

VOID AND VOIDABLE *NIKAH* (MARRIAGE)

Text of Paper Delivered at the Virtual National Workshop for Area/Sharia/Customary Court Judges Held at Andrews Otutu Obaseki Auditorium, National Judicial Institute (NJI), Abuja: 13th-15th April, 2021.

BY

**HON. KADI MUHAMMAD INUWA GOMBE
SHARIA COURT OF APPEAL,
GOMBE STATE**

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

PROTOCOL

PREAMBLE

All praise and gratitude are due to Almighty Allah with Whose guidance and support all good things are realised. May He shower His peace and blessings on His messenger, Muhammad, his companions, members of his household and all who follow his guidance till eternity.

I am elated by the invitation of the National Judicial Institute asking me to serve as a resource person at this workshop for Area/Sharia/Customary Court Judges. I wish to express my profound gratitude to the esteemed Administrator of National Judicial Institute (NJI), **Hon. Justice R.P.I Bozimo, OFR** and the Education Committee of the Institute for affording me this rare opportunity of sharing my thoughts with my colleagues on this echelon of the Judiciary.

INTRODUCTION

It is established that from the earliest period of human history religion and the family have been intimately related. Each has influence upon the other so that neither can be fully understood apart from the other.

Many definitions and descriptions have been attributed to the Family. We may for our present purpose adopt a simplified definition. The following, as put forward by Abdul' Ati may suffice:

The family has been described as "a human social group whose members are bound together by the bond of blood ties and/or marital relationship. The

family bond entails mutual expectations of right and obligations that are prescribed by religion, enforced by Law, and observed by the group members. Accordingly, the family members share certain mutual commitments. These pertain to identity and provision, inheritance and counsel, affection for the young and security for the aged, and maximization of effort to ensure the family continuity in peace.”¹

From the foregoing, the family could rightly be said to be the foundation of the society. It is the nucleus of the society where the primary character- traits of man are set. As such it is the cradle of civilization. If the family is strong, the society will be good, but if there is anything wrong with it, this will cause trouble in the society. For that reason, Islam gave much care, and paid great attention to the family. Marriage is regarded as the basis of the family. It is a social institution as old as human race.

The topic of our discussion is *Void and Voidable Nikah (marriage)* which is an aspect of Islamic Family Law. Generally, a void marriage is the one that is unlawful or invalid from its beginning. It is as though the marriage never existed and it requires no formality to terminate it. Those marriages that can be cancelled at the option of one of the parties, but otherwise remain valid are said to be voidable. Such are subject to cancellation through annulment if contested in Court. The paper approaches these under the following segments, namely; Definition and nature of marriage, Purpose of Marriage, Formation/Essential Elements of Marriage, Prohibited/Unlawful Forms of Marriage and a Conclusion.

It is to be noted here that in Islam, religion and Law are indivisible. Law is the external concept of religion. The Qur'an states:

“Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the inclinations of those who do not know.” (Q45:18).

Also:

“He has ordained for you of religion what He enjoined upon Noah and that which We have revealed to you, [O Muhammad], and what We enjoined upon Abraham and Moses and Jesus- to establish the religion and not be divided therein....” (Q42:13).

It is in the light of the above that the terms Islam, Sharia and Islamic Law are used in this paper interchangeably (as synonymous) to mean one and the same thing.

MEANING AND NATURE OF MARRIAGE

It is a universally accepted phenomenon that every serious investigation starts with definition of the subject matter. Same is proposed here. A number of definitions have been attributed to the concept of marriage.

According to Abdul Fattah:

“Marriage is a means of unity that connects between a man and a woman who aim to share life together for establishing a Muslim family according to the instructions of Almighty Allah and His Messenger (SAW).”²

Hussaini defines it as:

*“In Islam, marriage is a civil contract to which both parties; a man and woman freely consent and accept.”*³

It is also defined as:

*“A relationship between a man and a woman which is recognised by custom or law and involves certain rights and duties, both in the case of the parties entering the union and in case of the children born of it.”*⁴

From the above definitions, it is manifest that marriage is a social contract which connects between parties to it, thereby making it possible for them to enjoy the company of one another. It is a solemn covenant by which rights of parties are guaranteed and respected. In Islam, marriage is of utmost importance as it helps the Muslim lead a good, stable and decent life. It is a norm of Allah in His creation as pointed out in the Holy Qur'an:

“And of his signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.” (Q30:21).

Many Qur'anic verses and Prophetic traditions call for marriage and affirmed its significance, condemning its avoidance without Legal excuse. Allah (SWT) says:

“And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-encompassing and knowing.” (Q24:32).

Abdullahi bn Mas’ud (RA) narrates that the Prophet (SAW) said:

“O young people who ever among you is able to marry should marry, for that will help him to lower his gaze guard his modesty.”⁵

Muslim jurists have interpreted the Qur’an to mean that marriage is a religious duty as well as a social necessity. As a religious duty, it must be fulfilled, but like all other duties in Islam, it is enjoined only upon those who are capable of meeting the responsibilities involved. As a social necessity it is not absolutely necessary for every individual. Thus individuals are classified with regard to their marriageability from the point of view of religion. This classification makes it obligatory on those who cannot practice abstinence and such could lead them astray, while it is preferable for those who anticipate no irresistible temptation or lack of self-control.

PURPOSE OF MARRIAGE

The strong emphasis that Islam has put on marriage may be seen clearly in the context of the purposes that it is designated to serve. Abdul’Ati maintains thus:

“Marriage in Islam is regarded first and foremost as a righteous act, an act of responsible devotion. Sexual control may be a moral triumph, reproduction a social

necessity or service and sound health a gratifying state of mind. Yet, these values and purposes of marriage would take a special meaning and be reinforced if they are intertwined with the idea of God, conceived also as religious commitments, and internalized as divine blessings. And this seems to be the focal point of marriage in Islam.”⁶

It suffices thus to point out that marriage is a means of emotional and sexual gratification; a mechanism of tension reduction, legitimate procreation and social placement; an approach to inter family alliance and group solidarity. In a nutshell, the functions of marriage could be summed up in two main heads: it is means adopted by human society for regulating relations between the sexes; and furnishes the mechanism by means of which relations of child to the community is determined. In other words, marriage in Islam serves the purposes of giving spouses right to enjoy legitimate sexual relationship as well as laying the duties of parents in child upbringing.

Doi has given a befitting description of the purpose of marriage when he explained that:

“Allah created men and women so that they can provide company to one another, love one another, procreate children and live in peace and tranquillity to the commandments of Allah and the directions of His messenger.”⁷

He further explained:

“Islam prescribes clear rights and obligations on parents and their descendants: parents are legally responsible for the education and maintenance of their children. These by turn,

are legally responsible for accommodating and maintaining their parents, if they so require, in their old age. Both parents and children inherit from each other according to a prescribed and accurate law of mirath (Inheritance) specified, in the Qur'an. Neither of them can deprive the other of their respective shares in the legacy.”⁸

FORMATION OF MARRIAGE

It has been observed earlier that Islam sees marriage as a civil contract. It then follows that if marriage is to be valid, certain conditions must be satisfied. Some of these conditions pertain to the contract itself while others pertain to the contracting parties. The details and the difference of opinion expressed are obvious. Our present inquiry would however be glued only to the general features.

Basically, there are five essential conditions upon which the validity of Islamic marriage depend, they are:

- i. Marriage guardian
 - ii. Dower
 - iii. Parties
 - iv. Formula
 - v. Witnesses
- ✓ **Marriage Guardian**

Marriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently. It is the authority of the father or nearest male relative over minors, insane, or inexperienced person who needs protection and guardianship.

A marriage guardian is thus a person who has legal authority to conduct marriage contract for and on behalf of a woman. A woman's marriage guardian is usually her father. In the case of **Shamsiyya Alh. Sale Vs Alh. Sale Gadawo** (Unreported) Appeal No **GMSJ/SCA/CVA/DB/08/16** the Gombe State Sharia Court of Appeal nullified the marriage between the Appellant and one Sa'idu because same was concluded by other than her father while the father was available and his consent was not obtained.

In the absence of the father, testamentary guardian (*Wasiy*) may act in that stance. The order of preference of guardianship is: father, testamentary father, son, paternal brothers, Amir of the Muslim community. But for a previously married woman, it is her son, paternal Grandfather, paternal uncle and his son. Emphatically, any marriage purported to have been entered into without a marriage guardian is invalid on the authority of the Prophet (SAW) who declared that:

“Any woman who marries without the permission of her guardian, her marriage is invalid...”⁹

In the case of **Maryam Ya'u Vs Alh. Ya'u Maigwanjo (2015) 3 SCLR (Pt III) 515 at 518 Ratio I**, the Court of Appeal had this to say:

“The cardinal principle of Islamic Law as regards to Muslim marriage as reported in various books of Hadith is that there is no marriage without Waliy (marriage guardian), sadaq (dowry) and two impeccable witnesses. In the light of the above quoted Hadith, any marriage contracted without the permission of a proper guardian of the woman to be given in marriage is void.”

The Bauchi State Sharia Court of Appeal also held in **Aishatu Ibrahim Vs Malam Audu Ciroma** (Unreported) **Appeal No SCA/CV/43/AB/1985** that the marriage between the Appellant and the Respondent was null and void having been contracted without a marriage guardian.

It is worthy of note that certain conditions must be fulfilled by a marriage guardian otherwise, he is not competent to act as such. He must be free born (not a slave), male sane, adult, Muslim, if the woman on whose behalf the marriage is to be concluded is also a Muslim, and he must not be engaged in pilgrimage (Hajj) or lesser pilgrimage (Umrah).

Muslim jurists seem to be inclined that marriage guardianship is a duty rather than a right of the guardian, or at least a fusion of both. Thus, while the guardian has the right to negotiate and conclude a marriage on behalf of his ward and to give his consent or object to her “unwise” choice, it is his duty to exercise this right in her best interest. He is enjoined to take her wishes into consideration. It is therefore required that in case of a previously married woman, her permission must be sought and obtained before concluding the marriage on her behalf, while in case of a virgin, her consent must be sought without which the marriage may be repudiated if she strongly desires.

It is evidently clear from the above that marriage guardianship is an essential element of marriage formation without which the marriage cannot stand. Thus any marriage which is concluded without a marriage guardian is null and void and therefore of no legal effect whatsoever.

✓ **Dower**

Dower, known as *sadaq* or *mahr* is an essential element of Muslim marriage without which there is no valid marriage. It is what a Muslim

Groom gives to his prospective bride as a consideration of the marriage. In other words, it is payment in contemplation of the marriage, usually given by the Groom to the Bride according to their mutual agreement. Dower may consist of money, property, moveable objects or services rendered to the bride herself.

This essential element is enjoined by the Qur'an and Prophetic traditions. It is the exclusive property of the woman which she is empowered to reduce, remit to her husband in whole or in part as it pleases her. Nevertheless, she has no right whatsoever to contract the marriage without dower, thus it should not be waived in toto.

The Qur'an commands on this:

“And give the woman (upon marriage) their (bridal) gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease.”
(Q4:4).

According to Umar bn al- khattab and other jurist, if a woman remits part or all of her dowry and later demands it, the husband shall be compelled to pay it back, because the fact that she demands it is a clear proof that she did not remit it out of her own free will.

Generally speaking, there is no limit to the amount or value of dower. However, some scholars maintain that the minimum is a quarter of 'Dinar' or its value. What is important is that under no circumstances should it be dispensed with. This position is best illustrated by the following situation:

“A woman came to the Prophet (SAW) and said: “O Apostle of Allah, verily I give myself to you; and stood by waiting for a

long time. Then a man stood up and said; “Apostle of Allah, marry this woman to me if you have no need for her.” The Prophet of Allah said, “have you anything for mahr, i.e. dower?” the man said that except his loin cloth he had nothing and could not get anything else, not even an iron finger ring. Then the Prophet asked. “Do you have something of the Qur’an?” “Yes” I know such and such surah; answered the man. The Prophet then said, I marry you to this woman in consideration of the *surahs* you know, i.e. that you teach them to her.”¹⁰

This further shows that the dower must not necessarily be in monetary terms; rather, it must be something lawful, known, described and distinguished. It may also be paid either at the time of consummation or afterwards. But Imam Malik is of the opinion that at least part of the dower must be paid before consummation, otherwise the woman is at liberty to deny cohabitation with the husband.

The nature of entitlement to the dower can be summed up as follows;

- i. The woman is entitled to fixed dower after consummation or if one of the spouses dies before consummation.
- ii. She is entitled to half dower if she is divorced before consummation.
- iii. She will not be entitled to any part of the dower if the marriage contract is repudiated before consummation either on ground of invalidity or defect.
- iv. She is not entitled to dower if the husband dies before consummation and no dower has been fixed, but she will inherit from him.

✓ Parties

Another fundamental aspect of Muslim marriage is the availability and mutual consent of the marriage parties. Since Islamic Law recognises marriage as an agreement between parties, it then follows that it must be contracted with the free consent of the parties to it, as there can be no valid contractual relationship without consent. For the purpose of emphasis therefore, any marriage contracted without the parties consent is invalid. When entered into, such contract can only be ratified by the parties; otherwise, either party can repudiate same. It was reported that a virgin girl came to the Prophet and complained that her father gave her in marriage against her wish. The Prophet (SAW) gave her the option to repudiate the marriage. In essence, such marriage is voidable at the instance of the party against whose consent was not sought. In the case of **Alhai Isa Bida Vs Baiwa Daughter of Alhaji Isa Bida (1980) I SLR 38**, a father intended to give his daughter to a nephew in marriage. But the mother of the would-be bride protested and got her away. The father then told his daughter to find a suitor of her own choice and he would give her away to the man she chooses. The girl then brought to the father a man called Hamman. At first the father was agreeable, later he refused and alleged that that the new suitor was a leper. The suitor denied the allegation and the lower court was satisfied and ruled that the girl could go ahead and marry Hamman. The father appealed to the Sharia Court of Appeal Sokoto which dismissed the appeal and held inter alia that:

1. The father has no right after having considered his daughter to be matured enough to decide things for herself, to give her out in marriage against her wish.
2. A father has the right not to complicate matters where his daughter is trying to get married.

It is pertinent to note that marriage parties must be known at the time of making the contract. If one of them is not known, the marriage is invalid. It is also necessary that both parties must be free from any legal impediment such as illness, engagement in Hajj or Umrah, or that either the woman is already married or is a Muslim while the man is not.

✓ **Formula**

It is established that for any contract to be valid and effectual, it must be characterised by an offer, acceptance and consideration. The same is true of marriage contract under Islamic Law. Marriage formula are those words used by the Groom or his representative seeking the bride in marriage from her marriage guardian and the simultaneous reply from the guardian that he gives her in marriage to the Groom or his representative on his behalf. It is in other words, the offer to marry by the husband or his representative and the acceptance of the offer by the woman's guardian, the dower being the consideration.

It is important to note that once the offer is made, the acceptance must follow without undue delay. The offer lapses if the other party walks away from the place or speaks on different issue all together.

Traditionally, marriage formula takes place at a meeting place fixed for that purpose. Such meeting called *Majlis* is aimed at publicising the marriage. Normally, the meeting opens with a sermon which explains the purpose of marriage and the marital roles of spouses. Some conditions may also be stipulated to form the terms of the marriage contract and may serve as evidence in case of any defect discovered later from either party.

✓ **Reliable Witnesses**

There is the necessity of witnesses to testify that a marriage is contracted between a man and a woman for such marriage to be valid. In the absence of witnesses, a husband is forbidden to consummate the marriage. It is desirable that witnesses be present at the time of making the contract in the Majlis. The Prophet (SAW) declared:

“Any woman who marries without the consent of a guardian and two reliable witnesses, her marriage is null and void.”¹¹

Although mention is being made of two reliable witnesses, that does not exclude other people who are present in the Majlis from serving as witnesses. The implication therefore is that, there should be not less than two reliable people as witnesses, even though as many people as possible, may serve in that capacity.

However, there are some pre-requisites for being a witness to a marriage a marriage contract, and these may be enumerated as follows:

- i. A witness must be adult and sane.
- ii. Both witnesses should be male only, According to Shafi'i and Hambali Schools, but Hanafi School hold that either two men or one man and two women may suffice.
- iii. They should be trustworthy, or at least not known to be of bad reputation.
- iv. They should be Muslims if the two spouses are Muslims. But if the wife is of a revealed faith (e.g. Christian) the witnesses may be of any other revealed religion.

PROHIBITED OR UNLAWFUL FORMS OF MARRIAGES

For the purpose of building a sound and healthy society whose behaviour should be distinct from the animalistic form of behaviour, certain marriages have been declared by Sharia as void ab initio for one reason or the other. Such marriages do not require any divorce i.e. repudiation from husband or by judicial process. They have no legal effect whatsoever and as such the court shall waste no time in nullifying such whenever they are brought before it.

By the provisions of the holy Qur'an, the Sunnah and other legal stipulations, there are 21 women with whom marriage contract cannot take place. Some are related by blood, some by fosterage and some by marriage. Others include a woman observing her *iddah* period etc.

The holy Qur'an provides thus:

“And marry not women whom your fathers married except what is past; it was shameful and odious, an abominable custom indeed”. “Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father’s sisters, your mother’s sisters, your brother’s daughters, your sister’s daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives’ mothers, and your step daughters under your guardianship [born] of your wives unto whom you have gone in. but if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is

ever Forgiving and Merciful”. “And [also prohibited to you are all] married women except those your right hands possess.” (Q4:22-24).

From the above injunctions, it could be deduced that a Muslim is forbidden to marry the following, as a result of blood relationship, affinity, fosterage or on account of (a woman) being legally married to another person. Such forms of marriages are categorised into two- permanent prohibited and temporary prohibited degrees. We shall therefore take them one after the other.¹²

a. Permanent Prohibition

The permanent prohibited degrees as contained in the Qur’anic provisions above cited can be itemized as follows:

1. His mother; if it is a woman, her father.
2. Step mother; in pre-Islamic period, a step son or brother inherits his father’s widow(s).
3. Grandmother(s); (including father’s mothers however high).
4. Daughter(s); (including granddaughters).
5. Sisters whether full, consanguine or uterine.
6. Father’s sister(s) (including paternal grandfather’s sister(s).
7. Mother’s sister(s) (including maternal grandmother’s sister(s).
8. Brother’s daughters.
9. Foster mother(s).
10. Foster mother’s sister(s).
11. Sister’s daughter(s).
12. Foster sister.
13. Wife’s mother.

14. Step daughter(s); (such daughters should have been born of his wife with whom he has consummated. However, if such marriage was not consummated, there is no prohibition).
15. His real son's wife.
16. Legally married woman whose marriage subsists.
17. To combine two sisters at the same time.

b. Temporary Prohibition

Temporary prohibitions are those which arise only on account of certain special circumstances in which the parties are placed. If the circumstances change, the prohibition would also disappear. These are as follows:

1. **Mut'a:** This is temporary marriage which is contracted for a stipulated period such as one year etc. This type of marriage was practiced before the advent of Islam most especially among the Arabs. Later, with the coming of Islam, this type of marriage became prohibited according to a unanimous view of all Sunni schools of law. They rely on the Hadith narrated by Ali Ibn Abi Talib that:

“The Prophet (PBUH) forbid temporary marriage and eating the flesh of donkey during khaibar.”¹³

2. **Shigar:** This is a marriage where a person gives his daughter or woman for whom he acts as marriage guardian to another person who in turn gives his own daughter or woman to the former in exchange without the mention of dower. To this, the Prophet is reported as saying;

“Marriage be exchange is forbidden in Islam.”¹⁴

3. **Marriage with triply-divorced woman:** If a man pronounces three divorces (triple divorce) against his wife, he is forbidden to remarry her until she marries another man and the subsequent marriage consummated. It is also unlawful for another man to marry the woman with the aim of divorcing her later, in order to remove the prohibition against the husband who pronounces the triple divorce. The Prophet said that:

“God has cursed who permitted the forbidden and for whom the forbidden is permitted.”¹⁵

The implication is that the so-called permission cannot legalise the woman to the husband who pronounces the triple divorce.

4. **Marriage during Pilgrimage:** It is prohibited for one to contract marriage or give in marriage while in the course of performing pilgrimage or lesser pilgrimage as per prophetic hadith:

“He who is in pilgrim’s dress (*Ihram*) could neither marry nor could be given marriage.”¹⁶

5. **Marriage during Iddah:** A marriage contracted with a woman who is observing her waiting period is void ab initio, and the impediment operates as a bar until the expiry of her period. Thus when her Iddah is over, which is normally three monthly courses, then the impediment is removed. The Court of Appeal in the case of **Alhaji Dikko Setto Vs Motsibbe & 1 OR (2013) 1 SQLR (Pt IV) 104 at 110** held that the effect of marriage contracted during *Iddah* in Islamic Law is a nullity as the same is void ab initio.

However, there is no blame if one makes an implied proposal to the woman, but such must not be so direct as to amount to a promise to marry.

It is provided in the Holy Qur'an that:

“There is no blame on you to make an indirect offer or betrothal or hold it in your hearts, but do not make a secret promise with them except in terms honourable, nor resolve on the tie of marriage until the time prescribed is fulfilled.” (Q2:235)

6. **Marriage with a Pagan or Polytheist:** This is another area of strict prohibition. So long as a woman remains an unbeliever, she is not lawful to a Muslim. But as soon as she becomes a Muslim or a believer in any of the revealed faiths, it becomes lawful for a Muslim to marry her. The Qur'an states:

“Do not marry unbelieving women (idolaters) until they believe.” (Q2:221)

However, if the woman is a Muslim, it is not lawful for her to marry any other than a Muslim,

7. **Marriage with a Sick Person:** Sharia prohibits contracting a marriage with one of the parties in serious illness, especially if it is feared that the illness may lead to his death. This is probably so to avoid want of inheritance by either party.

8. **Marriage to a Fifth Wife:** A Muslim is prohibited to have at the same time five wives. This, if allowed, contradicts the provision of the Qur'an to the effect that a Muslim is allowed a maximum of four wives. It was reported that the Prophet (PBUH) asked Naufal Ibn Mu'awiya, who had five wives then, to keep four out of them

and make the other free. Thus there is no doubt that it is the unanimous decision of Muslim jurists that no valid marriage exists if the husband is already lawfully married to four wives.

Finally, on this, in all the cases enumerated above, there is no any legal effect whatsoever. Therefore, the court may not be required to establish any evidence provided it is satisfied that the marriage falls within these two categories. Thus the marriage shall be annulled.

CONCLUSION

The discussion in the preceding heads of this paper have been able to identify to an extent, void and voidable marriages in the perspective of the Sharia. Essentially, marriages that fall short of the conditions of validity examined above are largely considered as void save in exceptional circumstances like the case of absence of consent of a party, in which case, such a party is at liberty to keep the marriage or void same. In the same vein, where it is established that one of the spouses to a marriage falls within the permanent prohibited degrees, that marriage should be declared a nullity, same being void ab initio. Conversely, marriages that fall within the degree of temporary prohibition are either void or voidable depending on their respective circumstances.

The paper is not, however, exhaustive of the topic, rather, it is intended to stir up interest and generate cross fertilization of ideas.

Thank you for your rapt attention.

Hon. Kadi Muhammad Inuwa Gombe,
(minuwagombe@hotmail.co.uk/inuwigombe@gmail.com)
Sharia Court of Appeal,
Gombe State.

APRIL, 2021 (RAMADAN, 1442AH).

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