibited except after the lawful marriage of the woman with another man and then its being dissolved and consummation.
3. Marriage during pilgrimage: Under Shia Law, Marriage during pilgrimage is void.
4. Marriage with a sick man: Marriage with a sick man suffering from disease which is likely to be fatal is irregular. If however, he recovers and the marriage is consummated, it is valid.

Polygamy

Even in the present context, when all other religions enjoin monogamy, polygamy i.e. authority to marry up to four women is a privilege of Muslim men. Since it is one of the religious practices it is claimed to be immune from any legislative enactment.

#### Conversion to Islam for the Sake of Legitimising a Marriage

*Skinner v. Orde* (1871) 14 M.I. A. 309. Helen Skinner was married according to Christian rites with George Skinner. George died in the lifetime of Helen. Thereafter she cohabited with John Thomas who was married to a Christian wife, who was alive at that time. In order to legalize their union Helen and John both converted themselves into Islam. However, their conversion was not held to be bona fide. It was held that this conversion was pretended for the purpose of Bigamy and was not permissible under the law.