

Law of Marriage A Comparative Analysis of Arthashastra and Islamic Jurisprudence

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Abstract

Family is first and the basic unit of the society .Family lays the foundation of the any nation and shapes the destiny of the upcoming generations. It provides a safer place for young, so they can be brought up, educated, trained and civilized citizen. The mankind likes to live in society being social and affectionate to others. The main objective of the marriage in Islam is preservation of the human life in the frame of Islamic principles on the planet in the shape of procreation. Before the rise of Islam, woman was considered as property and was deprived of the inheritance .In social practice, she had no right to exercise her power or will in her property. Man and woman are two prime figures of the human society; each of them has its own identity as well as personality. The coordination of man and woman shapes the family. In this paper the law of marriage and their basic terms & conditions and principles has been discussed in detail.

Keywords: Law of Marriage, Family system, Manu Shastra, Arthashastra, Qur'an, Sunnah

Introduction

Like other earthly creatures, for the growth of human race, its: its procreation, birth, nourishment and development are considered unavoidable, there it is also considered it essential the reproduction of human race should be under some law. This is why that in every nation and religion, the meeting of man and woman is not made freely, but it is done under the social and ethical rules, because the free and unlawful merging of man and woman produce minus and fatal effects on society. There are different terms are used for marriage in religions. In every nation there are such acts, which denote Nikāh [marriage]. In Hinduism “Grihastha Ashram” (literally means "being in and occupied with home, family" or "householder"¹.) is used for marriage while in Islam “Nikāh [marriage]” is specific word for marriage. Islamic Sharia nonce such like meeting / merging of human race (man and woman) as Nikāh [marriage]. Nikāh is an Arabic word which means, meeting, adding and merging.² Qur'an has described Nikāh [marriage] as “Strong Promise”.³ God has told in the Holy Qur'an, *that those women who have sought a strong promise from you.*⁴ In the definition of Islamic Fiqh, the wording of acceptance of each other is called Nikāh [marriage].⁵ In some other places it has defined thus, that Nikāh [marriage] is a share Agreement between a man and woman,⁶ which it becomes legal for one and other to be useful for both ⁷ while the literal meaning of Nikāh [marriage] is “to connect in such a manner to absorb each other like the drops of rain in the ground or dissolve like sleep dissolve in eyes”.⁸

Kinds of Marriage

In Hinduism, marriage is started with engagement. According to it two things are necessary of the correctness of marriage.

- (1) One is that the girl belong to race of boy. Its definition is “DHARAM PATNI”.
- (2) Second is that the boy should gift something to the girl at the time of engagement. Its definition is done as “TEEKA”. On the other hand in Islam only verbal message is enough to merging the man and woman in Nikāh [marriage]. Because through Had'rat Abdullah ibn Umar (RA) indicated that the Prophet of Islam Had'rat Muhammad has said that in the presence of a message for Nikāh [marriage] of one, another should not give message of Nikāh [marriage], until the first leaves his message of Nikāh [marriage] or allow the second for message of Nikāh [marriage].⁹

In Arthashastra for all kinds of marriage has been quoted thus:

- (1) To make married one in decorated manners is called “Brāhma Marriage”.
- (2) When the husband and wife carry the scared customs of marriage jointly, such marriages are called “Prājāpatya Marriage”.
- (3) When the father in lieu of one Bull and one Cow marries his daughter in the follow up the Sacred Laws, is called “Ārsha Marriage”.
- (4) When a girl is sacrificed for a God through a PUJARI, is called “Daiva Marriage”.
- (5) When a girl on her own will meet a man, it is called “Gāndharva Marriage”.
- (6) To marry a daughter in lieu of receiving a charge amount is called “Āsura Marriage”.
- (7) One a girl is kidnapped for marriage; such is called “Rākṣasa Marriage”.
- (8) To bring away a girl in sleeping mood or intoxication, is called “Paiśāca Marriage”.

The first four kinds of marriages are appreciable due to the permission of father, because these are inheritance customs. The children born as a result of these marriages are interested in the Sacred Laws and Books.¹⁰

In the Manu Dharma Shastra it has been quoted: “In the remaining four kinds of marriages bad children are born. The boys are tyrant and liars. They have no interest for Scared Laws and Books”.¹¹ In the Arthashastra it has been quoted about such these marriages, “...That these should be avoided”.¹² Before the rise of Islam, the followers of many religions thought the meeting of man and woman wrong and negative to be near to God; and piouness and stressed to lead the life alone. Some people thought that the free meeting of man and woman had changed the human beings into animal lives and had finished the family identity in the society. According to Hadr'at Ayesha (RA), before Islam three kinds of Nikāh [marriage] were present except Islamic system of Nikāh [marriage].

- (1) NIKAH-E-IDTIBAH: It was a system in which a man sent his wife to another for getting a good child of great qualities.
- (2) NIKAH-E-RAHAT: In such system a woman met ten men and after the birth of child she called the ten men and referred the baby to one man while other accepted it.
- (3) In the third system the woman hoisted the flags on her house. Everyone could go to the woman for using. When she gave birth to a child, through a woman (guessing one) she referred the child to a man.¹³

Motivation of Marriage

In Hinduism, marriage is considered as second part/stage of life.¹⁴ According to the Hindu laws, the marriage has central importance. To be alone is considered bad in society. Particular instructions have been given in all Hindu Law about “Grihastha Ashram”. In Manu Shastra it has been said that as the husband helps the other these stages/degrees of life, therefore he has preference over all others.¹⁵ Such like in

Arthashastra is quoted, that “..With the marriage all matters are started”.¹⁶ The plea of Islam is according to the human nature. It is far better than the other systems of Nikāh [marriage]. In the Holy Quran and the Sayings of Prophet Muhammad (SAW) not only a middle way for Nikāh [marriage] has been started but it also gives incentive to it. In the Holy Qur'an and Hadith(s), the following directions about Nikāh [marriage] are given.

¹⁷ وَأَنْكِحُوا الْأَيَامَى مِنْكُمْ "In you, who are without Nikāh [marriage], they should do it.

¹⁸ فَأَنْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ "You do Nikāh [marriage] with those women whom do you like.

¹⁹ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ "Do not prevent the divorced women from Nikāh [marriage]

with their husbands. وَلَقَدْ أَرْسَلْنَا رُسُلًا مِنْ قَبْلِكَ وَجَعَلْنَا لَهُمْ أَزْوَاجًا وَذُرِّيَّةً²⁰

"...and I sent Prophets prior and established wives and children relations for them.

إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ²¹

"...and don't worry about Nikāh [marriage] if they are poor; Allah will enrich them by his bounty. In Islam Nikāh [marriage] is the Sunnah of Prophet Muhammad (SAW). He has said:²² مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ "that any of you has the power [and wealth] for marriage he should do it.

²³ Nikāh [marriage] is my Sunnah, those who has love

for me, should marry. عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَعَلَى آلِهِ وَصَحْبِهِ وَسَلَّمَ: تَزَوَّجُوا.

²⁴ النِّسَاءِ، فَإِنَّهُنَّ يَأْتِيَنَّكُمْ بِالْمَالِ

"Hadr'at Ayesha (RA) has quoted of Prophet Muhammad (SAW), Do Nikāh [marriage] to women, they will bring wealth for you. Translation: Islam has neither left the sexual feelings very free, nor has condemned it. Therefore it is fare for any Muslim to lead Rahbaniyat (loneliness) in case he has wealth for settlement. This is why the Prophet Muhammad (SAW) prohibited Hadr'at Usman bin Mazo'on from Tabattul (bachelor life).

قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: النِّكَاحُ مِنْ سُنَّتِي، فَمَنْ لَمْ يَعْمَلْ بِسُنَّتِي فَلَيْسَ مِنِّي²⁵

Translation: The Prophet Muhammad (SAW) has said, I have married and who gives up my ways, is not of us. Translation: Who did Nikāh [marriage], he got half faith, for other half, he should be afraid of ".²⁷ The youth are directly advised by the Prophet Muhammad (SAW) apart from their guardians to be careful as; "O class of youth, who of you have potential (to carry the burden) of marriage, he should marry".²⁸

Members of Marriage

According to Hinduism's Laws the some kinds of marriage mentioned before are legal and desirable. In the Arthashastra it has quoted: "The first four kinds of marriage are appreciable and legal. For that only the willingness of the girl's father is necessary while for the other four ways the willingness of parents is necessary".²⁹ While in Islamic Fiqh, the members and other points of marriage has been discussed in detailed. In Islam, for the correctness of Nikāh [marriage] the fulfillment of all members is necessary. The members of Nikāh [marriage] are Eeja'b (proposal) and Qabool (acceptance).³⁰ Such like its uttering is necessary while written Proposal & Acceptance and points is not acceptable except having no power of speaking.³¹ As for Nikāh [marriage] wordings is concern, it is compulsory to use present and past tense not future.³² If one of the two Nikāh [marriage] doers is not present, then the man through a letter presents Nikah to a woman. In the presence of two witnesses the letter should be read to woman, and woman should say

“Accepted”. In case of absence, one should appoint “An Attorney” through a letter, who may utter the wordings of Nikāh [marriage] and the second party, should accept it. This process is also for telephonic Nikāh [marriage].³³ According to Hanfi school of thought, the wordings of proposal and acceptance if said in gossip or under stress, will be considered as true Nikāh [marriage]. As the Prophet Muhammad (SAW) has said:

قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ثَلَاثُ جُذُوهْنَ جِدُّ وَهَزْهْنٌ جِدُّ وَالطَّلَاقُ وَالرَّجْعَةُ³⁴

Translation: Those three things are such, that intention of that intention and gossiping of these is intention. Those are Nikāh [marriage], Divorce and return from Divorce.³⁵ While according to other Jurists, in tyranny proposal and acceptance is not valid.³⁶

Terms of Marriage

In Hinduism, for getting marriage, there are two things are necessary. Which are; the acceptance of two parties and presence of witnesses is necessary. It has been quoted there in Arthashastra:

*“That of every kind of Nikah is legal, if the two parties are willing. Presence of witnesses is must. Two witnesses should be acceptable for the parties”.*³⁷

In Islam, the following things are essential for the correctness of Nikāh [marriage]. One is the presence of Heir and the second is two witnesses. As the Prophet Muhammad (SAW) has said:³⁸ لا نكاح الا بولي Translation: that “without Wali (Heir) Nikāh [marriage] cannot be performed”. As for as the witness is concern; it has been narrated:

عن ابن عباس رضي الله عنهما أن رسول الله صلى الله عليه وسلم قال: البغايا اللاتي ينكحن أنفسهن بغير بينة³⁹

Translation: Hadr'at Abdullah bin Abbas (RA): that those women who do Nikah without witnesses are adulterers”.

Mahar (Dower)

Mahar means financial help in lieu of Nikāh [marriage]. But in daily deal Mahar (Dower) is the wealth, which a woman has over the man for Nikāh [marriage] and sexual meeting.⁴⁰ In Hinduism, Mahar (Dower) is also considered one of the essential part of some marriage. According to Arthashastra in one kind of marriage “Aasar” wealth/money is paid to girl or her relatives. Except to this in all other kinds of marriage money is paid to the parents. In Arthashastra marriage in lieu of enough money is called “Āsura Marriage”. It is said: *“When the bridegroom on his will pays a large amount to the bride and her relatives is called “Āsura Marriage”. For the rest of marriages willingness of parents is necessary. Because they receive the money, which is paid by the husband. If parents do not exist, then the Heirs will receive the money. In the absence of the entire girl will receive it”.*⁴¹

In Mano Dharma Shashtra, in contempt of money received it has been described that according to the Law: *“The father should not accept in lieu of his daughter, otherwise he will be a children seller”.*⁴²

In Islam, for the sacred relation of husband and wife “dower” is kept with Nikah. It is not the cost of woman, but it is due to on husband in respect of the woman. The proof of Dower is in Quran, Hadith and Ijma (Consensus). In the Holy Quran the word “Sadaqa” used for Mahar (Dower). It has been ordered:⁴³ وَأَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً Translation: Pay Dower to women delightly-

Many Hadith are in favor of Dower. The Holy Prophet Muhammad (SAW) himself said about Dower and described its laws. In Hadith it has been stated that all the terms which

are essential for you to fulfill, the important Term is that by which you have done Halal (lawful) the women.

The Compatibility (Kufu)

In Hinduism, marriage has one of the important role and consider beautiful moments in a life. In Hindu's Holy Scriptures marriage consider as a holy union planned even before taking birth. Everyone wants to get a good spouse with whom he/she can create some beautiful memories. In this regard, Kundli Matching [Horoscope Matching] has a significant role and pre-requisite at the time of marriage. In Hinduism, horoscope or kundli of both boy and girl are matched in order to nullify any bad effects after marriage.⁴⁴

In Arthashastra it has been quoted: *"The bride is given the maximum property inheritance rights when the parents select the groom and the girl consents to the selection (Brahma marriage), and minimal if bride and groom marry secretly as lovers (Gandharva marriage) without the approval of her father and her mother. "However, in cases of Gandharva marriage (love), she is given more rights than she has in Brahma marriage (arranged), if the husband uses the property she owns or has created, with husband required to repay her with interest when she demands".*⁴⁵ The Islamic Sharia has taken great precautions in ensuring that Nikāh [marriage] with an incompatible person or a person of a lower social standing does not take place. In other words, do not perform the Nikāh [marriage] of a girl with a man who is not equal to her in status or who is of no match to her Compatibility or equality is considered in several factors: (1) lineage, (2) Islam, (3) piety, (4) wealth, (5) profession or occupation. The Prophet Muhammad (SAW) has said in this regard.

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ عَنْ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: (تُنكَحُ الْمَرْأَةُ لِأَرْبَعٍ : لِمَالِهَا ، وَلِحَسَبِهَا ، وَلِجَمَالِهَا ، وَلِدِينِهَا ، فَأَظْفَرُ بَدَاتِ الدِّينِ تَرَبُّثُ يَدَاكَ ⁴⁶

Muharram'at Nikāh (Illegitimacy of Marriage)

Most religions consider family life to be a blessing and value the stability of marriage. Having a family is the second Ashram, so some Hindus view it as a duty. Although, the following conditions must be keep in mind at the time of marriage. *"If the two are brother and sister; uncle and niece; Aunt and Nephew or children of brother and sister of two brothers or two sisters it must have been noticed in some communities the marriage with the wife of the brother and mother's brother and the first cousins are solemnized, those marriages, in the absence of a custom in the community are not valid marriages".*⁴⁷ In Arthashastra it has been quoted: *"It is har'am (unlawful) to marry women of direct lineage, such as grandchildren, great-grandparents, mothers, grandmothers, and great-grandparents, as well as sisters, nieces, aunts, cousins, and their daughters. It is har'am (unlawful). However, marriage is permissible at a distance of five generations, but it is not desirable".*⁴⁸ In sample words, a person cannot marry up to his second cousin from the mother's side and up to his fourth cousin from the side of the father. It is also necessary the parties should not be appends of each other from either side.

Islam allows a man to marry four wives at the same time, but there are some limitations too. Islam prohibited men from marrying some specific women. The following two verses clearly show that who those specific women with whom Nikah is prohibited are. Allah says in the Holy Qur'an:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ ۚ إِنَّهُ كَانَ فَاحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا

⁴⁹ About other prohibited marry, it has been described in detail in the following verse.

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِكُمُ اللَّاتِي فِي حُجُورِكُم مِّن نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ لَمْ تَكُونُوا دَحْلَتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَخَالَاتُكُمُ اللَّاتِي أُبْنَيْتُمْ وَأَخَوَاتُكُمْ أَلَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ ۚ إِنَّ اللَّهَ كَانَ غَفُورًا رَّحِيمًا⁵⁰

What's prohibited (for marriage) because of milk relationship are the same as what's prohibited because of blood relationship, in Islamic Sharia.

Conclusion:

Marriage is a sacrosanct union in Hinduism. It is also an important social institution. The society as well as the Indian legislation attempt to protect marriage. Hindu marriage harmonizes two individuals for ultimate eternity, so that they can pursue Dharma (Truth), Arth (meaning), and Kama (physical desires). It is a union of two individuals as spouses, and is recognized by livable continuity. In Hinduism, marriage is followed by traditional rituals for consummation.

In Islam, Nikāh [marriage] is a great bounty from Allah almighty. The affairs of this world and the hereafter are put in order through marriage. There is a lot of wisdom and many benefits in marriage. A person saves himself from sinning and his heart is put at ease. He does not have any evil intentions and his thoughts do not begin to wander and stray. The greatest virtue is that there are only benefits and only rewards in this. Keeping in view, Islam has not appreciated the celibacy instead it has incited to live a marital life. There are different objectives of marriage, like love and affection, tranquility and preservation of human procreation. Islam appreciates all these but tranquility the most on the whole. The Holy Quran says this: “And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought”.⁵¹

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⁴⁰ *Ibn Manzoor Afriqui, Lesa'n-ul-Arab*, 3/253

⁴¹ *Arthashastra, Chapter: 3, Part: 2*, p.337

⁴² *Manu Dharma Shastra, Chapter:3,Verse:41*,p.69

⁴³ *Al-Qur'an,Al-nisa*,4/4

⁴⁴ *Grihya Sutra, Chapter:3,Verse:43*,p.30

⁴⁵ *Arthashastra, Chapter: 3, Part: 2*, p.338

⁴⁶ *Al-Bukhari,1961,Vol:02,Hadith No.5068*

⁴⁷ *Grihya Sutra, Chapter:3,Verse:45*,p.32

⁴⁸ *Arthashastra, Chapter: 3, Part: 2*, p.338

⁴⁹ *An-Nisa:4/22*

⁵⁰ *An-Nisa:4/23*

⁵¹ *Al-Quran, Ar-Rum,30:21*