PREREQUISITES OF MARRIAGE UNDER ISLAMIC LAW: THEIR APPLICATION IN THE NORTHERN STATES OF NIGERIA.

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DEPERMENT OF ISLAMIC LAW
FACULTY OF LAW
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DECLARATION

This Thesis has been solely undertaken by me while registered for the Degree of Masters of Law at the Ahmadu Bello University, Zaria, Nigeria, Any contribution from other parties in relation to this study have been duly acknowledged.

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CANDIDATE SUPERVISOR

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DEAN OF POSTGRADUATE SCHOOL

ABSTRACT

Nigeria is a country with a dual if not triple system of Law is largely faced with the difficulty of finding the demacating line between the rules of Islamic Law Proper, and The non-Islamic Customary Law. Islamic Law has its sources from the Qur'an - the ipsissima verba of God transmitted to mankind through the arch-angel Gabreal to the Holy Prophet Muhammad (S.A.W.); the Sunna of the Prophet - his sayings, doings and approvals; the ijma - (the consensus of Muslin jurists) and Qiyas - (analogical deduction). The topic is therefore specifically selected to restate the basic rules governing the Islamic Law of Marriage with emphasis on the Maliki doctrines and principles because it is the school of Law governing the Muslims in the Northern States of Nigeria.

Marriage under Islamic Law is a highly topical subject today with considerable significance and practical value. It's significance stems from the fact that no part of Law and institutions of society or country can be of move vital importance to it's members or inhabitants than those which regulate the institution of Marriage. Marriage is the basic unit of human civilization and is the first principle of the whole social structure and the foundation of the family is laid down through the institution of marriage.

Marriage in Northern States which is predominantly Muslims are in practice influenced by customs and usages of the people. This study is to critically analyse marriage contract in Islam, it will also explore the nature and extent it is properly maintained and practiced among the Muslim communities of the Northern States of Nigeria, and to see the extent to which local customs and usages have affected the Islamic Law on Marriage; and to suggest ways and

means of improving upon the present system.

The study is composed of six chapters excluding the introduction. The first chapter deals with brief survey of the concept of Marriage among the nations of antiquity and under Islamic Law. It also covers defination of marriage according to the various schools and modern jurists. It also highlights the objects and the various aspects of marriage under Islamic Law. Chapter two deals with the formation of marriage contract under Islamic Law and the practices of betrothal in Northern States of Nigeria. It also deals summarily with the prerequisities of Islamic Law of Marriage. The third chapter discussed the proposal and acceptance as a prerequisite of Islamic Law of marriage. An attempt is also made in this chapter to look into the stipulations that has been entrenched into the contract and to classify such stipulations as (i) Those which are valid and enforceable;(ii) Those which are invalid and therefore not enforceable and at the same time do not disturb the validity of the contract; and (iii) Those which are not only invalid in themselves but also rendered the contract void ab initio. The chapter also deals with the witnesses and the publicity of the marriage contract, and the different views of Muslims jurists. The fourth chapter sketches the broad outlines of the concept of guardianship in marriage in ancient societies and in Islamic Law as well. An attempt is also made to highlight the views of the different schools particularly with regard to the rules of priority and the doctrine of ijbar is also attempted. It also deals with the recent modifications of the issue in Muslim world and its practice in the Northern States of Nigeria. The fifth chapter contains a brief account of the concept of dower among the nations of antiquity, Pre-Islamic Arabian Customs and the customs prevelent among the non-muslim societies in Northern States of Nigeria. It also deals with the definations, classification

and adequacy of dower.

The sixth chapter deals with the legal competency of the contracting parties that, they should be free from legal bars or impediments into permanent and temporary and the practice in the Northern States of Nigeria. The seventh and the last chapter, contains an analysis of the various topics, the problems and their solutions discussed in the thesis and offers some suggestions as to what should be done to make the Law more effective on the issue of Marriage Contract and more representative of the spirit of Islam.

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IN THE NAME OF ALLAH, THE BENEFICIENT, THE MERCIFUL.

INTRODUCTION:

(1) PURPOSE:

The purpose of this study is the partial fulfilment of the requirement for the Master's Degree in Law (LLM) of the Ahmadu Bello University, Zaria.

Marriage in Northern States which is predominantly Muslims are inpractice influenced by custom and usages of people. The study is to critically analyse marriage contract in Islam, It will also explore the nature and extent it is properly maintained and practiced among the Muslim Communities of the Northern States of Nigeria, and to see the extent to which local customs and usages have affected the Islamic Law on Marriage, and to suggest ways and means of improving upon the present expensive, wasteful and to some extent negative approach to marriage. An attempt is also made to compare and contrust the Islamic practice with the practices and traditions adopted under other systems prevailing in Northern States.

(2) SCOPE:

The study is composed of six chapters excluding the introduction. Chapter one deals with the concept of marriage. The chapter deals with the marriage among the nations of antiquity. Customs of marriage in Northern States of Nigeria, concept of marriage and the defination of marriage. The chapter deals also with the objects and nature of marriage in Islam. Chapter two deals with the formation of marriage contract under Islamic Law and the practices of betrothal in Northern States of Nigeria. It also deals summarily with the prerequisites of Islamic Law of marriage. The third chapter discussed the proposal and acceptance as a prerequisite of Islamic Law of marriage. It also discussed the formal and

formation of the declaration and the acceptance and the competance of the parties involved and stipulations. The chapter also deals with the witnesses and publicity of the marriage contract, and the different views of Muslim Jurist.

The fourth chapter covers the question of marriage guardians and marriage guardian, the classes of marriage guardian i.e (Wali) mujbir and Wali not mujbir). It also deals with the recent modifications on the issue in Muslim world and its practice in the Northern States of Nigeria. The fifth chapter discussed the question of sadaq (dowry), its meaning, concept, nature and importance to Muslim marriage. It also looks into different kinds of sadaq and the legal consequences; incidence of non-mentioning and non payment, entitlement and enforcement, mordification and practice in Northern States of Nigeria.

The sixth chapter deals with the absence of impediments, general observation, need and effect of non-observance. The classification of the impediments into permanent and temporary and the practice in Northern States of Nigeria. The seventh and the last chapter is a summary and conclusion of the entire study. Here a survey of the whole system of marriage and how it effects the society at large is made. Suggestions are also made as to what should be done to make the law more effective on the issue of marriage contract and more representative of the sprit of Islam.

) APPROACH:

The fact that Islam sees life as a unity where there is no compartmentalisation of activities into the legal or moral sphere, for the two are indivisibily interwoven to the extent that every legal act is also a moral act and vise versa, in this humble study, an effort is made to survey the subject from its socio-legal point of view. Legal injunctions or juristic arguments will have no value whatsoever if the sociological context within which

it is to operate is diametrically oppose to it. Islamic principles and injunctions of necessity require also a society set up on Islamic ideals and values to operate effectively. The fact that some of its principles are not fetching the desired goals, is a proof that something is intrinsically wrong with the setting and values of the society.

In Northern States of Nigeria where about ⅔ of the population is Muslims. They perform their marriages pursuant to the Islamic Law of marriage, but they always allow their customs to be used. Because of this, now in most of the states you will find young men and women of marriageable age could not get the chance of marrying. This is despite the Islamic injunctions which made marriage in itself the most simplest social contract in a Muslim society. This is the fundamental reason why I believe this Topic of study will be very helpful, because I will try to state categorically the relationship between Islamic Law of marriage and the customs included in to it, so that we shall compare and see whether it is possible for the people in Northern States who are Muslims to drop their traditional practices which have gone contrary to the Islamic Law of marriage. The topic will also be very important to our Area Courts judges, the students in the higher institutions of learning as well as other authorities who are looking forward to finding the solution in which Islamic Law of marriage will be strictly followed.

Islamic Law, the Sharia is a way of life which the law-giver enjoins all those who accept Islam to follow. The word Islam itself means a complete submission to the way of God in all matters of life both in this world and the world hear after. Shuria comes from the Arabic word shari meaning road or part. It is therefore the road to the direction of righteousness a road to perfection which the Muslims are enjoined to follow. From this, it is clear that Islamic Law encompasses all human behaviour and conduct to-wards his creator-

The Almighty God; that is in his performance of the obligatory duties.

In every organisation, therefore, there must be a basic unit and since the family is the basic unit of a community it is necessary to have a law governing the relationship of the individual members towards each other. There must be the law creating the unit; a law setting out the duties and obligations of the members of this unit. Since this study intends a brief survey of the contemporary Muslim societies of Northern States of Nigeria, with particular reference to their method of contracting a marriage contract and the subsequent consequences that follows, a brief survey of the basic sources of Sharia becomes necessary.

(4) SOURCES:

Islamic Law is an all-embracing legal system that regulates and guids the life and conduct of Muslims concerning their rights and duties. The purpose of the law is to promote the welfare of people both individually and collectively and its basic principles are justice, equality, liberty and fraternity.

According to the classical theory Islamic Law derived from the following sources:-

(a) PRIMARY SOURCES:

(i) QUR'AN:

Qur'an is the name of the Book containing the word direct revelations from God. Every word of the Qur'an is that of the Almighty, revealed to the prophet Muhammad (S.A.W) through the Angel Gabriel. The sovereign authority to enact laws primarily belongs to God, and He alone has supreme legislative power (law giver) in the Muslim system. Ever since the days of Adam, God has promulgated His laws and ordinances on this earth from time to time through His Messengers and Prophets.

Qur'an is the original primary and sovereign source of Islamic Law from which all the principles, ordinances, teachings and practices of Islam are drawn. The Quran is actually the real foundation of which the whole superstructure of Islam rests. The authority of the Quran is supreme and paramout and it is the first source of law not only in point of time but also in point of importance. The name Quran is frequently mentioned in the book itself (1), which also states to whom, when, in which language, how, and why it was revealed. It was revealed to Muhammad: "And (who) believe in what has been revealed to Muhammad, and it is the very truth from their Lord".(2)

The Quran contains about 6,000 verses but not more than 200 verses deals with legal principles and if we leave out of account those which concern the states as such, there are about 80 verses, more or less, which deals with the law of Personal status. Most of them are concerned with inheritance, marriage, divorce and such like matters.

(ii) SUNNA (TRADITIONS)

The second important source of law, which ranks next to the Qur'an, is the Sunna, the practices, the precedents and the precepts of the prophet Muhammad (S.A.W.) Sunna literally means a way of rule or mode of life. This in essence signifies the ideal practice followed or enjoined by the prophet and includes what the prophet said, did and or approved. The principles and fundamentals which were stated in the Quran found their application in the hands of the prophet either by his words or deeds. Consequently, what was said or done or upheld by the prophet becomes a primary source of Islamic Law second in point of time and authority, only to the Qur'an. The importance of Sunna as an important source of Islamic Law has been laid down in the Quran, emphasised by the prophet, recognised by his immediate successors and other

companions and accepted by all the prominent Orthodox Muslim jurists. Sunna is the living Quran. Where Quran is silent, the Sunna speaks. Sunna, properly speaking, explains, expanded, elucidates, interpret and supplement the Qur'an.

(iii) IJMA (Consensus of Opinion of Muslim jurists of a Particular Period) is regarded by the majority of Muslim jurists as the third source of Islamic law, both in point of time and importance, after the Holy Qur'an and the Sunna. The basis for the validity of Ijma as a source of law is founded on the Quranic and Sunna texts.

(iv) QIYAS (analogical deduction), is regarded as the next source of Islamic law. It signifies a process of deduction by which the law of a text is applied to cases which though not covered by the language, are covered by reasons of the text. Qiyas is the comparison between a new proposition and an old established matter with regard to the order and reason thereof.

(b) SECONDARY SOURCES:

The secondary sources reflect mainly the difference of opinion among the jurists in matters where discreation can be exercised and lead to refinements and distinctions which have became questions of controversy among the adherents of various schools. Some of the important secondary sources are:-

(i) Urf, (customs)

(ii) Istihsan, (juristic preference)

(iii) Istislah, (public intrest)

(iv) Istidlal, (Reasoning)

The much publicised conflict between law and religion is irrelevant to and has no place in Islam.

In Gibbs words:

"are indivisible...law is the external concept of religion .....from this follow two important consequences as

> distinguishing features of law in Islam..... The first is the width of the field it covers... The second is the spirit by which its judgements are made...In framing its defination, therefore, the ethnic aspect is paramount; and in no case the legal judgement conflict with it".

The system as a whole "is, in Mine's sense a system of equity. Like other systems of equity, it is addressed to the individual conscience and acts personam. It differs from other systems of equity in that it is not content to exist along side the original law it supersedes, but rather abrogates or obsorbs it." In accordance with the strict legal element, justice remains, but in accordance with Islam, "religion demands that it shall be tempered with mercy or even, in the relation between man and man replaced by mercy." (4)

Moreover, one fundamental rule in Islamic law is the principle of "liberty" or "permissibility" that is, everything is in essence lawful unless explicity designated otherwise . "Islamic law, like other systems of law, recognizes that social life would be unthinkable without some specific rules. But,and probably unlike them, it extends its applications to overt and covert behaviour, to the manifest acts and the inner-most feelings and thoughts of man. It is true that such covert aspects of behaviour, may not fall within the realms of formal law; but this is probably where the moral religious precepts become most meaningful. An act is not only legal or illegal, formally ethical or unethical, behaviorally physical or mental; it is above all else, a total involvement that is highly consequential and judiciously weighed by a very sensitive scale. Thus any action can be classified in Islamic law, under one of five basic categories; obligatory; voluntry but meritorious and

commendable; neutral, permissible or unlawful; reprehensible; and forbidden."(5) On the basis of this outlook human action is highly consequential in the direct legal moral or religious sense action in Islamic law is rewarded or punishable in the hereafter now if it is judicially delectable, and in the hereafter if it is not so. This is part of the actor's defination of the situation, a defination which takes the conception of Allah as a basic element of the entire situation of action. It is also part of the defination of the situation that the norms provided by Islamic law are for the welfare of man here as well here - after (6).

To understand and explain the system, it is necessary to realize the complementary nature of its religious, moral, and legal elements. Considering Islamic law from the strictly legal, moral, or religious point of view alone is probably more misleading than helpful. Even taking legalism and morality in to consideration, but disregarding religion, is more omissive than inclussive and may be just as misleading. What seems lacking in the views of most critics is adequate appreciation of the religious component whose purpose is to integrate and reinvigorate the ethical and legal elements, and whose appeal to or impact upon the actor may be greater than that of formal codes of law and ethics.(7) And the fact that Islamic law holds the religion , moral, and legal elements as indivisible may suggest that in the Islamic conception of society the mechanisms of social control are likewise indivisible. Human behaviour is so complexed that to control it in a comprehensive way there must be an integrative synthesis of religion moral and law. This tendancy of Islam may also suggest that the legal system of a society is determined by, and in turns determines, the ends of that society. Because of both the worldly involvement and the otherworldly concern of Muslim society, Islamic law was formulated with a view to incorporating in one system a religious spirit, a moral fabric, and a mundane practi-

cally.

In short, Islamic Law is distinguished by the variety of its sources, by the wide area of "behaviour" it covers as well as the range of the religious, moral, and legal principles of action it contains. It assigns to man a greater responsibility and to action more quensequences than are perhaps found incomparable systems of law or behaviour. It sets before a man ends beyond his immediate sense of time and space, conceiving God as an integral part of any action situation(8).

(5) THE FAMILY:

There have been many defination and discriptions of the family. For our purpose, we shall adopt the following simplified defination - "The family is a human social group whose members are bond together by the bond of blood ties and/or marital relationship."(9). The family bond entails mutual expectation of rights 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 provisions, inheritance and counsel, affection for the young and security for the aged, and maximization of effort to ensure the family continuity in peace.

As can be clearly seen from this, the foundations of the family in Islam are blood ties and/or marital commitments. Adoption, mutual alliance, clientage, privite consent to sexual intimacy, and "common law' or "trial" marriages do not institute a family in the Islamic sense. Islam builds the family on solid grounds that are capable of providing reasonable continuity, true security, and mature intimacy. The foundations of the family have to be so firm and natural as to nurture sincere reciprocity and moral gratification - Islam recognizes that there is no more natural relationship than that of blood, and no more wholesome pattern of sexual intimacy than one in

which morality and gratification are joined.

(6) MARRIAGE, THE BASIS OF FAMILY: - a little comparison between other systems

Islam recognizes the religious virtue, the social necessity, and the moral advantages of marriage. The normal course of behaviour for the Muslim individual is to be family oriented and to seek family of his own. Marriage and the family are central in the Islamic system. There are many passages in the Quran and traditions of the prophet which go as far as to say that when a Muslim marries, he has thereby perfected half of his religion; so let him be God-minded and careful with the other half. The Quran says

> "O Mankind, be conscious of your duty to your Lord, who created you from a single soul, created of like nature, his mates, and from the two created and spread many men and women; and be mindful of your duty to God in whose name you appeal to one another and to the ties of the womb. Verily God watches over you."(10)

It may be noted that in this verse, the institution of the family - the first family of Adam and Eve- is shown as the main spring of the human race.

In another chapter the creation of man and woman and the marriage relationship permeated with tranquility, love and mercy have been described as "signs of God."(11). The institution of marriage and the family have been commended as the "way of the prophets".(12). And the prophet Muhammad (S.A.W.) has said,"Marriage is a part of my Sunnah, whoever runs away from my path is not from amongst us"(13).

It will be noted that, in many Quranic verses - 7;189,16; 72,30;21,42;21 etc, the multiplication of the human race is mentioned as one of the objects of marriage. The family which

is the real unit of the human race and the first conhersive force which makes civilization possible, owes its existence solely to marriage. O If there is no marriage, then there can be no family, no ties of - kinship, no force uniting the different elements of humanity and consequently no civilization. It is through the family that humanity is held together and civilization is made possible.

Muslim scholars have interpreted the Quran to mean that marriage is a religious duty, a moral safeguard, and a social commitment. 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.

Under other systems of law, any union between man and woman whether legal ie. through a valid marriage, or illegal ie. by way of adultry would be the bases of family. In these systems of law, a woman has been regarded as a means to provide sensuos pleasure only to the male. Also adoptation is regarded as a means of having children. It is not c uncommon in some parts of Northern States that adultry has not been regarded as a crime. In some places it is a condition of the marriage that a husband has to pregnate his would be wife before the actual marriage takes place.

(7) FAITH AND THE FAMILY:

Faith constitutes the bedrock for the institution of the family. A Muslim is not permitted to marry a non-Muslim.(14). The only exception is that a Muslim male can marry a jewish or Christian woman, on the grounds that the Muslims, Christians and Jews believe in revealed books and as such share, to a certain extent, a common outlook of life. This permission is only in cases where the husband, the head of the family, is a Muslim. A Muslim woman is not permitted to marry a Christian

or Jewish husband except when he embraces Islam. Marriage should be among partners who share a common outlook on life and mority, and who participate in this co-venture to fulfil their destiny c God's vicegerents. In fact, it has been emphasised that a guidi principle in matrimony should be that of "corrupt women for corrupt men, and corrupt men for corrupt women; good women for good men and good men for good women"(15), and that "the fornicator shall marry none but a woman who fornicates"(16). The prophet has said:"A woman may be married for four reasons; for her property, for her rank, for her beauty and for her religio n (and character). So marry the one who is best in religion and character, and prosper"(17)

Faith continues to play a decisive role in the entire system of family relationships. A father or a son is not to inherit or make a bequest to a non-Muslim son or father. Similarly if one of the spouses changes his or her faith, the marriage contract is broken. These instances do not mean that the Shariah does not prescribe rights and obligations even in such cases. A non-Muslim father has certain rights as has a wife who changes faith. But that is a different issue. Here we are only trying to bring home the crucial role of faith in the institution of the family as such. Thus, marriage is not simply a sexual relationship. It is a basic religious and social institution.

It is somewhat curious that the family is not necessarily a "religious" unit. While Islam prescribes family rights and obligations, it does not seem to presuppose, at least on the primary level, religious uniformity. Family members are entitled to their rights and are assigned reciprocal obligations which hold whether or not the members subscribe to the same religious beliefs. The principle holds for both primary foundation of the family - ascribed blood ties and the acquired marital relationship. Islam did not insists on religious uniformity as a condition for the full imple

mentation of the mutual expectations of the family members, because the Qur'an clearly stated that:-

> "Let there be no compulsion in religion: Truth stand. out clearly from error: who ever rejects evil and believes in God has grasped the most trustworthy hand-hold, that never breaks and God hearth and knoweth all things. (18).

This declaration of freedom of belief and concience would make Islam's insistence on religious uniformity of family members an internal inconsistency or obvious contradiction, something that is unthinkable for Muslims.

INTRODUCTION

1. Quran 2:185; 10:37 and 61; 17:106.
2. Quran 47:2
3. Gibb, H.A.R. "Law and Religion in Islam." In Rosenthal, E.J.J., edition, judaism and Christianity Vol. III, PP. 145 - 169, The University of Chicago Press, 1947
4. Ibid at P. 150 - 159.
5. Hammuda, A.A., (The Family Structure in Islam), American Trust Publication, 1977, P. 16.
6. Ibid at PP. 16 -17
7. Gibb, H.A.R., Supra, at P. 165.
8. Hammuda, A.A. Supra at PP. 17 - 18.
9. Hammuda A.A., (Islam in Focus), American Trust Publication, Indiana 1980, P. 134.
10. Quran 4:1
11. Quran 30:21
12. Quran 13:38 "We indeed Sent Messengers before you (O Muhammad) and We Assigned them with wives and Children".
13. Al-Bukhari, (Sahih al-Bukhari), Tr. Dr. Muhammad Muhsin Khan, 1977 PP. 1-2 Published by Hilal Yayinlari Turkey.
14. Quran 2:221
15. Quran 24:26
16. Quran 24: 3
17. Bukhari and Muslim, quated in (Miskhat al-Masabih), Tr. J. Robinson Lahore, S.M. Ashraf 1963, Vol. II, P. 658.
18. Quran 2:256.

CHAPTER ONE

CONCEPT OF MARRIAGE

1. GENERAL SURVEY:

In any study of the Law of Marriage as it is today, some knowledge of the history of the subject is desirable. The customs of primitive people as to marriage vary widely and that it is very difficulty to make any general statement with regards to them. Howeve , a brief account of some important and interesting customs will be useful for the sake of a comparative study.

Marriage in society is neither a new issue nor is it fully settled. The position of Islam on this issue has been among the subjects presented to the western reader with the least objectivity. It is, therefore, intended to provide a brief and authentic exposition of what Islam stands for in this regard. The teachings of Islam are based essentially on the Qur'an and the Sunna of the Prophet (S.A.W), which properly understood and interpreted, provide both the basis and structure for Islamic Law.

2. MARRIAGE AMONG THE NATIONS OF ANTIQUITY

(a) GREEKS: Among Athens, women were not better off than either the Indian or Roman. Her consent in marriage was not generally thought to be necessary and she was obliged to submit to wishes of her parents, and receive from them her husband who is to be her lord even though he were a stranger to her.[1]

(b) ROMANS: In Roman civilization, the woman was continually under the tutelage and guardianship of her husband. She was incapable of doing or acting anything according to her own individual taste. She was completely dependent, and upon marriage, her person and property passed into the power of her husband. A woman could not exercise civil or public office, could not be a witness, tuitor; she could not adopt or be adopted or make a will or contract.[2]

(c) HINDUS: In Hindu scriptures, subjection was a cardinal principle. The women were held by their protectors in a state of dependence. The description of a good wife is as follows: a woman whose mind, speech and body are kept in subjection, acquires high renown in this world, and in the next, the same abode with her husband.[3]

(d) CHRISTIAN MARRIAGE: In Common Law consent of the parties to the marriage - (matrimonium non facit coitus set voluntas) was regarded as essential. It was also a sacrament; and the blessing of the priest was considered one of the necessary conditions of validity. The conception of marriage envisages that man and woman were made "one flesh" by the act of God.

The Canon Law of the Roman Catholic Church was the only Law governing matrimonial relations in Western Europe until the reformation, and has still exclusive authority in some Roman Catholic countries.[4]

3. PRE-ISLAMIC ARABIAN CUSTOMS

The Islamic Law of Marriage is the reformed shape of the Pre-Islamic Arabian Customs of marriage and to appreciate the reforms brought about by Islamic Law in this respect, it is necessary to cast a look on the pre-Islamic Arabian customs so that the nature and magnitude of reforms may be noted.

The pre-Islamic Arabian customs regulating sexual relations and the status of children as mentioned in kashful Gumma[5] were as follows:

(a) a custom according to which a man would say to his wife: "Send for so and so" (naming a famous man) and have intercourse with him." The husband would then keep away from her until she had conceived by that man, and then he would return to her. This custom originated from a desire to secure a noble seed.

(b) another custom was where by a number of men, less than ten, used to go to a woman and have a sexual connection with her. If she conceived and was delivered a child, she would send for them, and they would be all bound to come. When they assembled, she would address them saying: "you know what has happened. I have now brought forth a child. Then there she would name whomsoever she chooses, and say, "this is your child." The child would then be ascribed to the man, and he was not allowed to disclaim its paternity.

(c) another custom was where by a number of men would visit a woman, who would not refuse any visitor. These women were prostitutes and would fix at the doors of their tents a flag as a sign of their calling. If a woman of this class conceived, the men that frequented her house or tent would be assembled, and physiognomists would decide to whom the child belonged.

(d) another custom, is where by a man asks another for the hand of the latter's ward or daughter, and then marries her by paying dowry.

4. CUSTOMS OF MARRIAGE IN NORTHERN NIGERIA

In Northern States, among the non-Muslim societies, the position still remains the same although the bride and the bridegroom must first give their consent. Marriage is concluded upon payment of the dowry by the husband to the parents of the girl and this dowry remains the parent's property. even though sometimes the dowry may be services rendered to the father of the girl. In fact a woman married under the various customary laws, does not enjoy the emancipation indulgence as her counterpart enjoys under Islamic law. Upon termination of the marriage she is not free to marry another man of her choice like her counterpart would under Islamic law. If the husband dies then the marriage is not, in fact, broken, but is regarded as part of the estate of her deceased husband and could be inherited by another male member of the husband's family. Usually the eldest son of the husband, if he is adult, or the deceased brother, or the widows are distributed amongst the brothers of the deceased. If, however, she refuses to abide by the decision of the family council or refused to accept any member of her deceased husband's family, then she must refund the whole of the dowry that was paid on her by the deceased husband.

The idea of the widow inheritance in Nigerian society as suggested by James J. was that it was regarded as a sort of native customary economy for providing maintenance for the widow on the death of her husband.[6] While Jibow, J. (as he then was) thought that the concept was based on the principle that women were chattels.[7] The latter view might be the correct interpretation of this concept since it is recognised that if she refused to marry any member of the family she would have to refund the dowry. However one might not totally disagree with the former view especially when there are children between her and the deceased husband. It might be that by keeping the wife within the family it might provide security to the children as the new husband would either be elder brother to the children or their uncle.

5. CONCEPT OF MARRIAGE IN ISLAM

The institution of marriage (nikah) occupies a paramount and pivotal position in the Islamic Family Law. Among the Arabs nikah is a wife term which means "joining together" or "sexual intercourse". But in Islamic Law it has a very definite legal sense and meaning, it is a contract for the legalization of sexual intercourse and the procreation of children.

"Marriage", says the author of (Hamilton, "is an institution which has been legalised for many objects. Islamic Law has ordained the institution of marriage thereby sanctioning sexual relation between two members of the opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning livelihood."[8]

It follows from the above theory, therefore, that marriage was instituted to ensure the permanence of the marriage relations by which foulness and unchastity may be prevented thereby promoting a normal family life. It is also an institution by which procreation of children is allowed and the legitimacy of the children is established. To the same effect Quran says:

> "And among His signs is this, that He Created for you mates from among yourselves that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Verily in that are signs for those who reflect."[9]

Islam view marriage as a strong bond (mithaqur-ghaleez), a challenging commitment in the fullest sense of the word. It is a commitment to life itself, to society, and to the dignified meaningful survival of the human race. It is a commitment that married partners make to one another as well as to God. It is the kind of commitment in which they find mutual fulfillment and self-realisation, love and peace, compassion and severity, comfort and hope. All this is because marriage in Islam is regarded first and foremost as a righteous act, an act of responsible devotion.[10] Marriage is a divinely ordained and inspired institution. It was an institution that come into existence with the creation of man. It is in the nature of a contract entered with the consent of the parties. It is defined as "a solemn covenant between Allah and the human parties as well as between the parties themselves."

However laudable the concept of marriage in a society may be, it does not allow for free sexual intercourse. Some people especially in the Western world, find means of criticising the Islamic attitude against free sexual relations. For instance, western Biologist accused Islam of repressing the vital energy of man and rendering his life very miserable. No religion is as frank as Islam in recognising the natural motives and treating them as clean and healthy. Quran says:

> Fair in the eyes of men is the love of things they covet: women and children; heaped-up hoards of gold and silver; horses branded (for blood and excellence; and (wealth) cattle and well-titled....."[11]

In this verse, the Qur'an names the earthly desires and recognises them as a matter of fact and states that they are desirable things in the eyes of men, but does not object to these desires as such, nor does it disapprove of such feelings. However, Islam does not permit people to give way to such desires or to be dominated or enslaved by them. Humanity aims at development and improvement, it can never achieve such aims as long as it is dominated by its unruly passions which exhaust all the energy and lead it downwards to animalism. In its treatment of human soul, Islam recognises in principle, all the natural emotions and permits as may give pleasure without causing any harm or injury to the individual or to the community by the destruction of the concept of family thereby rendering human society to the society of animals.

The Prophet (S.A.W.) is reported to have said:-

> "A man is recompensed for the sexual act he performs with his wife." And when his companions asked: 'Is the person rewarded for satisfying his passions?" The Prophet (S.A.W) answered:- "Do you not see that if he were to satisfy it in prohibited manner he would be committing a sin? So if he satisfies it in a lawful manner he will recompensed."[12]

From the above tradition it is clearly understood that since sexual intercourse between legally married couple attracts rewards, the act must therefore be pious. But on the other hand the institution of marriage in Islamic Law is contractual in nature constituted by offer and acceptance.

6. DEFINATION

It is always very difficult to define anything accurately, but nevertheless always writers use to offer their definations in regard to the subject matter of their discussion. Let us examine some of these defination.

HEDAYA: "Nikah in its primitive sense, means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law it implies a particular contract used for the purpose of legalising generation."[13]

AMEER ALI "Marriage is an institution ordained for the protection of society and in order that human being may guard themselves from foulness and unchastity."[14]

DURR al-MUKHTAR:

"Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of the man and the woman between whom there is no bar to a lawful union."[15]

TYABJI:

"Marriage brings about a relationship based on, and arising from, a permanent contract for intercourse and procreation of children between man and woman, who are referred to as parties to the marriage and who after being married became husband and wife."[16]

ABDURRAHIM:

The Muhammadan jurists regard the institution of marriage as partaking both of the nature of ibadat or devotional acts and mu'amalat or dealings among men." It is founded on contract for which the consent of both the parties is essential."[17]

Abdur Rahman al-Jaziriy, quoted various definitions offered by the four Sunni schools:

(i) Malikhi Law: It is a contract which sanctions the right of enjoyment of the person not being determined in terms of purchase price and which is free from legal impediments imposed by the divine texts or 'ijma).[18]

(ii) Hanafi Law: It is a contract by which the right of the enjoyment of (a woman) is legalised to the exclusion of all other men.[19]

(iii) Shafi'i Law: It is a contract which was concluded by the words "nikah" or "tajwiz" or equivalent terms and by which contract, the right of sexual intercourse and other services of the woman in matters of enjoyment are acquired and guaranteed in a reasonable manner.[20]

(iv) Hanbali Law: This school agrees with the Shafi'i's defination.

As regard the concept of marriage Dr. S.A.M. Habibi[21] observe that the concept of marriage in Islam, differs from other concepts on the subject, either ancient or modern, for it is neither a "sacrament" nor it is a voluntary union for life of one man and one woman to the exclusion of all others, nor is it a marriage in the Roman sense, for those that were married by confarreato could not be divorced at all. While it is true that the concept of marriage in Islam differs from the Roman confarreato nor is it the same as the principle laid down in an English case HYDE V. HYDE.[22] It is true that it partakes the nature of both the sacrament and contract, yet it is intended from the out-set, to be a life long union, even though divorce under Islamic Law is permissable as remedy and in exceptional circumstances.

7. OBJECTS OF MARRIAGE

The strong emphasis that Islam has put on marriage may be seen more clearly in the context of the purposes that marriage is designated to serve. Islam favours marriage as a means to emotional and sexual gratification, as a mechanism of tensi n reduction, legitimate procreation and social placement.

What is probably most characteristic of the Islamic position, is that, marriage, apart from these functions and perhaps also because of them is regarded first and foremost as an act of piety-sectual contral may be a moral victory, reproduction a social necessity, and sound health, a gratifying state of mind. Yet, these values and purposes of marriage would take on a special meaning and reinforced if they are inter-twined with the idea of God, conceived also as a religious commitments and internalized as divine blessings. And this seems to be the focal point of marriage in Islam. In the Holy Qur'an, the call is addressed to mankind to be dutiful to God, Who created them from a single soul, and from it created its mates, and from the two of them - scattered abroad many men and women.[23] Allah created men and women so that they can provide company to one another, Love one another, procreate children and live in peace and tranquility, all these cannot be possible except through marriage. The Qur'an says: "And among his signs is that, He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Undoubtedly in there are signs for those who reflects."[24] "And Allah has made for you your mates of your own nature and made for you, out of them sons and daughters, and grand-children and provide for you sustenance of the best."[25] Even at most trying times, of marriage life, and in the minds of legal disputes and litigation, the Qur'an reminds the parties of God's Law; it commends them to be kind to one another, and above all dutiful to God.

The institution of marriage is also responsible to a very great extent for the development of those feelings of love and service which are the pride of humanity today. The mutual love of husband and wife - a love not based on momentary passion but life long connection - and the consequent parental love of offspring leads to a very high development of the feeling of love of man to man as such, and thus to the disinterested service of humanity. This love is discribe as a sign of God in the Qur'an.[28] The natural inclination of the male to the female and of the female to the male finds expansion through marriage and is developed, first, into a love for the children, then a love for one's kith and kin, and ultimately into a disinterested love for the whole of humanity. The home, is, in fact the first training ground of love and service. Here the spouses finds real pleasure in the service of humanity and the sense of service is thus gradually developed and broadened. It is infact a training ground for every kind of morality, for it is in the home that a man learns to have a sense of his own obligation and responsibilities, to have respect for others rights, and above all to have a real pleasure in suffering for the sake of others. The Prophet is reported to have said: "The best of you is he who treats his wife best."[29]

The purposes of marriage and its functions are beautifully summed up by Khurshid Ahmad when he said "....It provides for the reproduction and continuation of the human race. It acts as the protector of the morals of the individuals and society. It creates a congenial context for the spiritual and emotional fulfilment of the spouses, as also of all other members of the family and promotes love, compassion and tranquility in society. It initiates the new generations in the culture, tradition and further evolution of their civilization. It is the sheet-anchor

of a system of socio-economic security. It sharpens the motivation of man and strengthens incentives for effort and social progress. It is the cradle of civilization and a bridge that enables the new generations to move into the society. It is the link that joins the past with the present and with the future in such a way that social transition and change take place through a healthy and stable process. Thus it is, on the one hand, the means adopted for regulating relations between the sexes and providing the mechanism by which the relation of a child to the community is determined and on the other, it is the basic unit of society integrating its members within and enabling them to play their ideological and cultural role in the world, (both now and in the future).[30]

8. NATURE OF MARRIAGE IN ISLAM

The institution of marriage under Islamic law is a divine institution combining the elements of both secular contract and a religious sacrament. Although it is essentially regarded as a civil contract, the validity of which, inter alia, based on the consent of the contracting parties, the offer (ijab) and the acceptance (qabul) and the capacity of the parties, yet it has social and religious aspects. The words fard (duty), wajib (obligatory), haram (unlawful), makruh (abominable) and sunna (obligatory practice) denote and determine the category to which marriage belongs.

These remarks which are based on Qur'anic injunction, the traditions of the Prophet (S.A.W.) and the consensus of opinion (ijma), establishes that marriage is a religious rite and has been considered to be an institution of ibadat (devotional act), although clothed in the legal form of a contract. But let us

not ignore an important fact that the notion of contract is brought into prominence because it renders facility for divorce, and allows separation of the parties easy in the eye of the Law, where as the sacramental aspect would make the marriage indissoluble. Consequently, it is not quite accurate, therefore, to designate marriage in Islam as either a secular contract or a religious sacrament; it has elements of both. The appropriate designation would seem to be that of a "divine institution".

For fair evaluation and correct approach to the concept of marriage, it is desirable to highlight the different aspects of marriage.

(a) RELIGIOUS ASPECT:

Marriage in Islam is a sacred contract which every Muslim must enter into, unless there are special reasons why he should not. Thus in the Qur'an it is said: "And marry those among you who are single and those who are fit among your male slaves and your female slaves, if they are needy, Allah will make them free from want out of His grace; and Allah is Ample-giving, Knowing. And let those who do not find a match keep chaste until Allah makes them free from want out of His grace."[31] In another verse, marriage relationship is given the same importance as blood-relationship: "And it is He who has created man from water: Then has He established relationships of lineage and marriage: For thy Lord Has Power (over all things). Prophetic traditions also lays stress upon living in a married state. The Prophet (S.A.W.), is reported to have said to certain people who talked of fasting in the day-time and keeping awake during the night, praying to God and keeping away from marriage." I keep a fast and I break it and I pray and I sleep, and I am married, so whoever inclines to any other way than my Sunnah,

he is not of me."[32] In another tradition, the Prophet (SAW) said, "O assembly of young people! whoever of you has the means to support a wife, he should get married, for this (i.e., marriage) is the best means of keeping the looks cast down and guarding the chastity; and he who has not the means, let him keep fast, for this will act as castration.[33]

Muslim jurists have interpreted the Qur'an to mean that marriage is a religious duty and is consequently a moral safeguard as well as 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. The predominant view among the jurists is that, although marriage is a social necessity, it is not absolutely necessary for every individual. Maliki jurists take it that marriage in its origin is deemed to be recommended, but for certain reasons affecting certain individuals it takes other shapes. Sometimes it becomes obligatory and sometimes forbidden and so forth. Hanafis and Hanbalis agreed with Malikis. But according to Shafi'i jurists marriage in its origin is mubah (Nafl) i.e., supererogatory, and according to Zahiri's it is obligatory.[34]

Hear below are the detailed views of Maliki jurists on this subject:

Obligatory

Marriage becomes obligatory for a man who has strong sex desire and fears committing illicit relations and has the means i.e., he has the dowery and the maintenance. For the woman marriage is also obligation if she is unable to earn her living or she fears illicit relations.

Forbidden

Marriage is forbidden for a man who control himself and has not the means for marriage or who has a bad illness which will affect the wife or his expected offspring.

Recommended

Marriage is recommended for the men who has desire to sex but can control himself and keeps chastity but hope to have offspring.

Mubah (Nafl)

Marriage is mubah i.e., Nafl or supererogatory, for a man who can control himself and does not hope for offspring and marriage will not prevent him from performing his rituals.

Makruh

Marriage is condemned for a man who has no sex desire and at the same time marriage will prevent him performing his rituals.[35]

Although Islam advocated marriage and took various measures to regulate its functioning, it seems to have realized that marriage is not a light commitment. A person must be fairly certain of his ability to meet the responsibility of marriage before taking a wife, that is he has to have dowry and the way to maintain the wife. In Islam poverty is no barrier to a successful marriage; Allah has, as has been stated in the Our'an undertaken to provide for every living creature, and He can, and has promised to, enrich the poor motes of His bounty.[36] But at the sametime, Islam recognised that it may not always be possible for every one to have at his disposal the means to marriage. There sometimes arise the obstacles and some problems here and there; for example it is very common today among Muslim community for a young man of marriageable age who

cannot marry, despite the Islamic injunctions which made marriage in itself the simplest social contract in a Muslim life. The socio-cultural traditions of the people however insisted on unnecessary expenses which is contrary to the teaching of Islam on the respective bride and bridegroom, which finally culminated - into the most ugly situation people find themselves today.

Islam in respond to these problems and alike, is not in the direction of celibacy, laxity, or avertion to marriage and sex altogether. Rather, it prescribes several specific measures, the last of which is resort to self discipline and temporary abstinence in the hope that the assured help of Allah will be forthcoming. The Prophet intimated that whoever can marry should do so, but he who cannot afford to i.e., (he has no dowry and maintenance), should keep on fasting, which helps him to safeguard his moral integrity and to assume command over his desires. The immediate implications of all this is probably that neither sex nor marriage is dismissed easily or taken lightly.

(b) THE SOCIAL ASPECT

Islam gives to the woman a definitely high social status after marriage. Restrictions are placed upon the unlimited polygamy of pre-Islamic times, and a controlled polygamy is allowed in exceptional circumstances. The Prophet (S.A.W.) both by example and precept, encouraged the status of marriage. He positively enjoined marriage to all those who could afford it. And the well-known saying attributed to the Prophet (S.A.W) "There is no monkery in Islam."

Islam for this reason provided a guarantee which would secure happiness to the family as well as to the whole society. Pursuant to the Qur'an, mutual companionship, love and peace are the main objectives of marriage:

> "And among his signs is this that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (hearts). Verily in that are the signs for those who reflect."[37]

Marriage in Islam check the unruly sexual passion which brings about the loss of dignity in both the man and the woman and the production of the unwanted children invariably resulting in some cases, in the destruction of the unwanted babies. To safeguard the relations between males and females and as a preventive against the severe punishment of fornication and adultery, the Quran ordains the institution of marriage. Adultery and fornication have been expressly made unlawful by the Almighty Allah as otherwise the society would have been reduced to chaos and disorder. The Holy Qur'an proclaims: "And do not near fornication. Surely it is indecency and evil as a method."[38] "And do not compel your slave girls to prostitution when they desire to keep chaste."[39] Regarding the sentence of adultery, the Quran says:

> "The adulteress and the adulterer, flog each of them giving a hundred stripes; and let not pity for them move you in the matter of obedience to Allah if you believe in Allah and the last day, and let a party of the believers witness their chastiment."[40]

When this verse was revealed, it was ordained that those guilty of adultery should be given hundred lashes as a punishment. The Prophet (S.A.W.) was reported to have said:

> "Take from me, accept from me, undoubtedly Allah has now shown path for them. (adulterers). For them unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death."[41]

It is only logical that Islam sets up the rules to regulate the functioning of the family whereby both spouses can find peace, love, security, and relatedness. The elements are necessary for accomplishing the greatest purpose of marriage in Islam.

Marriage creates a family consisting of children and wife. Families creates society. Marriage creates a new company of kith and kin, because sons and daughters go to create new families. Hospitalities, fellow feeling, kindness and mutual help becomes binding among these relations. Marriage therefore gives impetus to what is called "social virtues". Marriage gives the right of inheritance and ownership in property to the nearest relations. The Quran therefore says: "And He it is who has created man from water, and then He has made for him blood and marriage relationship."[42]

8. (c) LEGAL ASPECT

The most important aspect of marriage under Islamic law is its legal aspect. The contract of marriage by itself gives rise to many rights and obligations of the parties. Most of the incidents of marriages are wholly independent of any contractual obligations.

In the leading case of Abdulkadir v. Salima Mahmood J, observed:

"The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance and raiment obligatory on him; and establishes on both sides the prohibition of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category."

Now the legal effects of marriage as enumerated in the Fatawa-i-Alamgiri, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiations is simultaneous, and there is no authority in the Muhammadan Law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife."[43]

The legal effect of a valid marriage now be summarized.

(i) The marriage contract itself is a legal contract based on proposal and acceptance.

(ii) After the contract has been concluded all lawful condition and terms inserted by the parties into the contract became enforciable.

(iii) Sexual intercourse becomes lawful and the children born of the union are legitimate.

(iv) Mutual rights of inheritance are established.

(v) The wife becomes entitled to her dower (sadaq)

(vi) The wife becomes entitled to maintenance.

(vii) The husband is entitled to restraint the wife's movements in a reasonable manner and to exercise the marital authority.

(ix) The prohibitions regarding marriage due to the rules of affinity come into operation.

(x) The wife has to observe idda after the dissolution of her marriage.

(xi) No merger of personalities or property after the marriage contract.

9. MARRIAGE AND "FREE LOVE"

The western world undoubtedly leaning more and more to "free love" in the place of marriage, but free love will certainly prove the ruin of western civilisation. Marriage is being discarded, not on account of any reason, but simply because it entails certain responsibilities on both parties to the marriage contract, and it is really these responsibilities that shirked in avoiding marriage. Marriage undoubtedly strengthens the ties of the natural love of the two mates, but it also requires them to share each others cares and sorrows;

for human life has its cares and sorrows as well as its pleasures. "Free love" makes each of the mates selfish in the extreme because, while the male and the female became each other's partner in happiness, each is free to leave the other, uncared for, in his or her sorrow. Marriage again makes the two mates jointly responsible for the welfare of the children, but in "free love" either the procreation of children is altogether avoided, and thus the end which Allah has in view in the union of the two is defeated, or when either of the parents has had his or her own satisfaction of the other, the children may be left without shelter.

The institution of marriage is found in all countries and all nations, has been practiced in every age for thousands of years and has worked to the advancement and welfare of humanity on the whole. "Free love", if practiced on a large scale for half a century, would either put an end to the human race altogether, or bring such chaos in society as would destroy its very foundation. It may suit a few irresponsible, selfish individuals who are the slaves of their passions, but there can be no spark of true love in a union which may end abruptly at the whim of either, and it can serve no useful purpose for humanity in general.[44]

10. MARRIAGE A CIVIL CONTRACT

Although marriage is a Divinely-ordained institution, each marriage as such is in the nature of a contract. The word "Nikah" used for marriage in the Qur'an and sunnah, mean "aqd" that is contract. In the Qur'an, marriage has been spefically referred to as "Mithaqan ghalizah," a strong convenant.[45] The pre-Islamic practice of inheriting women was forbidden.[45] The consent of both parties is an explicit condition for a valid

marriage.[47] This means that marriage in the sense of a ceremony takes a form of contract, mutual assent being the predominant and indispensable features. Contracts of marriage for minors are entered into by persons whose position is recognised by Law as that of guardians (wali). Remedies are also provided for enforcing the obligations under matrimonial contracts as in the case of other contracts. From a purely juristic point, marriage among Muslims is not a sacrament but a civil contract, and though it is solemnised generally with recitations from the Holy Qur'an, yet Islamic Law does not positvely prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. The distinction between sacred and secular was never explicit in Islam. Any action or transaction has religious implication. Marriage in Islam is not conditional on officiation by a priest because strictly speaking there is no such office. Neither was religious benediction, though highly recommended for the occasion, a necessary requisite for the validity of the marriage. Islamic marriage is social contract, a noble and sacred contract, but a contract nonetheless. It leads to a number of relationships and engenders a set of mutual rights and obligations. Therefore the contract is not a sacrament, it is not irrevocable. Divorce is permitted in cases where marriage has failed. Remarriage is also allowed, and even encouraged. There is no stigma attached to remarriage or to marrying a divorce woman or a Widower.

11. MARRIAGE CONTRACT MUST BE PERMANENT

It is necessary that the contract of marriage should be a permanent one. It cannot be restricted as regard the duration. Thus a contract of usufructu ary marriage (nikah mut'a) (e.g., where a man says to a woman, "I will marry you for such a time or for so much a time) would be illegal. So also temporary marriages. This type of marriages were allowed in the pre-Islamic period, and also during the early days of Islam. It was only allowed in the early days for people going on jihad or Ghazwat. If two parties entered in to a contract of marriage, there is a hope that they will remain together bound to their covenant until death part them away, or when divorce comes in, in certain circumstances.

But according to the Isna Ashariyya Shia Law; Mut'a or temporary marriages are valid. The period of the marriage has to be fixed i.e., a day, one month, one year etc. If the specification of the period of mut'a is omitted, the contract becomes permanent contract of marriage and gives rise to inheritance between the parties.

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CHAPTER TWO

FORMATION OF MARRIAGE CONTRACT

(1) PRELIMINARIES OF MARRIAGE CONTRACT

A l which is the conclusion of the marriage contract is generally preceeded by preliminary steps or betrothal where each of the contracting parties seeks to determine if the other is free to marry and by which the man expresses his intention for marriage, when it is proved to him that the proposed wife is not already committed to the betrothal of another legally competent suitor. The formal initiative of marriage proposal may came from either side directly or through parents or guardians of the two parties. From the period that the husband made up his mind that he would marry the proposed wife, some steps must be taken before the final conclusion of the marriage. These steps are referred to in Arabic as Khitba. As soon as a man thinks of marriage, he usually tries to acquire as much knowledge as possible about the woman he intends to marry. Among the things normally he will try to find out, are, the social standard of her family, the morals, behaviour, reputation and so on. Nowadays, the educational background of the girl is one among the most important things to be taken into considerations.

After being satisfied with his findings, the next thing is to try and see the girl. Prophet (S.A.W.) recommended that in the selection of bride, a man should try to see the intended bride before betrothal, least a blunder in choice or an error in judgement should defeat the very purpose of the marriage. However, a man should not throw a passionate gaze at the would be bride but to have a simple look at her face and hands to gain sufficient idea about her personality and beauty. (1) It is said that the face denotes the beauty and the hands show the fertility and delicacy of the body. The general principle of Islamic Law forbid a male from gazing at a female in a passionate

eyes from looking in a passionate way, and guard their modesty-and chastify.

> "Say to the beliving men that they should lower their gaze and guard their modestity; that they will make for greater purity for their God is well acquiainted with all that they do"(2)
>
> "And say to the beliving women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear there-of; that they should draw their veils ever their bosoms and not display tneir beauty, except to their husbands, fathers,...."(3)

The rule or the need for modesty applies to both men and women. A brazen stare by a man at a woman is a breach of refined manners, where sex is concerned, modesty is not only "good form". it is not only to guard the weaker sex, but also to guard the spiritual good of the stronger sex. But on account of the differentiation of the sexes, temperaments, and social life, a greater amount of privacy is required for woman than for man, especially in the matter of dress and the uncovering of bosom.

Though it has been disallowed by Islam to allow people of different sex to remain alone in a room, because of the saying of the Prophet (S.A.W) that when ever a man and a woman remain together in a lonely place, a third person is present and that is the Shaidan, but Prophet (S.A.W) recommended that, the suitor, is to be allowed to see his would be wife. It is prefferred that when looking at the proposed woman her permission should be obtained before-hand, but he may have a look at her inadvertently. The would be wife also has the right to look at her suitor. The suitor may be allowed to sit in one room with the proposed wife provided she is decently covered, and provide there be present

with her one of her near relatives who came within the prohibited degree of marriage, such as her father or brother.(4) The Holy Prophet (S.A.W) is reported to have said; " When one of you makes a proposed of marriage to a woman, then if he can, he should look at what attracts him to marry her" In another tradition, he is reported to have said; to one of his Sahab Mungira Ibn Shu'ba, who expressed his desire to marry" look at her, it is likely to bring about greater love and concord between you." (5).

Whenever one is proposing a wife, he must bear in mind the advice of the Prophet (S.A.W) that a woman is married for her beauty, her wealth, her family, and her piety; the best of you is that who marries a pious woman. Also the Prophet (S.A.W) is reported to have siad, "The best wife is that when you look at her you feel pleased and if you asked her enything she obeys and if you are absent she will be honest over your property and over herself" (6).

When-ever a man proposes to marry; he is only permitted to make such proposal to a woman who can be lawfully married to him and that there is no legal prohibition affecting them. Some of these prohibition comes as a result of certain degree of relationship between the parties i.e. blood relationship, affinity and fosterage relationship, and these are everlasting relationships. Once, they exist, they will never be removed; while others are only temporary, and removable when the circumstances allows it, eg. a Muslim cannot marry morethan four wives at a time, or joining two sisters together as wives at a time, or, a married woman, or a woman during her idda period etc.

2. THE CASE OF TWO SUITORS AFTER A GIRL:

The Prophet (S.A.W) prohibited two suitors vying with one another for marriage with one girl. This is so because such a situation may likely to result into enemity between two Muslim brothers. He is reported to have said; "A believer is a brother

to a believer, hence it is not lawful for him to bargain upon the bargain of a brother; nor propose the hand of a girl on the marriage proposal of his brother, until the latter (voluntarily) with draws the proposal." Also it is reported that the prophet (S.A.W.) has said; "A man should not demand in marriage a woman previously sought by another." So, any woman to whom a proposal was previously made and agreement has been reached between both suitors, would not be proposed by another suitor. But if there has been no agreement reached between the parties, then the other suitor can propose for marriage. Fatima Ibn Ngais once reported to the prophet (S.A.W) that Abu Gahaw bin Huzaifah and Mu'awi-yah Ibn Abu Sufiyan proposed her marriage; the prophet (S.A.W) said to her, not to marry any of them on the ground that Abu Gahaw bin Huzaifah was cruel to women and Mu'awiyah had no property, so better marry Usamah. But on the other hand, where agreement has been reached with a suitor who is debauch, and a pious and better man stepped in, the latter is allowed to propose to that woman.

Where agreement has been reached between both parties and a second suitor of equal standards as the first, steps in and marries that women previously proposed, Maliki Jurists, hold three different views. The first group says that, such a marriage is held void and should be annulled altogether whether before or after consummation or even after giving birth. The second group states that such a marriage is void and should be annulled before consummation, but becomes valid after consummation. The third group hold that such a marriage is valid and legal, but the second suitor would be held to have committed sin and that is a religious point of view only. This can be remedied by asking pardon from the first suitor and if he pardons it is alright, but if he refused, he has to ask God's pardon - Hanafi and Shafii agreed with the Maliki's third group. (7). On the other hand, Imam Zahiri considers such a marriage

void altogether and should be annulled whether before or after consummations.(8)

(3) THE PRACTICE OF BETROTHAL IN NORTHERN STATES:

The practice of betrothal in the Northern States is nearly the same as the traditional Islamic Law, Except for few variations from here and there. When a man meets a girl and shows his intention to marry her and the girl responds, then she will invite him to go and see her parents. Normally, the suitor will first notify his parents about his intention, and then the parents or a family friend will be send to the girl's parents with some presents. This presents differ from place to place, for example in Zaria, the presents will comprise of one wrapper and some cosmetics to the parents. Among the Fulanis of Gongola they use to sent some colanuts, a bag of salt and some token amount of money. The father of the girl or her guardian will then receive the presents, but will not give a definate answer to the request at that time. After that, he will summon the relations of the girl for a meeting inorder to choose a suitable man for the girl, if the suitors are many, because in most cases, many other suitors would have sent in their requests for marriage to the same girl. Before the council of the girl's relatives meet, they normally consult her to make the choice and they normally approved. Sometime if they think that the girl's choice is not acceptable, they will communicate to her the reason for rejecting her choice. The council in most cases considers whether the person selected by the girl is of good character and capable to maintain her. But if she insists on her first choice, this may sometime reluctantly approved with a warning that she has to put up with whatever happens to her during her marriage with the man.

After accepting the would be husband, they will communicate the same to his parents and suggest for a date for the formal betrothal

or Fhidba (engagement) called "Baiko". On the date fixed for the betrothal, a small ceremony is to be held comprising people from both sides and their friends. The engagement is to be publicly announced and the date for actual contract of the marriage is also to be fixed and announced. In the case of those suitors who were not successful in the contest, their presents would be returned to them. Some will accept back his presents, and some will forgive it to the girls parents.

The practice now prevailing in Northern States has introduced alot of divi tions from the way Islam prescribed bequeths - Islam does allows bequeth but a simple one, where no payment of anything is required. But contrary to t is Islamic teachings, you will find that alot of payments use to be made, involving both money and other things like dresses, ornaments etc.either to the girl herself or to her parents, sometime to both. Customs with regard to these payments vary not only from state to state, or locality to locality, but from tribe to tribe. For example in Zaria, the local custom prescribes about seven different payments - by the groom some to the girl herself, some to her father or guardian and some for distribution to other members of her family. The payments here include the Sadaki (dowry)which will be handed to her father or guardian. Any body either within her family cycle or to other family friends who have received a share in these payments will contribute towards her tajhiz. In Bauchi town, the prospective husband will first send some money gift to the girl's father, and then from there to the prospective wife, finally some kolanuts will be sent to the family for the distribution among the members of the family. The distribution of the kolanuts will indicate that their daughter has been given to a husband. With the coming of Izala a religious group of preachers things are now going back to the traditional Islamic teaching with regard to the bad practices affecting marriages.

(4) GIFTS MADE DURING AND AFTER BETROTHAL:

The betrothal is only a promise to mary, therefore it cannot create any legal right or liability. Any of the parties is free ti withdraw without any legal liability towards the other. Islamic Law of betrothal differs from that of English form of engagement in the breach of Islamic betrothal, the withdrawing party has to pay back the presents he or she might received inconsideration of the marriage contract (9). Any gift made by one party to the other during betrothal is the same as ordinary gifts. In law gratuitous gifts are non-refundable. Where the donee has taken delivery of the subject matter of gifts, property rights in the matter is transferred to him and he becomes the legal owner of that property; he can do what ever he likes with it. Therefore to retract the gift, would amount to taking away property from ownership of another without that other's consent (10). But where a gift is made for consideration and with the expectation of some compensation and if the receiver fails to perform his part of the transaction the giver is permitted to recover back the property given, because the gift is subject to the intention of consideration. Where, therefore, a person makes a gift of property in consideration for marriage, and the marriage is not concluded, the giver can demand the return of his gifts which he made in consideration of the marriage.(11)

In Hanafi Law, they treated such presents and apply the law partaining to gifts. In accordance to that, whoever the one withdrawing, such presents should be returned if they are still in their original condition, but if some of the presents lost or undergone a change, the giver should not claim for compensation or the value of the property.(12) Under Maliki Law there are two different views, the favoured view of the school is that, such presents should not be returned if the suitor withdraws, but

they should be returned if she withdraws, and the value of perished or changed property will also be returned. The second view of the school is that, nothing should be returned whoever be the withdrawing party.(13) The Hambali furists treated such presents given during betrothal as gifts, and in the view of the school gifts after being received cannot be returned, So, according to the school, betrothal presents once given, should not be returned, whether the presents remains in their original condition or not, and whether the withdrawing party is one who gave the present or who received them. The Shafii jurists state that such presents should be returned whoever be one withdrawing and the value of the perished and chan ed property should also be returned returned.(14).

(5) BETROTHAL IN ISLAM DISTINGUISHED FROM OTHER LEGAL SYSTEMS - PARTICULARLY ENGLISH LAW - NIGERIA:

Under english Law,a marriage is friquently although by no means invariably, preceeded by an agreement to marry or "engagement". At common law, such agreements amounted to contracts provided that there was an intention to enter into legal relations. Consequently if either party withdrew from the contract without lawful justification, the other could sue for breach of contract. Therefore under English law, as applicable in Nigeria now in Laws of Matrimonial Causes the breach of promise to marry is actionable, unlike under Islamic Law where it has not provided for court action. But under British Common Law, it is no more actionable. It has been abolished onthe recommendation of the Law Commission No. 26 (Breach of Promise of marriage) 1969, and this recommendation was implemented by section 1 of the Law Reform (Miscellaneou Provisions) Act 1970. This provides that no agreement to marry shall take effect as a legally enforceable contract and that no action shall lie in this country for breach

of such an agreement, wherever it was made.

At Common Law a gift made by one party to an engagement to the other in contemplation of marriage could not be recovered by the donor if he was in breach of the contract. This meant, for example, that if the man broke off the promise without legal justification, he could not recover the engagement ring, but he could do so if the woman was in breach of contract. This is inconformity with the majority view of Maliki Law, where after the betrothal. If it is the husband who is withdrawing from his promise he cannot ask for the return of his presents while if it is the woman who is withdrawing she has to return everything given to her by the man.

In Nigeria, three different systems of family law exists side by side. One system which is the predominant system is based upon Islamic Law; the second system of law is based upon Native Law and Custom, and the third one is based upon English Law. The practice of betrothal under Islamic and English Laws has already been explained. Unlike Islamic and English Laws having application in Nigeria, Native Law and Custom does not consists of a single uniform set of legal principles. Rather, it is composed of hundreds of sets of laws, each of which was developed by and applies to a particular ethnic or tribal group. The Tiv, the Biron and the Angas, each have their own system of family law, and each may differ from the other in many significant respects. Indeed the native law and custon of a particular group may itself vary from place to place. For example, in Plateau State, the law of Angas living in the hills differs slightly from that of Angas living on the plains a short distance away. Therefore, to discuss the practice of betrothal of the various tribes governed by their customary laws is not possible in this work. But I have selected two tribes among the many to discuss the way of their betrothal.

(i) ANGAS

As is common to all systems of customary law in Nigeria, one of the essential elements of a valid marriage is the payment by the boy or his family of cash, goods or animals to the family of the girl. Among the Angas, the payment of the bride price is usually made over a period of years. Traditionally, during the first year of the betrothal, the boy's parents would send three large measures of corn, one in the rainy season, one in the dry season and one during the season of the hammatan. In the second year, two measures of corn will be sent during each of the three seasons. During the third year three measures will be sent at each season. Every year a goat, is also given to the girl's family, and at the end of the betrothal period, when the girl is ready to marry, the boy's father will bring two goats (one for the girl's father and one for the mother) and a roll of tobacco.(15)

(ii) LUNGUDA:

These people live in Gongola State. When a Lunguda boy meets a Lunguda girl whom he intends to marry, he has to express his desire by sending her leather clothes called Jelu which she will wear from time to time. The boy also will start going to the father of the girl's farm and do some farming for few days. This he will do almost every year until the girl reaches the age of marriage. If the girl reaches marriageable age, she will make a gruel and send it to the boy, and this is the indication that she accept him as her suitor, and also this is the final agreement between them that they are going to marry. After this, the farming on her father's farm would continue. The girl will send to him a hoe and in return, he will send to her some clothes. It is after that the girl will be taken to a place approved by the suitor where she will stay with the suitor and his friends for some time. Then finally the suitor will send four goats and five hoes to the girl's father.

(6) PROBLEMS FACING COURTS:

The teachings and regulations laid down by Islamic Law has been neglected by some people and because of this, courts finds alot of problems in adjudicating cases concerning presents given during betrothal period in the case where one of the parties failed to fulfil his or her promise. The fault mostly lies with the girl's parents, who, because of their greediness, use to collect presents from many suitors of their daughter, fully knowing that only one of them would have an opportunity of marrying her. At the end, the father would find himself refunding the presents. Sometimes, he cannot refund all the presents he received from the other suitors which usually resulted into protracted litigations. This,would sometimes involves the new husband who would be asked to pay back the presents. If it happens that he is poor or that not ready to refund the presents, it may lead to the break-up of the newly contracted marriage, putting their daughter in to misarable life.

On the other hand, some time the problem may comes up from the unlucky suitor who would claim morethan what he has given, thus to make things difficult to the father of the girl, especially if he is poor. All these are, as a result of the father's greediness and failure to abide by the teachings of Islam. According to the teachings of Islam, the two parties are prohibited from meeting each other without a third party who is supposed to be one of her relatives within the prohibited degrees of marriage. In defiance of this rule, the parties would meet seperately, sometimes in the girl's house and sometimes in the boy's friend's house, where normally the suitor would give some money to her without the knowledge of the parents. And when it comes to refunding, you will find him claiming more than what he has given her. When the matter is brought to court, some judges instead of

making things clear to both parties by telling them their own faults, and by doing which, he helps Islamic Law, he will simply accept the claims of the suitor and ask the father of the girl to pay up what ever amount demanded by the suitor.

(7) PREREQUISITES OF MARRIAGE CONTRACT UNDER ISLAMIC LAW:

Since marriage is, essentially a contract between two competent contracting parties, it must be rest for its validity on the arkan (pillars) or essential constituents without which there can be no valid marriage. But what constitutes those pillars differs from school to school. On some arkans (pillars) the jurists agreed but on some others referred it as arkan while others calls it Shurood (conditions). All jurists agreed upon the offer and the acceptance as arkan, ie. essentials of the marriage contract. Beside these two, others added some which they referred as arkan ie. essentials while others called them simply Shurood (conditions). Here below, I have discussed the view of each Sunni schools.

(a) MALIKI SCHOOL:

According to Maliki School, the arkan are six, namely:-

(i) The formula - (singa)

(ii) and (iii) The husband and the wife (mahalli)

(iv) The wali (Marriage guardian)

(v) The dower (maha)

(vi) The impediments (16).

It seems that maliki's view is in conformity with the prophetic tradition reported in Sahih al Bukhari that, "there can be no valid marriage without a marriage guardian, dower and two male witnesses of moral and religious probity".

(b) SHAFII SCHOOL:

In Shafii School also the arkans are six, they are:

(i) and (ii), the parties

(iii) The formular (singa)

(iv) The Wali (marriage guardian)

(v) Witnesses

(vi) Impediments (17)

(c) HAMBALI SCHOOL:

According to Hambali School, there are only two Ark an (essentials) all the rest they called them Shurood conditions.

(i) The parties

(ii) Offer and acceptance (18)

Others are conditions according to this school.

(d) HANAFI SCHOOL:

In Hanafi School there are three arkans (essentials), all the others are conditions.

(i) Parties ie. their identity

(ii) Offer and acceptance

(iii) Witnesses (19)

In the next coming chapters, I discussed all of them in length. Some of them whether they are called arkan or conditions, if they are lacking in a marriage contract, the contract will be void ie. like luck of witnesses in Hanafi School, or Wali in Maliki School. While others would not invalidate the contract. The general view is that luck of arkan i.e. essential will invalidate a marriage contract under all the schools. While on the other hand, luck of Shurood (conditions) would not sometimes invalidate the contract.

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2. Qua'an 24 : 30
3. Qur'an 24 : 31
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5. al-Bukhari Supra
6. al-Hkirshiyyi ala Mukhtasar Vol.2, p.10; Shaikh M.T. El Imiri (Personal Status in Islamic Law), p.12
7. Ibn Asker, (Ashal ul Madarik), Vol 2, p.68; see also M.T.El - Imairi Supra, p.12.
8. Adawi, (Hidayat al-Talib) commentry on the Risalah of Abu Zaid, Vol. II, p. 45
9. Sayyid Sabiq, (Figh al-Sunna), Beirut, 1973, Vol. II. p. 32
10. Sayyid Sabiq Supra, pp. 31 - 32
11. Sayyid Sabiq Supra p. 33. See also Ibn Abdin Vol. II, p. 374
12. Sayyid Sabiq Supra, p. 33
13. Sayyid Sabiq Supra, pp. 33 - 34; see also Abu Zahra (Ahwal al-Shakhsia) p.41.
14. J.N. Salacuse (selective survey of family Law in Northern Nigeria) 1965. p. 12
15. Abdurrahman al-Jazariy, (Figh ala Madhabib al arba'a), Vol.11, p. 12 see also Dasuqi Supra, Vol. 2, p. 220
16. Abdurrahman al Jazuriy supra, p.p. 12 - 13
17. Abdurrahman al Jazuriy supra p. 12
18. Abdurrahman al Jazuriy supra p. 13.

CHAPTER THREE

FORMULA

1. OFFER AND ACCEPTANCE

(a) Offer (Ijab): In theory there is no hard and fast rule about who makes the offer. It may be made by either party, although naturally the demand must come from the side of the bridegroom such as "I seek the hand, in marriage, of your daughter or ward D, to me, or to Mr. H."[1] The offer which is the pronouncement made by the bride's marriage guardian or his representative must be definite and in clear terms. They must be words denoting marriage according to Islamic Law, such as, "I have married her to you or I have wedded her to you." They may be express words although signs may be accepted if they clearly indicate that a contract of marriage is being concluded, e.g., "I have married may daughter D to you or to H for a dower of so much." The validity of the offer and the acceptance in Islamic Law of marriage depends on two things, viz

(i) The capacity of the parties to make a contract, and

(ii) The celebration of the marriage according to the forms prescribed in the place where the marriage is celebrated, or which will impress upon the woman, by the customary law of the Muslims, the status of a wife."[2]

(b) Acceptance (Qabul): The acceptance which is also a pronouncement of consent of the proposal must be express, or it can also be made by kinay at- (implied), e.g. "I have accepted D in marriage to me or to H" in the case of representation. It is also necessary that the acceptance must agree with the terms of the offer, e.g. where the offer contains a term stipulating the amount of dower, the dower must also be accepted.

2. MAGLIS

It is a condition of validity that, the agreement between the contracting parties must be reached in the same majlis (session). If an offer is made and either of the parties rises from the session before acceptance, there would be no valid contract. A proposal made at one meeting and acceptance made at another, would not constitute a valid marriage. "If, for instance, one of the bride's guardian says: "I have married my daughter D to you or to H" and the bridegroom or his representative keeps silent until the session had broken, and at a subsequent session or the two meet subsequently at another place and the bridegroom or his representative says: "I have accepted the offer of the marriage of your daughter to me or to H." Such acceptance is void. This is agreed by all the schools.

However, opinions differ as to lapse of time between the offer and the acceptance, even though both were made in one session. The Hanafis and the Hanbalis consider that it is not necessary that the acceptance must follow the offer immediately provided that the same session was not interrupted to the extent of taking the minds of the contracting parties away from the transactions. While Malikis and the Shafi's consider that there must be no delay between the offer and the acceptance.

According to Maliki, Shafi'is, and Hanbali schools, it is proper for an acceptance to precede the offer as, for instance, where the bridegroom says to the marriage guardian: "I have accepted to marry your daughter D", and the guardian says: "I have married her to you." This is valid; whereas the Hanafis said there is no hard and fast rule as to who first makes the offer, but, whoever first makes the offer, is the offerer, and subsequent declaration is the acceptance of the proposal.

A contract of marriage may be made only by speech uttered by the parties or their agents in the present of each other and also of the witness who are present in the session. It cannot be expressed through any act, for instance, by taking possession of dower or by mutual surrender. If however one of the parties is not present, a proposal of marriage may be by a letter, provided that there are witnesses to the receipt of the letter and to the consent of the person to whom it is addressed. The contents of the letter must be made known to the witnesses and the proposal should not be expressed in the imperative mood. In the case of dumb persons declaration and the acceptance may be expressed by intelligible signs, provided the witnesses present would able to understand the signs.

3. LANGUAGE

Offer and acceptance can be made in any language understood by the witnesses those present at maglis. It should denote clearly the purpose. Whether the offer and the acceptance is made orally, or through writing a letter, the language used should show explicity the intention to establish marriage relationship from the moment of the acceptance and should be permanent for life of either party unless necessity arises for repudiation. The language should by no means imply marriage at a future time or for a fixed period or on the happening of something in future. Temporary marriage and marriage for muta'a enjoyment are null and void agreed by all Sunni Schools, but valid to Shi'as.[3]

4. [illegible]

The contract of marriage in Islamic Law is essentially based on the consent of the contracting parties. There must be a meeting of the mind - (consensus ad idem).

Considered juristically, marriage under Islamic Law, is a bilateral contract, as stated in the Holy Qur'an.

> "And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant?"[4]

The contract is based on the mutual consent of the contracting parties possessing legal capacity. The presence of sufficient witnesses is required by some jurists, for the validity of the marriage, the publicity of the marriage is also laudable.[5] Islamic Law deserves the gratitude of humanity for securing rights to woman in a sincerely humane spirit, which after fourteen centuries, were incorporated in the convention relating to the formation of marriage and adopted by the United Nations - General Assembly on December 14, 1961. The substantive provisions are reproduced here below, and should interest those concerned with comparative law and sociology.

ARTICLE 1 (1)

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses as prescribed by Law.

ARTICLE II

States parties to the present convention should take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispenation as to age for specific reasons, in the interest of the intending spouses.

ARTICLE III

All marriages shall be registered in a appropriate official registry by the competent authority.[6] From the legal point of view, marriage is essentially a contract and therefore governed by the rules of simple contract. In theory as well as in practice, marriage may be contracted at any time and in any place, whether in a mosque, house, office, etc. In Law, no religious ceremony is necessary, nor the presence of any official or religious celebrant. But in practice socila celebration, which vary in different areas and, some religious features usually accompany Islam wedding.

5. [illegible] GIVE CONSENT

The consent must be given by the parties themselves or an agent who can lawfully give consent or in the case of a minor by a guardian who is competent to bind the minor. A woman who is an adult and is of sound mind, may be married by virtue of her own consent although the contract may not have been made or acceded to by her guardian. No one, not even the father has the right to contract an adult sane woman in marriage without her permission. The consent of the father of an adult woman

cannot take the place of her own consent. If the consent of bride is not formally asked for before the ceremony, the marriage would not be valid. Giving away in marriage is not sufficient, it must be proved that the woman herself consented to the marriage and there was performance of the ceremony. The Holy Prophet (S.A.W.) is reported to have said:

> "A previously married woman shall not be married till she gives consent nor a virgin be married till she gives is sought." In another tradition He was reported to have said." A grown up girl shall be asked permission about herself. If she is silent, it is her permission; and if she declines, there shall be no compulsion on her.

Ibn Abbas reported that the Messenger of Allah said:

> " A previously married woman is more a guardian for herself than her guardian, and a virgin should be asked permission about herself; and her permission is her silence. In a narration, He said: "A previously married woman having consummation has got greater right to herself than her guardian, and a virgin shall be asked of her consent; and her permission is her silence."[7]

A contract of marriage made under compulsion without any intention of making it, is valid, according to Hanafi school, while in the other schools it is void. Also according to the authors of Fatawa-i-Alamgiri and Radd-ul-Mukhtar such marriages are valid. The Prophet (S.A.W.) reported to have said, "there are three things which

whether done in joke or earnest shall be considered as serious and effectual, one marriage; the second divorce, and the third taking back."

6. PROCLAMATION OF MARRIAGE

Marriage by itself is a proclamation among the public, to the effect that two persons have united for procreation and legalising of children and that others have got no right to interfere in the conjugal relations of the married couple. The greater is its publicity and proclamation, the greater is its merit. If, however, there are no proclamation and no witnesses, it is nothing but secret sexual relations amounting to fornication, even though there is mutual consent. The Holy Qur'an therefore says: "Taking them in marriage, nor fornicating, nor taking them for paramours in secret."[8]

For the purpose of publicity it is recommended by Prophet (S.A.W.) after finalizing the marriage contract drums be beaten or guns be fired in the air, or cries of rejoicing be given. The difference between the Lawful and unlawful relations in the publicity and declaration. Walima (marriage Feast) is also recommended by the Prophet (S.A.W.) as it is a sign of publicity and declaration of the marriage. The Prophet (S.A.W.) made a walima on each of the occassion of his marriage. Once he slaughtered a goat and on another occasion he made a feast with two "muds" (handsful) of barley, to guide the Muslims to act according to their financial ability.[9]

The contract of marriage in Islamic Law may be summarised thus: Marriage is a bilateral contract based on the free consent of the two contracting parties. The parents certainly aid by their counsel and their experience in searching or selecting the companion of life for their child, yet it is the couple who have the last say in their matter. In this respect, there is no difference between man and woman in so far as the Law is concerned. Illegal practices may exist in varying degree from place to place and class to class; but the Law does not recognise the customs which contravenes its provisions.[10]

7. CAPACITY OF THE PARTIES

As a general rule, capacity to enter into a valid contract of marriage rests on the same basis as the capacity to enter into any other civil contracts. There are certain conditions which are requisite for the validity of any civil contract and are also capable to the contract of marriage. These are:

(a) Absence of Legal Impediment.

The parties to the contract must not be barred from entering in to such a contract by reason of legal impediment arising either from relationship or other legal impediments. Thus the parties are disqualified if they are related through consanguinity, affinity or fosterage which are permanent impediments. Also they have to be free from the temporary impediments, especially the man who is mostly affected by the prohibitions.

(b) Sanity - The parties to the contract must attain the age of discerment and must not be persons of unsound mind (majnun) or (non compos mentis). Because it is one of the essential features of a civil contract that there must be a consensus of the mind and this can only be achieved if the parties understand what they are talking about."[1]

(c) Majority - It is a further condition of validity that the parties must be adult and not minor. A minor is not competent to enter into contractual obligation. An adult male who is of sound mind can contract a marriage according to all schools of Law. But with respect to a female who is adult and of sound mind there is a difference of opinions. According to Hanafi Law, she is competent to enter into marriage contract without the least interference from her guardian or any ither person, except where the husband is not equal to her. But according to Maliki, Shafi'i, Hanbali and Dauda al-Zahiri she lacks the capacity. She has to do it through her marriage guardian. A minor is not competent to enter into contractual obligations whether for himself or on behalf of someone else. He is in Law, (Mahjur alaihi) - interdicted.[12] Generally speaking his contractual transactions are classified into three categories, vis;

(i) Contractual transactions which are necessarily advantageous to him are valid and enforciable, such as contractor for necessaries or of pious nature;

(ii) Contractual transactions which are necessarily disadvantageous to him, or which incur liability on him, such as the contract of marriage.

(iii) Contractual transactions which may or may not necessarily be advantageous to him. Such transactions are dependent on the consent of his guardian.

Islamic Law, therefore, makes a distinction between a contract of minor possessed of understanding, and one made by a child who does not possess understanding. A marriage contracted by a minor who has not arrived at the age of discretion, or who does not possess understanding, or who can not comprehend the consequences of the act, is a nullity. If the minor is possessed of understanding then a contract of marriage entered into by her is dependent on the consent of her guardian, according to Hanafi who allows a woman to enter into such a contract.[13] While under Maliki and Shafi'i schools she is under the power of(Ijbar) i.e., the power of her guardian who exercises that power.

As majority is attained on puberty, a woman is free to marry after attaining puberty even though she is under 15 years. According to Hanafi Law after attaining puberty she can select a husband for herself without reference to the wishes of her father or guardian, because no guardian can force an adult woman whether virgin or not into marriage.

While under other schools she has to be represented by her marriage guardian (wali). A contract of marriage made by a person of unsound mind or by one who has not attained puberty is not valid, and the marriage of such person can be contracted only by the guardians.

8. STIPULATIONS

The language used for offer and acceptance while contracting marriage is normally simple and concise. It is the words denoting a marriage according to Islamic Law. By virtue of this, the spouses have rights and obligations towards each other. Inspite of that sometime one party or both include certain conditions in the marriage contract. These conditions must be legal, reasonable and not opposed to the spirit of Islamic Law. The parties could modify or rescind these conditions at anytime they like. In cases where illegal and unreasonable conditions is attached to a marriage contract, the condition alone and not the marriage itself will be treated as invalid.

All jurists agreed that contracts with illegal stipulations sometime may invalidate the contract. Also such of these contracts are:-

(i) A marriage for temporary period i.e., (mut'a)

(ii) Nikah al-sigar i.e., exchange of sisters without paying Sadaq to each; making each one as dower for another.

(iii) Nikah al-Tahleel i.e., to marry a triply divorced woman on condition to make her lawful for her former husband who divorces her three times. The Prophet (S.A.W.) is reported to have

> said a marriage with such a stipulation makes the bride as a browed male goat, may God curse him and curse that former husband for whom such a woman is falsely presumed to be lawful.[14]

(iv) The stipulation that the husband should divorce his existing wife.

So all these contracts of marrigages enumerated above and alike are invalid because of the stipulations, and the contracts should be invalidated whether before or after consummation.

Stipulations which repeat or affirms the normal ingredients of a marriage contract such as that the husband should pay the dowery or that he should maintain the wife are valid. But stipulations contrary to the nature and object of the contract such as there should be no mutual rights of inheritance between the two spouses, or that the wife has to maintain herself, or that the husband is to restrain from having sexual intercourse with her such of these stipulations invalidate the marriage contract before consummation, but after consummation, the stipulation are to be considered as cancelled and the contract of the marriage should stand valid. Stipulation which are not contrary to the nature and object of the marriage such as

Abul al-Zubair al-Makkiy narrated that a marriage which was contracted in the presence of one male witness and one female witness, was reported to caliph Umar, where upon he said:

> "This is a secret marriage and I cannot approve of it, and had it been that the parties were brought before me, I would have decreed that they be stoned to death."[19]

Jurists differs as to the necessity of the witnesses being present at the formation of the marriage contract.

(a) According to Maliki Law it is not a necessary condition to the validity of the contract that witnesses should be present at the formation of the marriage contract. They are only essential to the validity of the marriage. However, in the event of a marriage contract without witnesses, such a marriage should be annulled before consummation, but it may be allowed to subsist after consummation, provided it was given adequate publicity such as by beating of drums or wedding feast.[20]

(b) In Hanafi school, the presence of witnesses at the formation of the marriage contract is a necessary condition of validity. Or otherwise the contract is null and void.

(c) In Shafi'i and Hambali schools, the presence of the witnesses is a necessary condition of validity of the contract.[21]

(d) In Shi'a Law, no witnesses are cecessary for the validity of a marriage. Thus, a marriage held in the absence of witnesses would be valid although the presence of the witnesses is required at the time of dissolution of marriage.[22]

2. QUALIFICATION OF WITNESSES

There are four conditions requisite to the competency of witnesses.

(a) They should be adult

(b) They should be Muslims, if both of the two spouses are Muslims, but if the wife is a kitabia then witnesses may be of any other revealed religion.

(c) Freedom - The question of freedom would not arise any longer owing to the abolition of slavery.

(d) The witnesses should be sane. Although a marriage contracted in presence of drunkard witnesses would be valid if they apprehended the matter at the time even though they may not recollect it on becoming sober but not if they were unable to understand what they heard.[23]

No particular type of witnesses are needed, only some witnesses must be present. Witnesses otherwise disqualified my qualified as witnesses for marriage. Thus a profligate (fasik) or one who has been punished for hadd of Zina or slander or descendants of one or both of the parties to the marriage who would in other matters be disqualified as witnesses may be witnesses for marriage,

3. NEED AND EFFECT OF NON EXISTENCE OF THE WITNESSES.

Jurist differ as to the question of the witnesses must be males. According to Maliki, Shafi'i, and Hanbali schools maintained that the testimony of females is not admissable in establishing the validity of marriage. They argued that a contract of marriage is not one which involves property transaction nor is it referrable to such a transaction. Moreover, it is normally attended by men. The following Hadith is quoted in support of this contention.

> "The testimony of females must not be admitted in criminal cases nor in matters involving dispute over a contract of marriage or divorce."

But to Hanafi school the presence of one male and two females is adequate for the validity of the contract. They too cited the Qur'anic authority which says:

> "Bring two witnesses from amongst your males, if there are no males then a male and two females will suffice from among those you accept as witnesses."[24]

In all the schools it is essential that the witnesses should be present at the time when the contract is being actually entered into i.e., when the proposal and the acceptance is made; the witnesses has to hear the words of both the contracting parties simultaneously so that if one witness was to hear the words of one and not of the other, the contract would be invalid. If the witnesses should hear both parties but hear them separately for instance, if the marriage should first take place in the presence

of one of the witnesses and should then be repeated in the presence of the other who was absent on the first occasion, the contract would be invalid. Even if both witnesses are present and one of them hears and the other being partially deaf does not hear and someone says aloud the words in his ears, the marriage would still be invalid.[25]

1. al-Dasuqi, (Hashiyat al-Dasuqi), Vol.II, p. 216
2. Ameer Ali (Muhammadan Law), Vol.II, Calcutta, 1894, p. 271.
3. M.T. El-Imairi, (Personal Status In Islamic Law) 1978, p. 19.
4. Qur'an 4:21
5. This is based on a tradition of the Prophet (S.A.W.), related by A'ishat and cited in Jami'al Tirmidhi 9:6.
6. CF Qur'an, 2:282. For the juristic of this rule, the caliphs, notably, Harun al-Rashid insisted on all Muslims and non Muslims, registering their marriages before a Qadi (judge) De Sacy, chrestomathis p. 22.
7. Fazlul Karim, (Al-Hadis), Vol.II, Lahore, p. 647-8.
8. Qur'an 5:6
9. Bukhari (Sahih al-Bukhari)
10. Muhammad Hamidullahi, (Introduction of Islam); p. 165
11. al-Dasuqi, supra, p: 230
12. al-Dasuqi, supra, p: 230
13. Ameer Ali, (Muhammadan Law), Vol. II, Calcutta, 1894, p. 272.
14. Bukhari (Sahih al-Bukhari)
15. Abdurrahmal al-Jazuriyyi (Fiqh ala Madhahib al-arba'a) Vol.IV, p. 88. See also Dasuqi supra, Vol.III,p.238.
16. Ibn Rusd, (Nidayat al-Mujtahid), Vol. II. p. 59
17. Qur'an 2:282.
18. Fazlul Karim supra, p. 653.
19. Quoted in Fiqh al-Sunna, Beirut, 1973 Vol,II, p. 57 See also Sayyid Sabiq (Fiqh al-Sunna), Beirut, Vol.II, p. 57

20. al-Dasuqi supra, p. 216.
21. Abdurrahman al-Jaziriyyi, supra, p. 20
22. Bail (Digest of Muhammadan Law), Vol. I, Lahore, 1974, p. 6 - 7.
23. Bail, supra, Vol.1, p. 8.
24. Qur'an 2: 282
25. Bail supra, Vol 1, p. 7.

CHAPTER FOUR

MARRIAGE GUARDIANSHIP

1. GENERAL SURVEY

Wali from the Arabic root word (wala) which means to be near, and waliyya is to govern, to rule and to protect some one who is unable to/so independently. In the Quranic concept, wali signifies protector, benefactor, companion, friend and is applied also to near relatives. When the term wali is used in marriage it means the person who is authorized by law to make a valid contract of marriage of a minor or person of unsound mind, who lacks the capacity of entering into contractual transaction.

Guardians therefore may be naturaly legal or contractual. It is natural when there is parental relationship between the guardian and his ward; it is contractual when the guardianship is by appointment, e.g., the wasi (executor) appointed by the father, and it is legal where the appointment is by the court of law.

Marriage guardianship has been defined as "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 a father or nearest male relatives over minors, insane, or inexperienced persons who need protection and guardianship.[1]

2. GUARDIANSHIP OF MARRIAGE IN ISLAMIC LAW

The purpose of legislating on the subject of guardianship seem to check the unlimited powers of irresponsible family heads. The law generally stated, is that there can be no valid contract of marriage without the guardian. This is following the authorities from the Holy Qur'an and the traditions of the Prophet (S.A.W.)

(a) QUR'AN:

(i) "Marry (Wali) those among you who are single or the virtuous ones among your slaves male or female." If they are in poverty, God will give them means out of His Grace. For God encompasses all and He knows all things."[2]

(ii) "When you divorce women and they fulfil the term of their idda don't (Wali) prevent them from marrying their (new) husbands, when they have agreed among themselves according to what is honourable."[3]

(iii) ".... No marry your girls to unbelievers until they believe....."[4]

(b) PROPHETIC TRADITIONS:

(i) A'isha, related that the Prophet (S.A.W.) said: "whoever amongst women marries without a marriage guardian, such a marriage is batil (void)."

If the marriage is consummated she will be entitled to a dower so as to legalised the sexual intercourse which had taken place between them. If a marriage guardian refuses to act then the Muslim ruler (who normally appoints a judge) is guardian of him who lacks one."[5]

(ii) Abu Musa narrated that the Prophet (S.A.W.) said: "There shall be no valid marriage without a marriage guardian."[6]

(iii) Abdullahi ibn Barid narrated on the authority of his father that a young woman come to the Prophet (S.A.W) and said that, "my father has married me to his nephew in order to raise his status." The Prophet (S.A.W), gave the option of accepting or rejecting. She then said, "I now approve the action of my father but I wantwwomen to know that fathers have no authority over their matters."[7]

(iv) It is narrated by Ibn Abbas that the Prophet (S.A.W) is reported to have said:

> "The Thayyiba (Matron) is the better judge of her own interest than her marriage guardian. But the virgin girl has to be consulted and her silence signifies assent." Reported in Sahih Muslim, Abu Daud, Tirmidhi and Ibn Majah.

3. VIEWS OF DIFFERENT SCHOOLS:

According to all schools of jurisprudence, a woman who is adult and of sound mind has the full capacity to deal with her property and to enter in to any kind of contract either for herself, or as an agent for somebody else without the least interference from anybody, be he her father, guardian or husband. But they differed as to whether she has full capacity to contract herself in marriage or to act for another in his or her marriage.

a. According to Maliki, Shafi'i and Hambali schools, a woman can, by no means contract herself in marriage to a man without the participation of her marriage guardian.[8] Neither is she competent to contract her daughter or ward, not to act as a matrimonial agent for anyone so as to enter into a contract of marriage on behalf of her constituent. Because, they argued,

the end proposed in marriage is the acquisition of those benefits which it produces such as procreation, and if the performance of this contract were in any respect committed to woman its end might be defeated, they being of weak reason and open to flattery and deceit.[9]

b. According to Hanafi School, every person who is (sui juris) whether male or female, maiden or matron, is competent to enter into a marriage contract on his or her behalf or on behalf of another person. This school argued, especially in the case of the adult woman, that in marrying, the woman has performed an act affecting herself only and to this, she is fully competent, if she is sane, adult and capable of distinguishing good from evil and since in law she is capacitated to act for herself in all matters of property, likewise she can be allowed to choose a husband for herself. But the guardian reserves the right to dissolve the marriage on the ground of irregularity, inadequacy of the dower or in the case where the bride is not equal to the woman (Kafa'a).[10]

The guardain's intervention is required to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar importance and guard her against being misled by unscrupulous people, or from marrying a person morally or socially not equal to her.

4. CONDITIONS OF MARRIAGE GUARDIAN

It is generally accepted by all the majority of jurists that marriage guardianship is committed to the agnatic relations of the ward but the Hanafi's accept females and cognates as well. Other conditions include:

(a) Freedom

(b) Adult. He must not be a minor

(c) Sane

Authority to contract others in marriage is not vested in a slave, an infant, or a lunatic, because such persons being considered in Law as incapable of acting for themselves, are incompetent to exercise any authority over others, a fortion: moreover, this authority is established in guardians and others out of tenderness to persons who from their situations require attention and care such as infants and lunatics; but this would not be manifested by committing the execution of marriage, on their behalf, to persons of the above descriptions.[11]

(d) Muslim:- A non-Muslim cannot be vested with this authority with respect to a Muslim male or female. For the Quran says:

"....,And never will God grant to the unbelievers a way (to triumph) over the believers."

But, there is an exception to this rule, that is, in the case of a non-Muslim ward- her non-Muslim father or guardian, provided that he follows the same religion as that of his daughter, is acceptable, because the ward of the Qur'an says:-... .And a non-Muslims may exercise authority over non-Muslims."[12]

(e) Male - Accofding to Maliki, Shafi'i, Hambali and Daud al-Zahiri, the marriage guardian must be a male, for such an authority to contract themselves or others in marriage is not vested in a female. While according to Hanafi school, he allowes both male and female to contract himself or herself in marriage.

(f) Not Muhrim - I.e., not engaged upon the ritual practice of Hajj (Pilgrimage) or Umra (Lesser Hajj). This is in accordance with Maliki, Shafi'i and Hambali Schools of jurisprudence who hold the view that such a person is prohibited from either contracting marriage for himself or on behalf of some one else. But he is allowed under Hanafi school.

5. CLASSES OF MARRIAGE GUARDIANS

Marriage guardians are of two types:

(i) Those who may impose their power regardless of the ward's wishes, they are known as wali mujbir. These are normally the nearest male agnate relative in whose absence a community official may assume the responsibility. Whether guardianship is considered as a right conferred on or as duty assigned to the guardian, the fact remains that it is ascribed by law and neither party can terminate it unilaterally so long as the conditions calling for it exist and is qualified.

(ii) Those guardians or (Wakils), who can only act as a legal representative (Wakil) at the making of her marriage contract within the limits of authority delegated to him by the ward; and these are known as wali not mujbir.

(A) WALI MUJBIR

As to who is Wali mujbir, different views has been expressed by different schools of Law.

(i) Maliki Law - According to Maliki Law, it is the father or his executor who has the power of Ijbar. Power of Ijbar under - Maliki Law has been restricted to the father only. The executor appointed by the father would also

> exercise the power. The appointment may be by will or verbally authorising him to do so. Such as where he said, "I authorised you to marry my daughter D. to H., or to whosoever you wish." The executor can not impose his powers unless the father has pointed out to him the husband and whether the marriage may take place before or after puberty. The father can not use his power in giving out his daughter to a man with incurable disease such as leprosy, insanity, impotence, enuct ect. But he has the right to give her away to a man not equal to her, to a blind or with less than the proper dower. Moreover the executor cannot give that daughter in marriage unless with mahr mithly.[13]

Imam Maliki argued for this rule of vesting the right of Ijbar in the father alone that this is a power, the exercise of which does not appertain to any of the relatives except the father; that the power over freemen is established from necessity; but in the present instance no such necessity exists as infants are not subject to any canal appetite. Yet it is vested in the father on the authority of the secret texts contrary to what analogy would suggest. The father's father not being the same as the father is not to be included with him.[14]

According to Maliki the father or his executor can exercise the power of Ijbar in the case of his minor daughters whether virgin or not, his adult virgin daughters and his insane daughters even after giving birth; he will also exercise his powers to marry his young son, if there is some benefit in it. Therefore the father under Maliki Law may impose his power on his following daughters:

(a) His young virgin daughter

(b) His young daughter who has lost her virginity

(c) His adult virgin daughter until she became (anisa)

(d) His adult thayyib daughter who lost her virginity outside wedlock.

(e) His insane daughter whether adult or young; and

(f) His young son

In the case of his adult daughter who lost her virginity through a marriage even invalid his power lapses.[15]

(ii) Hanafi Law - In Hanafi Law, the power of Ijbar can be exercise only upon minor daughters whether virgin or not Where, therefore, a virgin daughter has attained the age of puberty the power of exercising the matrimonial constraint on her lapses. According to Hanaf School, the power of Ijbar has been restricted to father and the agnatic relations in order of priority. All guardians are possessed of the power of Ijbar upon minors; minor boy or a girl, whether the minor girl is a virgin or not. If the minor has been given in marriage by a guardian who is not the father or the grandfather, the minor has the option, on attaining the age of puberty of repudiating the marriage. This is known as the doctrine of Khiyar

al-Bulugh (option of puberty[16] Ibn Abbas reported that a virgin grown-up girl came to the Prophet (S.A.W.) and narrated that, "her father had given her in marriage, which was disliking to her. The Prophet (S A.W) gave her option." (Reported by Abu Daud) But this tradition, shows that, even if the father gives away his daughter in marriage against her wishes and she is of age, the marriage must be repudiated if the girl so desires, and in the case of minor too if, on coming of age, she finds the match unsuitable.[17] However her right of option lapses by lapse of time, or by accepting the dower, or if she had allowed the marriage to be consummated.

(iii) Shafi'i law - Shafi'is maintained that the power of Ijbar must belong to the father and the father's father only, but not the executor or other agnate relations; because the father's father is a father in the absence of the father, and that entrusting the power of contracting marriage to any others than the two would be oppressive upon the child since it is to be supposed that no others are equally interested in its welfare or happiness; on which principle it is that the more distant kindred are not entrusted with the property of infant a matter of less importance than their person.[18] The Shafi'is argued that affinity is a cause of affection in other relations the same as in parents and in whatever degree that might be defective. A provision is made against any consequences in the matter after puberty which acquiescence is necessary to constitute its validity, contrary to acts with respect to poverty.[19] Shafi'i restricts the right of ijbar in case of virgin daughters whether adult or minors. He extends that right to the mad daughters, but not non-virgin

daughters even if they are minors.

(IV) Hambali Law - The Hambali's agree with the Maliki in restricting the power of ijbar to the father alone.[20] Also the school restricts the power to be exercise on minors whether virgin or not.

(ii) RIGHT OF IJBAR ENDS WITH PUBERTY

The power which Islamic Law vests in Wali Mujbir, whether he is the father, grand father or other walis of imposing the status of marriage on minor children terminates practically with the attainment of puberty.

Puberty is presumed on the completion of the fifteenth year, according to most of the schools, unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and (sui juris) possessed of the capacity to enter into legal transactions. After the age of fifteen every contract of marriage entered into on behalf of a minor boy or a girl is dependent upon his or her consent; and among the Hanafi's and Shiah's, the children of both sexes on attaining majority are free to contract marriages without the consent of their guardians.

All the schools of jurisprudence agreed upon the capacity of a male child to contract himself in marriage after he has attained age of puberty, but there exist considerable differences of opinion as regards the capacity of female children.

The Hanafi's and Shi'ah's hold that the right of ijbar is the case of males, as in that of females continues untill they have attained the age of puberty. Maliki's and Shafi'is are of the opinion that the exceptional right of ijbar, in the case of females continues in force until they are married, and consequently emanticipated from paternal control.[21]

(III) ABSENCE OF WALI MUJBIR

If the marriage of one of the above mentioned daughters is concluded by any one other than the father or his executor, it will be void, even if the father afterwards agreed and even after giving birth to children, according to Maliki Law. The same rule applies if the father was absent in a near place where it is possible to contract him, in condition that the father was maintaining his daughter.[22] On the other hand under Hanafi Law if later on the father gave his consent, the marriage becomes valid.

B. WALI NOT MUJBIR

The Wali not mujbir is the representative of the women in making her marriage contract with her express consent. Since this guardianship (wali) is committed to serveral persons, there bound to be a conflict in the order of priority. This being the case, the schools have different views as stated below:

(i) Hanafi Law:- It is stated that agnatic relations take precedence over cognates, and among the agnates the order of priority is as follows:

(i) The woman's son and his descendants, even if the son were a product of zina.

(ii) the father, and the fathers father, how high soever.

(iii) Brothers germane and consanguine and their sons, with the germanes taking precedence over the consanguines.

(iv) Paternal uncle's germane and consanguine and their descendants, with the germanes taking precedence over the consanguine.

The same rule applies to the corresponding females relations and cognates except that the mother of bride takes precedence over her daughter.[23]

Where a remoter marriage guardian gives a ward in marriage, it is suspended upon the approval of the nearer marriage guardian. But if the nearer guardian is absent when it is not easy to communicate with him, and it is feared that if his arrival were to be awaited, the arrangement will lapse, the remoter marriage guardian will act, and his acti n will need no ratification by the nearer guardian when he arrives.[24]

(ii) Maliki Law:- In Maliki Law the order of priority agrees with that of Hanafi. That is in the absence of wali mujbir, then the agnates in the order mentioned under Hanafi school. According Ibn Rusd a Maliki jurist, he says Maliki personally gives priority to the father over the son. Also in the case of the walad al-zina, (the illegitimate son) his guardianship for the marriage of the mother is only valid where the husband was not be the mother's partner in the illicit sex relations by which the son was begotten. In the case of the father, he must not only be the natural father, but also legitimate father. Thus if he was the natural father only his waliyat is not acceptable.[25]

(iii) Shafi'i Law:- The rule of priority in this school is the same as the other two schools except that, he does not approve of the son and his descendants as being wali (guardian) priority to act as a guardian is so strict that in no case can a remoter guardian participate in a marriage when a nearer guardian is alive. The Shafi'is observe that, it is necessary to follow the order of priority, and the right does not devolve to the person next in the order, unless the first person whose turn it was, was incapacitated through e.g., insanity, minority, difference of religion, or being engaged in the rituals of pilgrimage; or being interdicted person otherwise the order must be strictly followed. Therefore, they argued, if the nearer guardian is absent to a far distant place which would require another guardian to act, such authority must devolve to the political ruler, because this authority is vested in the first guardian as a positive right and cannot be annulled by the absence of the party, as the Law does not admit absence as destructive of right. Hence if the absent guardian were to contract the marriage of the minor on the spot where he may, at that period happen to be, it is Lawful. Moreover, a relation of more distant degree is not vested with the authority in the existence of a nearer relative, since the more distant is precluded by the nearer.[26]

(iv) Hambali Law:- The Hambali's agree with the Shafi'is in so far as the rule of priority is concerned. On the other hand, they also agree with Malikis that where the wali mujbir refuses to give his ward in marriage for no just cause the political ruler will step in and act in accordance to the interest of the ward."

It is worth-mentioning here that, Maliki, Shafi'i and Hambali Schools, agree that, failing the natural guardians, that is the agnatic male relations of the ward, the guardianship devolves on the political - ruler which may well mean the Qadi (judge). After him then the responsibility devolves on any Muslim. This means that the women can appoint any one among the Muslim community to act as her marriage guardian.

6. THE LEGAL ASPECT OF THE INSTITUTION OF WALI IN NORTHERN STATES.

In Northern States the people are predominantly Muslims and they follow the traditional Maliki Law. Throughout in Northern States a father is regarded as entitled to conclude marriage on behalf of his minor sons, or his virgin daughters of any age, at his unilateral discretion. Although frequently the whole family will have a say in such matters, particularly the mother on whom most of the work involved will fall. The pure Maliki Law, permits this right to the father alone or his executor, unless the virgin daughter has been expressly emancipated from tutelage, or has reached a comparatively advanced age. No any other person whether a brother, uncle or father's father has such right in the absence of the father and who did not appoint an executor. But in Potiskum in Borno State, at least, this right is regarded as passing to, e.g., a brother, or uncle where the father is dead. And although this is contrary to the pure Maliki Law, except as the fathers executor (wasiyyi), it seems probable that it would also, in practice, be recognised elsewhere.

In an unreported case decided by the Upper Area Court, Kano, the power of ijbar was exercised by the uncle of the girl i.e., the senior brother of her father. The facts of the case are as follows:

MAIRO BABA NASIDI VS. ALHAJI SANI

In this case, the plaintiff, Mairo Baba Nasidi is fourteen year old girl who is in form I W.T.C. Bajoga, Bauchi State. The senior brother of the girl's father went to the Principal of the school and requested for her transfer to Queen Amina College Kaduna. The Principal agreed and caused a letter of transfer to the uncle of the girl. Instead of the uncle to take her to Queen Amina College, he married her off in February 1982 to one Alhaji Sami a based business man in Kano, whose age is about seventy. Mairo did not want the marriage as such she refused to go to Alhaji Sani's house, instead she remained throughout with her mother. There was no cohabitation since the marriage. The uncle chained Mairo's hand and foot and beat her up.

Mairo with the help of her mother took the matter to court where she narrated the matter to the court. The lower court upheld the marriage of Alhaji Sani, but on appeal to Sharia Court of Appeal Kano, it was held that the uncle was wrong. And when the husband, Alhaji Sani, appeared before the court, he decided to divorce the girl which he did.

Whatever have been the merits for the doctrine of ijbar, in the past, certainly they would not stand the test of the modern age if applied to the present day girls where there is freedom of movements unlike in the past where the girls were kept under the full control of their parents. This is because nowadays girls are allowed to obtaine western education where they meet their suitors either in schools offices and other social places. And because of this the parents usually consult their daughters before marriage.

In Alhaji Isa Bida Vs. Baiwa, daughter of Alhaji Isa Bida, case No. SC./NWS/CV/47/70[28] In this case Baiwa lodged a complaints to Upper Area Court, Minna, on the ground that her father intended to give her for marriage to a son of his younger brother. Later, he dropped that idea and informed her that he was going to Makka for Hajj (Pilgrimage). He then authorised her (Baiwa) to bring somebody else for marriage of her own choice.

On this occasion, she saw Mamman and fell in love with him proposing to marry him. For this, she informed her father who, at first agreed with the choice. But later on, he objected to the matter and asked her to bring another man. The girl had already made up her mind to marry Mamman, but her father changed his mind and object her choice to marry Mamman Baiwa was matured and so she was in need of getting married, but her father refused to wed her to the man of her own choice; while at the beginning he was the one who authorised her to bring anyone of her choice.

In its investigation the court found that Alhaji Isa had actually authorised his daughter to bring any man of her choice and that he would give her in marriage to the person. This is because Baiwa's mother Hajiya Gogo refused to allow him to give Baiwa in marriage to Dan'iya, the son of his younger brother. Alhaji stated that in his investigation he discovered that, the Mamman, his mother and his brother were all suffering from leprosy and that was why he refused to wed her to Mamman. The court summoned Mamman, his mother and his brother to appear before it, where they were examined and were found healthy and free from leprosy. The examination took place before the court and in the presence of Alhaji Isa.

The court informed him that, Mamman was free from the desease of leprosy and therefore he had no valid reason why he would not allow Mamman to marry his daughter. Alhaji insisted that as long as the daughter belongs to him, he would not consent to Mamman to marry her, but his daughter could propose another husband. The daughter stated that, since her father authorised her to bring her own choice, which she did, and since the person of her own choice was physically well, she therefore loved nobody to marry, other than Mamman.

The court passed its judgment ordering Alhaji Isa to wed Baiwa to Mamman. The court stated that since he authorised his daughter to bring the man of her choice, and since the man is found to be free from leprosy, contrary to his allegation, he has no valid reason to object to her choice.

Alhaji Isa was not satisfied with the decision of the court (UAC) and appealed to Shari'a Court of Appeal, Sokoto on the ground that, his daughter was a girl who had no marriage experience and that he was her father, (wali mujbir). The court held as follows:

1. We have seen in Alhaji Isa's statement given at the U.A.C., that he admitted that he himself permitted his daughter Baiwa who is a girl without marriage experience to bring any one of her choice so that he will wed her to him and that she brought Mamman This statement of Alhaji Isa amount to his giving his matured daughter the capacity to conclude her marriage. For this reason though she was a girl without marriage experience and he allowed her to manage her affairs, she should not be married except to someone of her own choice. Her father had no right to force her to marry somebody else. This issue is

contained Jawahir ul-Ikhlil, a commentary on Mukhtasar volume I, page 280.

2. The reasons given by Alhaji Isa for refusing to give his daughter to Mamman, on the ground that Mamman and his relatives were suffering from leprosy, was unacceptable by law. Refer the chapter on option jawahirul Ikhlil, vol.I page 229.

3. According to Islamic Law, a wife has a right to waive her claim of equality to a husband. If a right of option is given to a wife concerning a defect of a husband like leprosy, her guardian has no right to say anything in this respect. See Dasuki, commentary of Mukhtasar, Vol.II, pp.248-9.

4. We have noted through the proceedings of the Upper Area Court that, Alhaji Isa had been unreasonable by putting his daughter in a difficult position because of his refusal to wed her to Mamman, who, after giving her consent was chosen by her. Alhaji Isa therefore, must comply with the order of the court. Failing to do so, the court will wed her to Mamman by itself in accordance with the authority in jawahirul Ikhlil, commentary of Mukhtasar, Vol.I, page 282. Appeal dismissed.

RECENT REFORMS:

During the current century, Islamic personal Law relating to family rights has formed the subject of legislation in several Muslim countries. In these countries, they have introduced significant reforms into some of the prevailing legal principle of their traditional schools of jurisprudence. Some of these countries are Sudan, Tunisia, Indonesia, Morocco, Algeria. etc. These reforms introduced affected many areas in the personal status. Among the areas that are more seriously affected is the marriage guardian and the power of ijbar.e.g., in Sudan, they did away totally with the question of wali mujbir by applying both the view of Maliki and Hanafi in their Law. This has been done through the Legal Circular No.54 issued in 1960 which amended the whole are of wali mujbir and his powers. According to the Circular, a woman is not permitted to contract herself in marriage, but must be represented by a wali, and in Article 6, it stated that no woman should be married before the attaining the age of puberty. Article 7, also says if an adult woman is contracted in marriage without her consent the marriage is null and avoid.

Morocco, Algeria and Tunisia, they are all followers of Maliki Law in 1958 and 1959 respectively concerning the question of wali mujbar and the power of ijbar, did away with the Maliki Law, thereby applying Hanafi Law. Morocco in their code, Article 5, they insisted on the consent of the bride and the conclusion of the marriage by the wali. In Algeria, Article 2 of their marriage ordinance stated that, the marriage contract should be concluded in the presence of both parties and two witnesses before a court or a Registrar for marriages. In Tunisia, article 3 of their Code of Personal Status, stated

stated that, no marriage shall be concluded without the consent of both parties. Article 9 of the Code allows the parties themselves to conclude their marriage.

In Indonesia and Malaysia, they adopted Shafi'i school, that the guardian should conclude the contract after the consent of the bride.

1. Cf. Shorter Ency. of Islam p. 447
2. Qur'an 24; 32
3. Qur'an 2; 232
4. Qur'an 2; 221
5. Reported by Ahmad, Abu Daud, Tirmidhi and Ibn Majah
6. Reported by Ahmad, Abu Daud, and Tirmidhi
7. Reported by Ibn Maja.
8. Ibn Rushd, (Bidayat al-Mujtahid) Vol.II, pp 8-9
9. Al-Marghinani, (Hedaya) Translated by Hamilton, New Delhi 1979, p.38.
10. Ibn Abidin Radd al-Mukhtar, Cairo, 1966, vol. III, p.66
11. Al-Marghinani, (Hedaya), Translated by Hamilton New Delhi 1979 p.38
12. Ibid
13. al-Adawi: (Hashiyat al-Adawi) Vol. II, p.35
14. al-Marghinani (Hedaya) Translated by Hamilton, New Delhi 1979 p.36
15. al-Dasuqi (Hasiyat al-Dasuqi), Vol.II pp.222-223.
16. Muhammad Ibn Faramuz:- (al-Durar al-Muhkam), Vol. p. 337.
17. Muhammad Ali (The Religion of Islam) 1973 Lahore, p. 522
18. al-Marghinani (Hedaya) Translated by Hamilton, New Delhi 1979 p.36.
19. Ibn Abidin (Radd al-Mukhtar) Cairo, 1966, Vol.II, p.56
20. Abdur Rahman, al-Jaziriy, (Fiqh ala Madhahib al-Araba'a) Vol. IV, p.29
21. Syed Ameer Ali (Muhammadan Law) Vol.II Lahore 1976, pp 210-211.
22. Adawiy (al-Hashiyyi) Vol.II, p. 32.
23. Abdur Rahman al-Jaziriyi (Fiqh ala Madhahib al-Arba'a) Vol.IV, pp 26-27.
24. Ibid. pp 40-41
25. Ibid. p.27
26. Sayyid Sabiq (Fiqh al-Sunna) Vol. II, Beirut, 1973, pp 134-135.
27. Abdur Rahman al-Jaziriy, Fiqh ala Madhahib al-Arba'a Vol.IV, p.36.
28. Sharia Law Reports, Centre for Islamic Legal Studies Vol.I pp 38-42.
29. Tahir Mahmood, (Family Reform in Muslim World), N.M. Tripathi, 1972.

CHAPTER FIVE

SADAQ (DOWRY)

1. GENERAL OBSERVATION

In order to constitute a valid marriage, Islamic Law requires that the husband should donate to the wife a legal property capable of constituting a valid transaction and which would be for the exclusive use of the wife. The principle of dower is not peculiar to Islamic Law. It originated in the ancient times. Two basic types of dowry have been practiced. The first type is that which is paid by the groom or his family to the bride or her family. It normally consists of money, property or animals. It may also sometime consists of services rendered by the groom to the family of the bride. Further, a wife could have been acquired by means of exchange when a man agreed to exchange his daughter or ward for anothers. The second basic type of dowry is that which is rendered by the bride or her family to the groom or his family. This was common in some ancient societies and is still so in some modern ones. However, nor are their sub-types.

The fact that marriage has been for so long accompanied by a "bride price" or "groom price" is interesting. The origin of the bride price, according to a comtemporary anthropologist," must be sought in a family set up in which a young girl was an economic asset for her father's family. The departure of the girl from her own family was an economic loss, and this was compensated by the bride price. From the point of view of the bride groom's family, the acquisition of a wife meant the addition of a pair of working hands in exchange for the amount paid over to the bride's family."[1] Beside this economic factor, there is also a procreative one, which is not entirely free from

economic considerations. The bride price is likely to be stipulated in a patrilineal system where a new union "holds out the promise of increasing the number and strength of the bride grooms family...." No comparable advantage occurs to the mother's family. The father not only looses a daughter but also all her future progeny. He should therefore, receive some material compensation for his losses. Sometimes the payment of a large bride price may be the expression of the love of the bride groom for his bride."[2]

There are situations where the bride's family pays a marriage portion to the groom or his family. This is common in monogamous societies, where the sex ratio is Low, where a large number of females never marry, and, finally, where married women lead an indolent life. In such societies, the marriage portion frequently becames a purchase sum by which a father buys a husband for his daughter.[3] This is true of modern as well as ancient societies. Some of the rules governing the dower in an ancient times are briefly discussed here:

(a) The Jewish Law: In the Jewish Law it was necessary to specify the total debt prior to the contract of marriage, any marriage contracted without a consideration is invalid.[4]

(b) The Hebrew Law: Among the Hibrews, the dower settled on the wife was never made over to her for her exclusive use and enjoyment; she acquired, in fact, no right over it until the marriage was dissolved, either by the death of the husband or by divorce, in which case the dower was made over to her in order to enjoy or to dispose of, according to her own desire.[5]

(c) The Roman Law:- The mahar of the Islamic system is similar in all its legal incidents to the donatio propter nupitias of the Romans. It is settlement in favour of the wife, made prior to the completion of the marriage contract in consideration of marriage. But there is still this essential difference between the Roman donatio propter nupitias and the mahar of Islamic Law, that is, the former is purely voluntary on the part of the husband, while the latter is absolutely obligatory.

(d) Pre-Islamic Arabia:- In Pre-Islamic Arabia, dower which was called mahar was paid by the husband to the wife's father or any marriage guardian in consideration of the marriage contract and only when a mahar had been paid did a proper legal relationship arise. A marriage without a mahar was regarded as shameful and looked upon as concubinage. At that time the bride received nothing from the dower. But this does not mean that she was totally excluded from receiving anything from the bridegroom in consideration of the marriage. In fact what was given at the betrothal called sadar was given to her because by the act of the betrothal the two have becomes friends and she was a sadiqat to him.[6]

2. CONCEPT OF DOWER

The concept of dowery under Islamic Law differs in two important features from the rules of dower under the Hebrew Law. In the first place Islamic Law does not consider a marriage without a dower as invalid, unless it was made a term in the contract that, there should be no payment of dower in which

case the contract is invalid according to some authorities, and others said an illegal term which does not destroy the object of the contract can only be expunged and the contract is left unaffected, in which case, the Law presumes that the proper dower, mahar al-mithli, is payable.[7] Secondly, Islamic Law recognises that the wife acquires an immediate right over the dower, or that portion of it which is "exible" in its nature.

The term "dower" or "dowry" in Arabic differs with dowry in the English term of it. The term mahar in Arabic means the property which is due from the hsuband to the wife in consideration of the marriage, while the English meaning of dowry which is probably the same with that of Athenians and the Romans and the French dot, is the property the woman brings with her to the husband's house, which is analogous to the jahaz in Islamic Law.

3. DEFINITION

Mahar under Islamic Law signifies the property due to the wife from the husband as an obligation imposed on him as a mark of respect to the wife. This is made abundantly clear by the author of Hedaya when he says:-

> "The payment of dower is enjoined by the Law merely as a token of respect for its object (the woman), wherefore the mentioned of it is not absolutely essential to the validity of a marriage; and for the same reason, marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower."

Baillie: "....the property which is incumbent on a husbnad, either by reason of its being named in the contract of marriage, or by virtue of the contract itself. Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the Law on the husband as a token of respect for its subject, the woman.

Mahmood J. defines dower as follows: "Dower, under Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the Law confers the right of dower upon the wife."[8]

Islam makes provision that it is obligatory on the husband to give to the wife upon marriage the dowry as has been agreed upon before or at the time of concluding the contract of the marriage, or, if it has not been fixed, the parties should fixed it later on after the marriage contract. A stipulation on the part of the wife before marriage to abandon all her right to dower is invalid and inoperative under Islamic Law, and should such a stipulation have been entered into, the wife would, nevertheless, be entitled to the proper dower (mahar al-mithli). But on the other hand, she can, if she choose after marriage, discharge the husband from his liability for the dower-debt, or return to him anything she may have received from him in satisfaction of his liability.

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Islam insists that dower should be paid to the wife herself, and made it to be her exclusive property, and no other person has any right of claim in it. Whatever she gives out from it must be with her consent. The requirement of the mahar for the woman is in the nature of a gift for which reason the Qur'an calls it (nihla), or present. This gift was required of the man to enable her to buys some furniture (jahaza) with which she would come to the husband's house. The Qur'an, therefore enjoins bridal gift for a legal marriage:

> "And give women their dowries as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.[9]

It is clear from this verse that the mahar should be a free and voluntary gift unaccompanied by any consideration. It is also inferred that she can, of her own volition, after properly in the mahar has been vested in her, without any duress or deceit, give the whole or any part of it to husband or any other person. But where a woman gives it out of timidity, or fear or deceit, it is not lawful to accept it. The Qur'an thus says:-

> "But if you decide to take wife in place of another even if you have given the latter a whole treasure for dower, take not the least bit out of it back; would you take it by slander and a manifest wrong? And how could you take it when you have gone in unto each other and they have taken from you a solemn covenant."[10]

And yet another verse, reads:

> "And Lawful for you all women besides these, provided that you seek them with your property, taking them in marriage not committing fornication. Seeing that you derive benefit from them, give them their dowers (at least) as prescribed; but if after a dower is prescribed you agree mutually (to vary it), there is no blame on you, as God is All Knowing All wise."[11]

In the case of a Muslim marrying a christian or a Jewish woman (ahlal Kitab), the Qur'anic injunction on the question of dowery is

> ("Lawful unto you in marriage) Are (not only) chaste women who are believers, but chaste women among the people of the Book revealed before your time, when you give them their due dowers, and desire chastity, not lewdness....."[12]

Islam is not exclusive. Social intercourse, including inter-marriage, is permitted with the people of the book. A Muslim man may marry a woman from their ranks on the same terms as he would marry a Muslim woman; i.e., he must give her an economic and moral status, and must not be actuated merely by motives of lust or physical desire. A Muslim woman on the other hand is prohibited to marry a non-Muslim man, because her Muslim status would be affected; the wife ordinarily takes the nationality as status given by her husband's law. A non-Muslim woman marrying a Muslim man would be expected eventually to accept Islam. Any man or woman of any race or faith, may, on accepting Islam, freely marry any Muslim woman or man, provided it be from motives of purity and chastity and not of lewdness.

Although dower is essential and is a condition, but is not necessary to be mentioned in the marriage contract. In the meantime that contract will be void if it includes a stipulation that there will be no payment of dower. But if the parties just refrain from mentioning anything about sadaq there will be no harm. This sort of contract is known as "Nikah al-Tafweed"; on which the Qur'an says:

> "There is no blame on you if you divorce women before you have touched them, or appointed for them a dower."[13]

There are numerous traditions of the Prophet (S.A.W) concerning the necessity of the payment of dower and all Muslim jurists are agreed that marriage without sadaq is unlawful.

4. NATURE OF SADAQ

Dower is analogous to a sale price, that is dower comprises the same fundamental conditions as those attached to a sale. When a woman marries, she sells a part of her person. As in any other bargain and sale, only useful and ritually clean objects may be given in dower e.g., the article must be pure, useful, capable of delivery, capable of ascertainment; neither may consists of wine (even in case of the bride being a dhimiyyah); nor of a run-away slave; nor of fruits liable to perish; etc. A dower may consists of the money, camels, cows, etc, or a certain piece of land, or buildings, but not the trees on a certain piece of land, even though described. If the woman be accustomed to a sedntary life the dower may properly consists of furniture of medium quality, such as is common among women of her position, but if she be a nomad the dower ought be camels, sheeps, etc, of medium quality.

With regard to the goods consisting the dower, which are subsequently found to be bad or defective, the wife has the option either to keep them as they are, or to return them and claim the equivalent value, or to demand that they shall be replaced by other goods of the same kind.

Dower payable to a wife is in the nature of an unsecured debt. The wife stands in respect of her dower in the same position as any other unsecured creditors and she can obtain a decree against the asset of the husband like any other creditors. But it has no priority over mortgage debts. Islamic Law under schools of jurisprudence, recognises what is known as the widow's lieu for unpaid dower. If a widow obtains possession of the property of her husband she is entitled to retain it The heirs or creditors cannot dispposess her till her dower is satisfied.

The Islamic concept of dower has no reference the price that under some systems of law was paid to the father or guardian of the bride when she was given in marriage. On the other hand, it is considered a debt with consideration (for submission of her person by the wife). The result is that dower is purely in the nature of a marriage settlement and is for consideration. The best general observation on this point is that given by Lord Parket of Wadding in Hamira Bibi v. Zubaida Bibi.[14]

> "Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the Law declares that it must be adjourned on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the Law allows its division into two parts one of which is called 'prompt', payable

before the wife can be called upon to enter the conjugal domicile; the other "deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce. But the dower ranks as a debt, and the wife is entitled, along with the other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditors....."

The nature of the right of sadaq to the woman is in the form of contract by the husband and as such has preference to (six) bequests and inheritance. Mahmood J. in Abdulkadir v. Salima[15] observed that:

Under Islamic Law the right of cohabitation comes into existence at the same time and by reason of the same incident of Law as the right of dower. That the latter may modify and affect the former cannot be doubted; how it affects and modifies it is the main subject of this reference. Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where dower is expressly fixed or mentioned at the marriage ceremony, the Law confers the right of dower upon the wife as necessary effect of marriage....."

5. OBJECT OF S.D.Q

Islam insists that dower should be paid to the wife herself, unlike under other legal systems where the dower should be paid to the father or guardian of the wife. It sought to make dower into a real settlement in favour of the wife, a

provision for the rainy day; and socially, it becomes an effective check on the capricious or arbitrary exercise by the husband of his almost unlimited power of divorce. Thus, a husband thinks twice before divorcing his wife when he knows that upon divorce, the whole of the dower would be payable immediately.

6. CLASSIFICATION OF SADAQ

According to Islamic Law, sadaq is payable whether it has been fixed and agreed upon or not, or even where the contract has entered into with a clear condition that there should be no payment of dower. Because of this, dower has be divided into two kinds. Viz, specified (Mu'ajjal) or unspecified (Muwajjal).

(a) SPECIFIC DOWER (Mahr-al-Musamma): This is the dower expressly agreed upon by the parties before or at the time of concluding the marriage or after the marriage contract. If the groom is minor, his father or guardian may settle the amount of the dower on behalf of the minor, and the minor becomes binding by the contract. Where the amount has been specified, the husband will be compelled to to pay the whole of it however excessive it may seen to the court having regard to the husband's means.

MAXIMUM AND MINIMUM AMOUNT OF DOWER

Generally speaking the Law does not fix any limit to the maximum amount of dower that is payable to the bride, because people differ in their financial circumstances and means, and each locality has its own custom and usages. It is therefore left to each individual to give what he is capable of giving

as the dower commensurate to his means and social status. None of the texts has prescribed the amount payable as dower except that they all insist that it should be something of legal value (mal). Anything over which dominion or the right of property may be exercised, or anything which may be reduced into possession, either at present or in future. Anything in fact which comes within the meaning of mal, and has a legal value, may be a subject matter of mahar.

Manafi'a, (profits accruing from land, investment business, industry), and debts owing to the husband from other people are proper subjects of dower. But if a free-man were to marry on the stipulation that he would render his own services to his wife in lieu of dower, although the marriage would be valid, the woman would be entitled to her sadaq al-mithli, (proper dower).[16] But if something is assigned by way of dower which is not in existence at the time, either substantially, or as a creation of the Law, such assignment is not valid. So, also where the thing assigned is prohibited by Law, e.g., Pig, Wine or other illegal objects. An iron of ring, a measure of dates, or services such as the husband to teach the wife some verses from the Holy Qur'an were considered by the Prophet (S.A.W) as adequate dower, so also other jurists agreed on this.

However the Hanafis and the Malikis schools fixed ten dirham and three dirhams respectively as the minimum amount of dower. It has been suggested that, three dirhams was the dower which the Arab husbands, prior to Islam, used to give their wives as dower besides flocks of sheeps etc. It is also the lower amount (nasab), for the theft of which the penalty of amputation was inflicted.

The other Sunni jurists and Shi'ite Law, fixed no minimum of sadaq, they said there is no limit either to the maximum of the minimum of dower, it being a matter of contract between husband and wife; so long as the article given or assigned by way of dower possesses any definite value, the assignment is considered valid. They relied on the Prophetic traditions among which are:

A hadith narrated by Amr Ibn Rabia suggested that a woman married for a dower of a pair of shoes, whereupon the Prophet (S.A.W) asked her whether she has agreed to take the pair of the shoes as her dower, and she answered in the affirmative, and the Prophet approved it.[17]

In another tradition reported by Sahl bin Sa'ad that, a woman came to the Prophet (S.A.W) and said; 'O Messenger of Allah, I offer myself to you." She then kept standing for a long time. A man got up and said: "O Messenger of Allah'. If you have no desire for her, marry her to me." The Prophet asked: "Have you got with you anything which we may give to her as sadaq." The man said: "I have got nothing but this trouser of mine." The Prophet said: "Seek, though it be a ring of iron." Then he searched but did find nothing. The Prophet asked: "Have you got any portion of the Qur'an with you? "Yes" said he, "such and such a verse." The Prophet said: "I give her in marriage to you for what is with you from the Qur'an."[18]

Anas reported that Abu Talhah married Ummu Sulaiman and the dower between them was Islam. Ummu Sulaiman accepted Islam before Abu Talhah who afterwards sought her in marriage, and she said:

"By God, you are not the type of person whose offer should be rejected, but you are an unbeliever and I am a Muslim. It is not lawful for me to marry you; but if you accept Islam that would be my dower and I would not demand anything else from you." So he accepted Islam and married her.[19] Narrated by Nasa'i.

All jurists agree that there is no limit to maximum sadaq, because of the following Qur'anic verse which reads:

"Even if you have given a whole treasure for dower take not the least of it back."[20]

However the question of accepting services as sadaq is disputable. According to Maliki it is reprehensible, and some of his jurists allow it, and Shafi'i agreed with them. Abu Hanifa rejected it and followed by a Maliki jurists Ibn Qasim. It was argued, the fact that, the Prophet (S.A.W) allowed the teaching of the Qur'an as mahar, was peculiar to him alone, and it does not mean a principle to be followed,[21] The other reason for the dispute is the wording of the Qur'an that:

"I intend to wed one of these my daughters to you, on conditi n that you serve me for eight years....."[22]

By this verse, services for eight years by the husband was accepted in lieu of the dower. This verse related something which happened before the advent of Islam. So the reason for the dispute of the jurist was whether Muslims were bound by the laws prior to the advent of Islm or not.

(b) UNSPECIFIED DOWER - MAHAR AL-MITHLI

The obligation to pay sadaq is a legal responsibility on the part of the husband and is not dependent upon any contract between the parties. Once, there is a marriage, then there is a dower for the wife. In cases where dowery has not been fixed either before or at the the time of the contract, or after the contract, it is fixed with reference to the social position of her father's family and her own personal qualifications. The social position of the husband and his means are of little account. This should be done by taking into consideration the amount of dower paid to her sisters and paternal aunts. The author of Hedaya says, "In regulating the proper dower of a woman, attention must be paid to her quality with the woman from whose dower the value is to be taken, in point of age, beauty, fortune, understanding and virtue, because it varies according to any difference in all these circumstances; and in like manner it differ according to place of residence or time."[22] Islam therefore safeguards the rights of a wife and attempts to ensure her an economic status consonant with her own social standing.

7. PAYMENT OF DOWER ON THE BASIS OF TIME

On the basis of time of payment also dowery has been divided into two. Specified dower and unspecified dower. Specified dower may again be divided into two (1) prompt (mu'ajjal) and (ii) deferred (muwajjal). This classification is according to the time when payment has to be made.

(i) PROMPT DOWER (MU'AJJAL)

The word mu'ajjal, technically means "that which has been hastened or given a priority in point of time." prompt dower is normally payable immediately after the marriage, if demanded by the wife. The wife can refuse consummation of the marriage until the prompt dower is paid. In this case she does not loose her right of maintenance on the ground of disobedience. The prompt dower is usually one half of the stipulated sadaw, but could be more or less.

(ii) DEFERRED DOWER (MUWAJJAL)

The word muwajjal, technically means "to defer "or delayed;" and this is the other portion of the dower which is deferred to a later date, usually to the dissolution of the marriage by either party. If she is divorced, the husband is liable to pay the whole deferred dower, and if she dies before him, then the deferred dower is payable to her heirs, and if it is the husband who died first, the deferred dower must be paid out of his estate she stands on the same footing with any other unsecured creditors.

(A) ENTITLEMENT OF DOWER

Where the dower has been specified before or at time of the marriage contract and the contract itself is valid, the dower becomes due on the following circumstances.

(1) WHOLE FIXED SADAQ: The wife is entitled to the whole sadaq under three instances.

(i) Consummation: According to all schools of Law, once a consummation has taken place the wife becomes entitled to the whole fixed sadaq even if later on the marriage is invalidated. Maliki, Shafi'i, Shi'i and Daud al-Zahiri schools makes it a condition that consummation mean actual sexual intercourse.[24]

The Qur'an says:

> "But if you decide to take one wife in place of another even if you have given the latter a treasure for dower take not the least of it back: would you take it by slander and a manufest wrong? And how could you take it when you have gone in unto each other and they have taken from you a solemn covenant."[25]

Maliki added that the mere stay of the wife in the husband's house for about a year even without sexual intercourse would entitles her to her full fixed dower.[26]

(ii) Death of Either Party. By the death of either party before consummation, the wife becomes entitle to her full dower. This is agreed upon by all the Muslim jurists. If the husband dies first she will be entitled to that out of his estate and if it is the woman who died first it has to be paid to her heirs including the husband if she is a Muslim.[27]

(iii) Valid retirement. The views of Hanafi and Hanbali jurists is that, where the husband retires a valid retirement with the wife, she becomes entitled to her full fixed dower.[28] This is where the spouses secluded themselves in a place where they may have

the chance to have sexual intercourse provided on that occasion there is no legal, moral or physical obstacle to prevent them from having a sex e.g., neither of them is observing the obligatory fasting; nor is either of them incapacitated through illness which would prevent actual penetration, nor is there with them a third party. This is the view of the orthodox caliphs, and so also the view of Zaid bin Abi Auf, that, where the spouses have closed the door and lowered down their garments, the mahr becomes due, because by that, she has surrendered herself, thereby performing her own part of the contract and would therefore be entitled to compensation.

Disagreeing with the Hanafis and Hambalis, Maliki Shafi'i and Zahiri, argued that, the whole mahr does not become due except by sexual intercourse. However, it is the view of Maliki that, where there is cohabitation and a long duration of such valid retirement the mahr becomes due even if no sexual intercourse has taken place. It is also the view of Maliki that a marriage should not be consummated unless part of dower or at least, the minimum of one quarter ($\frac{1}{4}$) of the stipulated dower is paid. But the wife has the right to wave this. This is in the case where no payment of dower is made at the time of the contract.[29]

2. HALF OF STIPULATED DOWER

By the authority of the Qur'an, an unconsummated marriage terminated by divorce, where the dower was fixed at the formation of the contract, the wife is entitled to the half of what has been stipulated. The relevant verse of the Holy Qur'an on this issue verse 237 chapter 2 reads as follows:

> "And if you divorce them before consummation give them half of their fixed dowery, unless they remit it, or (the mans half) is remitted by him in whose hands is the marriage tie."

From this verse it is clear that, the Law declares that in such a case half of the fixed dower shall paid to the wife. But it is open to the woman to remit the half due to her or the man to remit the half which he is entitled to deduct and thus pay the whole.

3. NOTHING OF HER FIXED SADAQ

The wife will not entitled to anything of her stipulated dower on the following occasions:

(i) If the marriage contract has been repudiated before consummation either because the contract was invalidated because of reason or the other, or because of a defect in the bride which amounts to repudiation. But if the invalidation took place after consummation, she is entitled in lieu of that the whole fixed dower. This is because of the following tradition 'A'isha reported that the prophet (S.A.W) said, a woman should not be married without the consent of her guardian. If she is married

(without his consent), the contract is void. But if consummation has taken place, she is entitled to the specified dower."[30]

(ii) If before consummation she kills herself or her husband, she will not be entitled to anything of her fixed sadaq according to Maliki, Shafi'i and Hanbali schools. But in the view of Hanafi school, she will be entitled to her full fixed sadaq. The Hanafi school makes no difference between the natural death and the death caused by the wife.

(iii) If before consummation she apostates. But if the apostation took place after the consummation, she is entitled to her full stipulated dower.[31]

B. UNSPECIFIED DOWERY

Where the dowery has not been specified either before or at the time of the marriage contract, the payment of the dowery which is obligatory, the contract may either be a nikah-al-tafweed, or a marriage entered into with the condition that dowery should not been paid.

(i) Nikah al Tafwid: A contract of marriage which has been entered into and no dower has been specified at the time of the contract is called Nikah al-Tafwid marriage by proxy. This is approved by the jurists on the authority of the Holy Qur'an.

There is no blame on you if you divorce women before consummation or the fixation of their dower, but bestow on them (a suitable gift). The wealthy according to his means. A gift of a reasonable amount is due from those who wish to do the right thing."[32]

In case of Nikah al-Tafwid, she will not be entitled to any of sadaq if the husband dies before consummation, but she will be entitled to mut'a and will inherit the husband. This is the view of Maliki school. But according to Hanafi and Hambali she will be entitled to the sadaq of her equals (sadaq al-mithli) and is also entitled to inheritance. Shafi'i school has these two views.[33]

(ii) Maharal Mithli - (Proper dower) - All jurists agreed that in the case of Nikah al Tafwid, if the death of the husband occurs after consummation and before the fixation of the dower, the wife will be entitled to the dower of her equals i.e., maharal mithli, and she will also be entitled to inheritance. Also as mentioned above, according to Hanafi and Hanbali, she will be entitled to mahar al mithli if the husband dies before consummation. So in the two schools it makes no difference whether the death of the husband has taken place before or after consummation.

Mahar al mithli of a woman is regulated with reference to the social position of her father's family and her own personal qualification. Mahar at mithli, therefore, varies, in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of dower in any particular case. When, therefore it is said that

the dower of a woman, where no mahar is stipulated or specified at the the time of marriage, should be the "dower of her equals. it is only intended to imply, that an approximation may be by observing the custom which has prevailed in her father's family, provided she d es not differ in intellectual capacity or personal attraction from the female relations with whom she is compared.[34]

(iii) When mut'a (Gift) of consolation is payable.

> In the case of Nikah - al-Tafwid, if the husband divorces the wife before consummation and the fixation of the dower, she will be entitled to a gift of consolation from the husband for the loss of consortium which she suffers through no fault on her part. All jurists agreed that the divorced woman, whose marriage was not consummated and no dower was stipulated for the marriage, is only entitled to a gift of consolation. There is however, no amount prescribed for such a gift but it is recommended that, the rich should give according to his means, and the poor according to his means.[35] Maliki himself suggested that two pieces of cloth which covers the body is sufficient, while Abu Hanifa, Ahmad bin Hambali, and some Maliki and Shafi'i jurists suggested that she is entitled to half the dower of her equals.[36]

The right of mut'a, according to Maliki is only recommended, but the majority ojurists say it is her right and it is an obligation on the part of the husband to give it to her on the authority of verse 236 chapter 2, which reads:

".....But bestow on them a suitable gift. The wealthy according to his means and the poor according to his means. A gift of a reasonable amount is due from those who wish to do the right thing."

9. INCREASE OR DECREASE OF DOWER

Under Islamic Law, there is no community of goods between husband and wife. She is absolute owner of her own property and of whatever she received from the husband as dower. The terms of the settlement are agreed to before marriage, but when these have been ommited, they may be settled subsequently. The terms of the contract may be varied at any time during the continuance of the marriage by mutual consent. The husband may at anytime after marriage increase the dower. Likewise, the wife has a right either to remit the whole dower or part of it in her husband favour.

In the case where the husband in-creases the dower, it is valid in the view of Hanafi Law and enforciable where the marriage has been consummated; or with the death of the husband. But if he divorces her before consummation she is only entitled to half of the originally stipulated dower, but not of the increase. According to Maliki Law, upon consummation of the marriage, effect will be given to the increased portion and if divorce takes place before consummation she is entitled to the half of the originally stipulated dower together with half of the increased portion. But where the husband dies before consummation, and before she takes delivery of it, she is only en entitled to the dower originally stipulated. The increase portion lapses. According to Shafi'i Law, it has been treated as an ordinary gift and therefore the rule of ordinary gift applies. If she has taken possession it is effective, and if she has not, it lapses.[37]

10. ENFORCEMENT OF SADAQ

The claim of the wife or widow for the unpaid portion of mahar is an unsecured debt due to her from her husband or his estate respectively. It ranks reteably with unsecured debts and is an actionable claim. During her life time, the wife can recover the debt herself from the estate of the deceased husband. If she predeceased the husband, the heirs of the wife, including the husband, becomes entitled to the dower if she is a Muslim.

If a husband refuses to pay prompt dower, the guardian of a minor wife has the right to refuse to allow her to be sent to the husband's house; and similarly, the wife may refuse the husband his conjugal rights, provided no consummation has taken place. The wife is, under Islamic Law entitled to refuse herself to her husband until the prompt dower is paid; and if in such circumstances she happen to reside apart from him, the husband is bound to maintain her. The passage in the Hedaya bearing in this subject is as follows:-

> "The wife has the right to deny her person to her husband or to go on a journey with him until she received the the dower. Her right in the consideration is the same as that of her husband in the object of the consideration his conjugal rights over her person as in sale. She is also at liberty to resist her husband carrying her upon a journey until she shall have received of him for the same reason., On the other hand the husband has no power to prevent her from travelling or going out of his house and visiting her friends, until he has paid the whole exigible dower, because a husband's right to confine his wife at home is solely for the sake of securing to himself the enjoyment

of her person, and his right to such enjoyment does not exist until after the payment of the return of it."[38]

This right of refusing herself is, however, lost on consummation. The non-payment of deferred dower by it very nature cannot confer any such right of refusal on the wife. The right to enforce payment arises only on death, divorce or the happening of a specified event.

THE WIDOW'S RIGHT OF RETENTION

Islamic Law gives to the widow, whose dower has remained unpaid, a very special right to enforce her demand. This is known as "th. widows right of retention." A widow lawfully in possession of her deceased husbands property is entitled to retain such possession until her dower debt is satisfied. Her rightsis not in the nature of a regular charge, mortgage or a lieu; it is in essence a personal right as against heirs and creditors to enforce her rights; and it is a right to retain, not to obtain possession of her husbands property. Once she looses possession of her husband's property, she loses her special right and is in no better position than an unsecured creditor. In Hamira Bibi v. Zubaida Bibi (1916) 43 I.A. 294, it was observed by the Privy Council,

> "But the dower rank as a debt, and the wife is entitled along with other creditors to have it satisfied on the death of the husband out of his estate. Her right however is no greater than an unsecured deptor except, that if she lawfully, with the express or implied consent of the husband or his other heirs obtain possession of the whole or part of his estate to satisfy her claim with the rents accruing therefrom she is entitled to retain such possession until it is satisfied. This is called the widow's leiu for

for dower of the Musulman law which has received recognition in the British Indian courts and at this Board."

The lien which a Muslim widow has over the estate of her deceased husband for her unpaid dower is a purely personal one and does not descend to her heirs, although the right to the dower itself passes to them by succession. It follows, therefore that they cannot take possession of the husbands estate under the claim for dower.[39]

11. NIKAH UL SHIGHAR

It has been clearly explained before, that, dower is essential and there can be no legal marriage without dower; and that the wife has no right to abandon it before it accrues. If the parties entered into the contract with a condition that there should be no payment of dower, the contract is void.

Nikah ul Shighar means marriage by exchange in which one man would give his daughter or sister to another man in exchange exchange to that others dauther or sister in marriage paying dowery. Each of the women would be treated as dower for the other, and this is prohibited in Islam. All jurists agreed that this kind of marriage is illegal. According to Maliki and Shafi'i schools states that such a marriage should be annulled whether consummation has taken place or not. But Abu Hanifa says although the marriage is illegal but it can be corrected by giving each of the two women the dower of her

equals (mahor el mithli). The Prophet (S.A.W.) is reported to have said: "There is no Shingar in Islam."[40]

12. THE PRACTICE OF SADAQ IN NORTHERN STATES

In Northern States where the people are predominantly Muslims, dower remains one of essentials of the marriage contract. The principle is so firmly established that there is hardly any marriage contract celebrated in accordance with Islamic rites where dower was not mentioned. The amount agreed upon by the parties would be announced to the people who gathered to witness the celebration by the religious celebrant. It is also the custom to announce whether the dower was prompt or deferred. In the majority of cases it is always promptly paid.

In some areas e.g., Gongola State especially in Yola and around, among the the Fulani tribes the practice slightly differs from that of other areas. In these areas the concept of dividing the dower in two parts, one being prompt and the other being deferred, is still alive. Usually the prompt dower would be in cash form and the difered part in kind. The prompt part use to be called in the Arabic term Rubu'u, while for the deferred usually a cow was offered. The idea of offering a cow as the dower, among Fulani tribe, could be explained by the fact that they are catile rearers and that cattle is their main economy.

But one wonders why the term rubu'u was thought appropriate for the prompt part of the dower. Rubu'u in Arabic language means one quarter of a unit and certainly it could not be that the amount of money paid as the prompt dower was assessed to be equivalent to a quarter of the price of the

cow. It could be more or more. It is true that in Maliki Law, the minimum amount of dower was fixed at Rubu'u Dinar - one quarter of a shilling gold being considered as equivalent to three Dirhams - three shillings of silver. However when I had the occasion of interviewing some judges and learned scholars on this point. They explained that the idea was conceived by one of the learned judge and a scholar of jurisprudence. In the days of that judge men used to marry women on promises of payment of cows as dowers for the women and those promised were never fulfilled on termination of the marriage. It was therefore thought that although men could be allowed to make such promises they must be fulfilled as the Law does not allow any man to enjoy the company of any woman under a contract of marriage without payment of dower, and since women were being cheated under the pretex of deferred payment of dower, it was necessary for the authority to come to the aid of the unfortunate women. On the authority of the then Lamido of Adamawa, under whom judiciary was then, perhaps with the advice of the Ulamas (scholars), it was made obligatory for the man to pay promptly, for a contract of marriage, at least what would be regarded equivalent to one quarter of Dinar Rubu'u dinar).

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26. M.T. El-Imiri; (Personal Status in Islamic Law), p.36.
27. Ibn Rushd supra, p.20
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29. Ashal al Madarik Vol.II, pp.111-112.
30. Qur'an 2:237
31. al-Mudawwanah al Kubra, Vol. II, p.165
32. M.T. El-Imiri Supra, p. 38
33. Qur'an 2:236
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35. Ibn Abdin supra, pp 581-2.
36. Qur'an 2:236
37. Ibn Rushd supra, p.27
38. Sayyid Sabiq supra, p.165
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CHAPTER SIX

THE LEGAL DISABILITY (PROHIBTIONS) TO MARRIAGE

1. GENERAL OBSERVATION

In all systems of Law some limits have been placed for contracting marriage. Certain relations are in all systems prohibited from marrying other relations. So far as the immediate circle of relations involving incest is concerned there is a universal prohibition in all systems. The circle of relations who are within the prohibited degrees is widely different in different systems. In early days when the totemic system was in vague prohibitions were placed against marriages within a whole totemic group; The members of the same totem were not allowed to enter into sexual relations with each other. The marriages were mostly axogamous i.e., they could be made only in tribes with other totems.

The special features of the Islamic prohibitions against marriage may be briefly noted.

1. The pre-Islamic Arabs permitted the unions of step-mothers and mothers in Law on one side, and step-sons and son's in Law on the other. This was expressly prohibited by the Qur'an.[1] The number of prohibited relations was thus increased by Islam.
2. An important rule about the prohibition of marriage with relations by adoption was abolished. The Qur'anic verse about abolition of the prohibition by adoption is related to the life of the Prophet (S.A.W.) himself. He had entered into marriage with divorcee of one Zaid who was known to be his adopted son. The doubts with respect to the abolition of prohibition on the ground of adoption were removed by a Qur'anic verse permitting the Prophet to marry the divorceed of Zaid.[2]

3. Prohibition on the ground of a affinity relates to the direct line of ascendants and descendants. Thus, a person must not marry the widow of his father or his son, but can marry the sister of his wife or the widow of his brother.

4. Simultaneous unions were prohibited to some extent. In the pre-Islamic days, marriage with the sister of the wife of the deceased was permitted and this is also under Islamic Law.

5. A prohibition on the ground of fosterage has been introduced.

6. Difference of religion is to a considerable extent a ground of prohibition.[3]

The impediments to marriage may be either absolute or relative. An absolute impediment is that the cause of which is permanent or absolute and the Law knows no means of removing that whereas the relative impediment is that where the cause is only temporary or relative and which is removed when the obstacle ceases to exist.

2. CLASSIFICATION OF PROHIBITIONS

Muslims are prohibited from marrying women of certain degree of relations. The prohibitions under Islamic Law are divided into permanent prohibitions.which will stand firm for ever, and that they will never be removed and the temporary prohibitions which might be removed at anytime when the circumstances calling for it is removed.

A. PERMANENT IMPEDIMENTS

Permanent impediments consists of prohibited degrees arising by consanguinity, affinity and fosterage. These three groups were agreed upon by all the schools of jurisprudence. Besides these three, Imam Malik added other three permanent impediments which includes separation occasioned by li'an (mutual imprecation), instigation of divorce and consummation of marriage contrage during the idda period of a divorcee.

(i) CONSANGUINITY

Consanguinity - (Blood relations) i.e., the very relations. These includes agnates and cognates relations i.e., both relations from the father side and the mother side. This rule finds sanction in the Qur'anic legislation.

"Prohibited to you (for marriage), are your mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sisters daughters....."

It is noteworthy that those prohibited on the grounds of consanguinity are as follows:

(i) Mother, and all the female ascendants.

(ii) Daughter, and all female descendants how low soever.

(iii) Sisters and their female descendants, and the offspring of brothers, how low soever.

(iv) Father's sisters (but not her daughters or any other descendants as one can marry his direct cousin whether paternal or maternal side and their female descendants).

(v) Mother's sister, as in (iv) above etc.

In the case of daughter, all jurists agree that a daughter begotten by way of illicit relations is not a legal or legitimate daughter, and she is not to be attached to that supposed father, and has no right of inheritance. But they disputed whether the marriage of the so-called daughter of that so-called father is also prohibited or not. According to Maliki, Hanafi and Hambali schools, the illegitimate daughter is also prohibited from marrying the so-called father. But according to Shafi'i, there is no prohibition for marriage between the so called daughter and the so called father. Because in his view illicit relations are not to be given any weight or respect and such relations are cursed and considered a crime punishable by hadd. He quoted a tradition that "No child can be attached to his father unless there are legal matrimonial relation."[4]

(ii) AFFINITY

The second permanent prohibited degree of marriage is founded on relationship by affinity, and this is created only by marriage contract. The Qur'anic verse which deals with the marriage prohibitions continued to read,

> "Prohibited to you (for marriage).... your wive's mothers; your step daughters under your guardianship, born of your wives to whom you have gone in; (those who have been) wives of your sons proceeding from your coins;"

Those female who are prohibited by affinal relationship are as follows:

(i) Wife's mother and grand mother how high soever. Whether from paternal or maternal side, and whether the marriage has been consummated or not.

(ii) The wife's daughters and their descendants and the female descendants of wife's sons, how low soever. This is on condition that, the marriage is consummated. Therefore if one contracts a woman and divorced her or she died before consummation, her female descendants are not prohibited the man. The general rule which can be deduced here is that, the mere marriage contract of a daughter prohibits permanently the marriage of her female ascendants, while it is only the consummation of marriage of the mother which prohibits her female descendants.[5]

Although the verse is clear as regard the "rabiba" which means that the wife's daughters, who come with her and remains under the husband's protection are prohibited to him in marriage. Yet the Malikis, the Hanafis, the Shafi'is and the Hambals, said that not only those daughters who accompanied the wife but also, all the other descendants of the wife, and this is taken through "ijma." Daud al-Zahiri on the other hand rejected this view and says that, the man is forbidden by the Qur'an from marrying the wife's daughters only who accompanied their mother to his house, but as those female descendants who do not accompanied their mother, there is no such prohibition.

(iii) Son's wife, or son's son wife how low soever. Whether the marriage has been consummated or not. The mere contract is sufficient for the prohibition.

The verse by mentioning aslab "coins" clearly excluded the adopted sons which was known and practice in the jahiliyya to which is abandoned in verse 37, chapter 33 of the Holy Qur'an.

(iv) Father's wife and grand father's wife, how high soever, whether paternal or maternal. The Qur'an says:

> "And marry not women whom your father's married except what is past. It was shameful and odious, and abominable custom indeed."

This prohibition stops only to the wife's ascendants only, it does not extend to their ascendants or descendants. According to Maliki and Shafi'i, illicit relations will never create this type of prohibition, while Hanafi and Hambali considered illicit relations also create prohibition to marriage. According to Hanafi and Hambali, if a man commits zina with the mother or daughter of his wife, that wife is permanently prohibited to him.[6] The other sunni schools in rejecting this idea quoted the following authorities from Qur'an and Sunnah.

> "Also (prohibited are) women already married, except those whom your right hands possess: Thus has God ordained (prohibitions) against you: Except for these, all others are lawful, provided you seek (them in marriage) with gifts from your property. Desiring chastity, not lust....."[7]

It is reported by Ibn Majah that A'isha related that the Prophet (SAW) was asked about a man who committed "uria" with a woman and wanted to marry her or to marry her daughter. Thereupon the Prophet (SAW) said, "The unlawful cannot render the lawful unlawful neither can the lawful render unlawful lawful."[8]

(c) FOSTERAGE

The third category of prohibition to marriage consists of prohibited degree by fosterage. The Holy Our'an says:

"Prohited to you (for marriage)....foster mothers (who gave you suck), foster sisters;....."

It is clear from the wording of this verse that, if one is suckled by a woman during his childhood such a woman and her female ascendant or descendant mentioned below, are prohibited to him permanently.

(i) The woman who suckled him and who is known as his foster mother and his foster grandmothers whether paternal or maternal side how high soever.

(ii) His foster daughters and their off-spring and the offspring of his sons daughters how low soever.

(iii) His foster sisters and their offspring and the female descendants of his foster brothers how low soever. Foster brothers and sisters are not only through the foster mother but also foster brothers and sisters though the man who is the husband of the foster mother and who is also the cause of the milk in his wife's breast and is described as foster father. Therefore it is possible for someone to have more than one foster-father. That is where he is suckled by more than one woman or is suckled by one woman but the cause of the milk of that particular woman was by more than one husband. i.e., in the case where she is either divorced or where the husband died and then she married another one else.

No one can be described as foster father of a child unless he has a legal relationship with the woman who suckled the child.

So, illicit relation should not be a source of this prohibition as agreed by all jurists.[9]

(iv) The sisters of his foster mother and the sisters of his foster mother, but not their female descendants.

(v) The foster-parents of his wife how high soever, whether paternal or maternal. The mere marriage contract with such a wife only is sufficient to constitute the prohibition.

(vi) The foster daughter of his wife i.e., (those who are suckled by his wife) and their offspring how low soever, on condition that the marriage has been consummated.

(vii) The wife of his foster father and grand father how high soever.

(viii) The wife of his foster son or the wife of his foster son's son, or foster daughters son how low soever.

The prohibitions of the foster mother and the foster sisters is made clear from verse 23 chapter 4 of the Holy Qur'an. For other fosterage prohibitions are as a result of many Prophetic traditions.

> "The Prophet (S.A.W) was asked by Ali to marry the daughter of his uncle Hamzah as she was the most beautiful of all the grown-up girls of the Quraish. The Prophet (S...W.) said to him "Do you not know that Hamzah is my foster brother, and that Allah prohibited on account of fosterage what he prohibited on account of consanguinity."[10]

A'isha reported that she was suckled by the wife of Abu al-Gaish and once his brother Aflah came to see her (A'isha), but she refused to allow him at first until when she asked the Prophet (S.A.W) who explained that Aflah was her foster uncle being the brother of the husband of that woman who suckled her."[11]

Suckling in order to constitute marriage prohibition, the following conditions has to be satisfied.

(a) The suckling should be during the first two years of the baby's life. This is by virtue of verse 235 chapter 2 of the Holy Qur'an:

> "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term."

All jurists agreed to this, but Maliki and Hanafi extended the period to further the period three months and six months respectively.

(b) If the baby before the completion of these two years could depend on outside food, and afterwards a woman suckled him that will not created the prohibition according to Maliki, but according to Hanafi and Shafi'i it will.[12]

(c) According to Maliki and Hanafi no amount of number of sucklings is required to constitute the prohibition even one suckling, provided the milk goes in the child's stomach, however little the quantity it may be. But according to Shafi'i and Hambali the suckling should be up to five different times before it constitute the prohibition. According to Maliki and Hanafi they said verse 23 chap. 4 is very clear on this issue when it says:

"Prohibited to you (for marriage) are your.....

foster mothers who gave you suck..... ...."

They said the Qur'an did not say how many times it only says "who gave you suck"; and also they quoted a tradition narrated by Bukhari and Muslim saying that when certain Uqbat Ibn Harith married Ummu-Yahya, a woman came to them and said that she suckled both of them. When they went and informed the Prophet (S.A.W), he ordered them to separate, without asking her how many times she suckled them.[13]

(d) The suckling should be direct from the woman's breast. This excludes artificial feeding, and also according to Maliki if the woman's milk mixed with other foods it will not constitute the prohibition while according to Hanafi if the milk is more than the other food it will constitue. Shafi'i says it constitute the prohibition however small quantity it may be."[14]

The above mentioned permanent prohibitions namely consanguinity, affinity and fosterage have been agreed to by all jurists. But beside these three categories of prohibition, Maliki school added three other categories. These are:

LI'AN (DOUBLE TESTIMONY)

A permanent bar to remarriage exists between couples separated as a result of li'an proceedings.[15] The procedure has been mentioned in the Qur'an as supplemented by the Sunna of the Prophet (S.A.W) This is where a husband accuses his wife of committing adultery or denying the paternity of her child the procedure of double testimony is to be taken and after that they are separated and that according to Maliki under no circumstances should they be allowed to re-marry.[16]

(e) INSTIGATION FOR DIVORCE

This rule which is applicable only in the Maliki school is as a result of their doctrine of Masliha al-Mursala (public policy). Whoever instigated a wife to secure a divorce from her husband in order to marry her if she is divorced, is permanently prohibited from marrying such a woman.[17] The instigation may include inciting a woman to (a) disobey her husband, or (b) cruelty towards him by turning the wife against him by malicious falsehood, or (c) seducing or enticing away the wife.

(f) CONSUMMATION OF MARRIAGE DURING IDDA

If a woman contracts a new marriage during the time she is serving an idda period from a divorce of the former marriage, the contract is null and void according to all schools. But if the consummation of the illegal marriage has taken place, according to Maliki after they are separated and after the completion of her idda period from the illegal marriage, the parties will never be allowed to re-marry, as there arise a permanent prohibition between the two.[18] Maliki in his support quoted a tradition in his Muwatta saying that:

"Yahya related to me from Maliki from Ibn Shihad from Sa'id Ibn al-Musayyab and from Sulaiman Ibn Yasar that Tulaiha al-Asadiya was the wife Rushaid ath- ath-Thaqaf. He divorce her, and she got married in her idda-period. Umar Ibn al-Khattab beat her and her husband with a stick several times, and separated them. Then she must complete her idda from her first husband, and then the idda from the other one, and they are never to be reunited."[19]

B. TEMPORARY IMPEDIMENTS

As previously mentioned there are two kinds of prohibitions:

(1) Permanent, i.e., the prohibition which will never be removed under any circumstances, and,

(2) the temporary prohibition which might be removed if the circumstances calling for it has been removed. These temporary prohibitions are as follows:

(i) Married Woman.

All jurists agreed that a marriage with a woman who is the wife of another person is void." Also (prohibited) are women already married."[20]

(ii) DIFFERENCE OF RELIGION

Islamic Law has made specific provisions for prohibiting marriages between Muslims and non-Muslims to a considerable extent.

(a) Marriage with a Kitabiyya

The marriage of a woman who does not believe in a revealed religion is forbidden until she believes either in Islam, christianity or jewish religion. The Qur'an says:

> Do not marry unbelieving (idolaterals), until they believe: A slave woman who believers is better than an unbelieving woman, even though she allure you....."[21]

The woman believers in a revealed religion is called a kitabiyya i.e., a woman of a revealed book. While it is unlawful to marry a woman who does not believe in a revealed religion it is lawful to marry a kitabiyya i.e., a christian or a jew. The Qur'an reads;-

"This day are (all) things good and pure made lawful unto you. The food of the people of the Book is lawful unto you, and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the Book revealed before your time,....."[22]

(b) Marriage with a Non-Muslim Women

According to Islamic Law the marriage of a Muslim with a woman of a non-scriptural sect, e.g., (with majusiah or fire worshippers, and polytheists) is not lawful. Marriage with any woman who worship the starts or any kind of fetish whatsoever is prohibited

(c) Muslim Woman is Prohibited from Marrying a Non-Muslim Man.

A Muslim woman is not allowed to marry a non-Muslim man whether he is christian or a jew. Thus a marriage between a christian man or a jew man and a Muslim woman according to Islamic rites does not create any valid marriage between the parties. The Holy Quran says:

"Oh you who believe, if the believing women come to you, as refuges, examine them: God is the most knowing as to their faith. If you ascertain that they are believers, then send them not back to the unbelievers. They are not lawful wives for the unbelievers nor are the unbelievers lawful husbands to them."[23]

The husband is certainly superior in his house and has authority over his wife. Islam does not allow superiority of a non-Muslim over a Muslim. The Qur'an says:

"And never will God grant to the unbelievers
a way over believers."[24]

Muslim men are allowed to marry the christians and the Jewish women because Muslims must believe and respect all revealed religious and all the Prophets of God. Qur'an reads:

"Say we believe in God and in what has been revealed to Abraham, Isma'il, Isa'ac, Jacob and the Tribes, and in the Books given to Moses and Jesus and the Prophets of their Lord. We made no distinction between one and another. Among them and to God do we bow our will in Islam."[25]

In another it is said that:

".....Any who denied God, His angels, His Books, His Apostles and the day of judgment, had gone far far astray....."[26]

Moreover the non-Muslim man does not believe in Islam nor does he believe in Muhammad as a Prophet of God, so he will never respect her religion nor respect her and once he does not respect her then a peaceful life in the house would be very difficult.

(iii) Triple Divorce:

It is prohibited for a Muslim to marry a woman who was married to him by a valid marriage but who had been divorced by him three talaqs either at one sitting or separately or by acts which takes effect as such, till certain conditions are satisfied. The Qur'anic verses read as follows:

"A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kinds....."

"So if the husband divorces his wife after that, he cannot re-marry her until after she has married

another husband and he has divorced her. In that case there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by God.. ....."[27]

Before the parties to re-unite all jurists agreed that the marriage with the new husband must be a valid marriage, and consummated with full sexual intercourse and thereafter she is divorced or the husband dies. There are many tradition to this effect.

(a) It is narrated by Abu Huraira that the Prophet (S.A.W), said, "May God curse the man who purports to make lawful (the triply divorced woman) and the man to whom (such woman) is made lawful." Recorded by Ibn Hambal.

(b) Aqaba Ibn Amir said, the Prophet (S.A.W) asked, "Have I not told you about the story of the borrowed he goat?" they said "No. Oh Prophet of God." He said, He is the man who purports to make lawful (the triply divorce woman." Recorded by Ibn Majah.

(c) Ibn Abbas said: The Prophet (S.A.W.) was asked about the man who purports to make lawful the triply divorced woman to the man who has given her divorce, and the Prophet (S.A.W) replied, "No marriage contract because of desire (for marriage) and not for a fraud and there should not be a mockery of the Book of Allah Most High. Each one of the spouses must taste the honey of the other." Narrated by Abu Ishaq al-Jauzari.

(d) Umar (God be pleased with him) during his Caliphate said, "No Muhallil and the Muhallila Lahu would be brought before me until I stoned them to death." His son asked him what he meant by saying that, and he said "both of them are adultrers." Narrated by Ibn al-Munzar.

According to Maliki, Hambali, Zahiri and Abu Yusuf the marriage with the intention to make her lawful to her former husband is illegal and so does not legalised the marriage with the former husband. It is illegal because it is a temporary marriage and it should be annulled whether before or after consummation. But if the second husband married the triply divorced woman without that intention and for one reason or the other divorce her thereafter, then there is no harm and the marriage will be valid. But Abu Hanifa and Shafi'i, consider that the intention of the new marrying man without mentioning it in the contract or expressing it openly there is no legal objection.[28]

(iv) Woman Serving Idda (Waiting Period).

It is prohibited for a Muslim to marry a woman who is undergoing idda period of her previous marriage after consummation. During that period she is prohibited from contracting another marriage until after the expiration of that period. There are different periods of idda and the period of each differs from the other. A woman serving idda after divorce should not even be proposed at all e.g., a menstruating woman if she is divorce after consummation should wait for three periods of purity according to Maliki or three periods of blood according to Hanafi. But she does not menstruate her period of idda is three months.

The Holy Qur'an says:

"Divorce women shall wait concerning themselves for three monthly periods."

"Such of you women as have passed the age of monthly courses, for them the prescribed period, if you have any doubt, is three months and for those who have no courses it is the same."[29]

As for those whose husbands died their period of idda is four months and ten days.

"If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days."

If a woman is serving aforementioned kinds of idda she is prohibited from contracting another contract of marriage until after the expiration of the period. Qur'anic verse to this effect reads:

"There is no blame on you if you make an offer of betrothal or hold it in your hearts. God knows that you cherish them in your hearts. But do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled....."[30]

If any woman serving any kind of idda period contract another marriage, the cntract is null and void. The couples be separated forthwith whether before or after consummation according to all schools of law. Further to that, in Maliki Law, such a woman will be permanently prohibited to that man. But according to Hanafi and Hambali after the separation and serving of idda the parties may re-marry.[31]

(v) Marriage During Pilgrimage

When a person is engaged in the rites of the pilgrimage or Umrah (Lesser Hajj), it is forbidden for him to engage into the contract of marriage for himself or for another person. This is the views of Imams Maliki, Shafi'i and Ahmad Ibn Hanbal. But Imam Abu Hanifa says, there is no harm for a Muhrim to either contract a marriage for him or to do it on behalf of another. In the view of the three Imams such marriage is invalid and should be annulled, but according to Abu Hanifa it is valid. The three Imams rely on a Prophetic tradition saying that "A muhrim should not marry and should not be married and should not proposed;" and they take this as a clear legal prohibition. They argued that during the rituals of pilgrimage or umrah the pilgrim is required to devote all his attention to what he is doing and must not busy himself with any other things outside the religious duties; but Imam Abu Hanifa understood the prohibition to be from a religious point of view. He thinks that ihram is only affected by sexual intercourse and not by the making of the contract.[32]

(vi) Marriage During Death Illness

Marriage during illness is prohibited, but it must be a death sickness. Such a person is usually legally incapacitated from entering into contractual obligations. If, however, the marriage is contracted and consummation has taken place, it must be annulled and she is entitled to the stipulated dower. She, is, however, not entitled to inherit should the sickness result in the husbands death before the idda period expires.[33] It seems that

the law fear that such sick person may be intending to join a stranger to share with his heirs in case of his death. But if the circumstances indicate that such marriage to such person will do him good or is really necessary he should not be prohibited and the marriage should be considered valid.[34]

Unlawful Conjunction

(a) It is unlawful for a Muslim to have as wives at one and the same time two women who are so related to each other that, if either of them had been a male, a marriage between them should have been prohibited. Such marriages are expressly prohibited by the Qur'an as to the conjunction of sisters.

> "Prohibited to you.....and two sisters in wedlock at one and the same time....."

A Muslim is also prohibited from marrying his wife's aunt or niece, unless his marriage to the wife is dissolved. The Prophet (S.A.W) is reported to have said:

> "A woman and her paternal aunt cannot be united, nor a woman and her maternal aunt." Agreed by all reporters.

A Muslim is entitled to have as many as four wives at one and the same time. There is, however, a restriction placed on simultaneous marriages. Certain women related to one another are prohibited from being wives of one person at one and the same time. Although there is no prohibition to a marriage with two or more of them at different times. Such relations are two sister or an aunt and a niece.[35] Both of them cannot be lawfully married at one and the same time. But the prohibition continues only so long as the marriage with one of them continues. As soon as the marriage is dissolved, the prohibition terminates

and the other can be lawfully married. Thus, while a Muslim man cannot marry the sister of his wife during the continuous of their marriage, he can lawfully do so on the dissolution of the marriage either by death or divorce. The prohibition also extended to cover the period of idda. When such a wife is divorced, he cannot marry her sister or her aunt while she is serving idda, if the divorce is talaq raj'i (revocable), agreed by all Muslim jurists. But if the divorce is ba'in (irrevocable) according to Maliki and Shafi'i he can marry her sister or her aunt, the moment she is divorced so long it is irrevocable divorce. But to Hambali and Hanafi it makes no difference whether the divorce is revocable or irrevocable, the prohibition is there, and it cannot be removed until after the expiration of the idda period.[36]

b. A MARRIAGE WITH A FIFTH WIFE

(b) A marriage with a fifth wife by a person having four wives is prohibited. The Quran says:

> ".....Marry woman of your choice two, or three or four; but if you fear that you shall not able to deal justly (with them), then only one, or (a captive) that your right hand possesses. This will be the better course to avoid in justice.[37]

By virtue of this verse, a Muslim is allowed to marry up to four wives. When this verse was revealed, the Prophet (S.A.W) asked Ghailan al-Thaqafi, the chief of Ta'if, to keep only four of his ten wives and divorce the rest. The same happened with Nawfal Ibn Mu'awiya who had then five wives. All the companions at that time did the same.

All the jurists and scholars of Islamic Law and the commentators agreed unanimously without the least shadow of doubt that this verse limits the maximum number of wives. That, one man may keep one and the same time to four and that is all. For this reason where a man repudiates one of his wives, she is not to be replaced if the repudiation is raj'i (revocable), until and unless she completes her idda. But as to that irrevocably divorced, the jurists differs. According to Maliki and Shafi'i, while that fourth wife is irrevocably divorced and is still serving idda, she may be replaced. But according to Hanafi and Hambali, there is no difference between the revocably or irrevocably divorced woman, and so long as she is serving idda she should not be replaced at all."[38]

(iii) Marriage of an Adultrer or adultress

Islam commends descency and modesty for men and for women, at all times, before marriage, during marriage, and after marriage. Those guilty of illicit practices are shut out of the marriage circle of chaste men and women. Quranic verse on this point reads:

> "Let no man guilty of adultry or fornication marry any but a woman similarly guilty, or an unbeliever: No let any but such a man or an unbeliever marry such a woman. To the believers such a thing is forbidden."[39]

From the wording of this verse it is clear that such marriage of an adultrer to a chaste woman and vice versa, is forbidden. The Prophet (S.A.W) once forbade a certain Muslim from marrying a woman who was his mistress before his embracing Islam. When the man thought of marrying

the woman, he came to the Prophet to enquire whether such a marriage is allowed. The Prophet (S.A.W) did not answer him until after the revealation of the above verse; and after reading the verse to him, and asked him not to marry her. Tirmidhi, Abu Daud and Nasa'i, all reported this tradition.

In another tradition a certain Muslim came to the Prophet (S.A.W) and mentioned to him that his wife commits zina. The Prophet told him to divorce her, but he said he loved her, then the Prophet said to him keep her. The schools of Islamic jurisprudence differed because of these two traditions. According to Maliki, Hanafi and Shafi'i, the prohibition mentioned in verse No.3 chapter 24, is a religious prohibition and not a legal one, and according to Hambali the prohibition is a legal one, and in his view the second tradition mentioned above is not authentic, so in his final view a chaste man is not allowed to marry a woman who commits illegal relations and vice versa, until they repent and amend their conduct.[40]

3. THE PRACTICE IN THE NORTHERN STATES

On the question of prohibited degrees to marriage, the practice among the Muslim community of the Northern States, is in conformity with the Islamic rules and regulation as practiced under Maliki School of Law.

1. Qur'an 4:22 and 23
2. Qur'an 33: 37
3. B.R. Verma (Muslim Marriage and Dissolution) 1971, Allahabad pp 38, 39.
4. Irshad al-Salik, (As'hal al-Madarik), Vol, II, p.79
5. Ibn Rush, (Diyat al-Mujtahid) Vol.II, p.25. See also As'ha al-Madarik, Vol.II, p.80.
6. Sayyid al-Sabiq (Fiqh al-Sunna), Vol.II, p.72, Beirut.
7. Qur'an 4:24
8. Sayyid al-Sabiq, Supra pp 73,74.
9. Ibn Juzayyi, (Qawanin ul Fiqhiyyah), p.23
10. Fazlul Karim, (Al-Hadith) Vol.II, Lahore, pp. 639-640.
11. Fazlul Karim, Supra, p.640.
12. Ibn Rushd, Supra, P.37
13. Ibid
14. Sayyid al-Sabiq, Supra, p.77
15. Qur'an 24: 4-10
16. al-Dasuqi, (Hashiyat al-Dasuqi) Vol.II, p.44
17. al-Dasuqi, Supra, p.46
18. Ibn Juzaiyyi, Supra, p.228.
19. Imam Malik (al-Muwatta), Trans. 1982, Cambridge, p.249.
20. Qur'an 4.22
21. Qur'an 2:221
22. Qur'an 5:6
23. Qur'en 60:10
24. Qur'an 4:141
25. Qur'an 3:84
26. Qur'an 4:136
27. Qur'an 2:229 - 230
28. Irshad al-Salik, (As'hal al-Madarik), Vol.II p.86

29. Qur'an 2:229, and 65:4.

30. Qur an 2:235

31. Sayyid Sabiq, Supra, p.27.

32. al-Dasuqi, (Hashiyat al-Dasuqi), Vol. II, p.65. See also Sayyid Sabiq, Supra, p. 91., Bidayat al Mujtahid, Supra p.45

33. Kifayat al-Talib: Commentary on the Risala of Abu Zayd al-Qayrawani, VolII, p.65.

34. Ibn Rusd, Supra, p.46

35. Hamilton, (The Hedaya) Trans., New Delhi, 1979, p.29, See also Ibn Juzayyi, Supra, p.232

36. Sayyid al-Sabiq, (Fiqh al Sunna), Vol. II, p.89. See also Ibn Rusd, p.40.

37. Qur'an 4:3

38. al-Dasuqi; (Hashiyat al-Dasuqi), Vol.II, p.255

39. Qur'an 24:3

40. al-Dasuqi, Supra, p.22

CHAPTER SEVEN

CONCLUSION AND SUGGESTION

Unlike positive Law, the Sharia to the pious Muslim is still, as it has always been, a divine Law. But like some positive Laws it reflects the character of society. The Sharia is an Arabic word which means the track to a water-hole and hence, in its technical sense, it is the path of behaviour which a Muslim ought to follow if he is to live in accordance with the principles of faith. Sharia is usually defined by Muslim scholars as the body of "those institutions which Allah has ordained in full or in essence to guide the individual in his relationship to God, his fellow Muslims, his fellow women and the rest of the universe."[1] It may be compared in certain respect to some denotations of the western concept of "natural Law." According to the classical view, "it is the basis for the moral judgment of actions as good or bad, and thus it came only from God.[2]

Islamic Law is "evolutionary" in that its full growth took centuries and passed through various phases. It beguns with general principles stated in the basic sources of Islam namely, the Qur'an and the Sunna of the Prophet (S.A.W.). At first, it dealt with simple practical problems of every day life, but as time went on it grew complex and inclusive."[3]

To every Muslim the Qur'an, is the primary and sovereign source of Islamic Law, which enunciates the basic norms and the fundamental principles of the Law valid for all times and places; and provide the solution to every problem. The Prophet Muhammad (S.A.W) during his life time remained the sole interpreter of this divine basic norm of the Islamic Legal System. Thus, the Prophet (S.A.W) built up, on its foundation, the superstructure of a comprehensive code of conduct embracing all facts of human life. During this period of the revelation which he received from Allah - the record of the sum total of which is known as the Quran -

often contained rules of conduct and behaviour for his community. Because of the limited legal material of the Qur'an and because of the death of the Prophet the living source of inspiration terminated and a reference to him being no longer possible, legal problems had to be decided by supplementing the provision of the Qur'an by facts from the life of the Prophet and from his sayings. These facts and sayings are known as the sunna and hadiths or practices of the Prophet (S.A.W.), the function of which is to explain, interpret and extend the Qur'an.

After the death of the Prophet (S.A.W.) the task of the interpretation fell upon his companions in the first place and then the jurists - theologians; who had to interpret and apply the Qur'an and the Sunna of the Prophet by way of ijtihad. But as these companions and the jurist theologians were not divinely inspired, they had to apply reasons which was bound to be influenced by urf, (the custom and general practice of the society around them). This, it is suggested, accounts for the doctrinal and legal differences among the various schools and jurists, which came to be accepted by the "Ijma" (consensus of the Muslim jurists). Ijma, was the agreement of Muslim jurists on any particular principle of law, Such an agreement could be based on the Qur'anic text or the Sunna of the Prophet (S.A.W.). This also became the third source of Islamic Law. To cope up with the growing needs and requirements of the society, the jurists had to resort to reasons, logic and opinion in order to supplement the Qur'an, the Sunna and the Ijma for the development of the Law. This new source took the form

of reasoning or deduction by analogy from the aforesaid three sources. Qiyas, is, therefore, based on a very strict, logical scientific and systematic principles and opinion.[8] The other principles of legislation recognised by the jurists are:-

(i) Istihsan, (Juristic preference) adopted by the Hanafi school

(ii) Masali al-Mursalah (Public Interest) expounded by the Maliki school.

(iii) Istidla, (Logic or reason) applied by the Shafi'i school

(iv) Custom (urf). While custom is not officially accepted as a source of law, it has achieved the force of law in some measure listed above. The Qur'an and practices of the Prophet (S.A.W.) embodied and ratified any rules of customary law of the Arabs, e.g., the law of inheritance which over laid the basic principles of succession obtaining in the pre-Islamic period. In the old customary law both old and children could not inherit from the property of their deceased relatives because they could not wield arms. The Qur'anic legislation modified that customary rule by granting them a right of inheritance as long as they were closely related to the praepositus. Women, because of their sex were disqualified from having a legal right of inheritence. The Qur'an reformed the law by introducing nine beneficiaries, and by anlogy three

more were added to them, most of whom were women and to who specific fractions were allotted.

Now going back to the necessity of the difference in interpretation of the divine texts, as noted above, it is interesting to note the harmonization of the two apparently conflicting traditions of the Prophet (S.A.W.) viz;

(i) "My community will never be unanimously in error", and

(ii) "Difference of opinion among my community is a sign of bounty of God".

These two traditions simply mean that the community can agree or to disagree. In otherwords every jurist strives to interprete the will of God in the light of his own understanding of the divine norm. Although he is absolutely bound to interprete correctly he can only do what is jumanly possible. He cannot, therefore, be absolutely sure that he interpretes the will of God with exactitude. Perfection is the attribute of God and it belongs to him alone. Human nature is not free from making mistakes. Even in his genuine mistaken interpretation of the will of God he is rewarded. For he has discharged his duty in good faith. Islam, infact, condones genuine mistakes and forgetfulness.

With this breif exposition of the nature and sources of Islamic Law, one is left in no doubt that while the basic norm is divine, relevant and suitable for all times and places, and therefore, immutable. However, the opinions of the jurists should not be neglected. They should be studied in order that we should dirive the utmost benefit

from them. These jurists had earnestly endeavoured to interprete the shari'a in the face of continually new problems of life and the genuine requirements of the soce society was silent. To promote the public welfare and to cater for the needs of the people and society, we should adopt the same attitude to the Shari'a. Following in their footsteps, we should apply our minds to understand the Sharia in its true picture.

In this last chapter I intend to give a summary of all what I have discussed earlier and to give my concluding remarks. Right from the beginning of this study, it is my submission that the problem of marriage generally in Islam, to be properly understood, must be examined in the full context of the family structure, the Islamic injunctions, the human situations and the socio-historical circustances. To confine ourselves to the value of those simplistic misconceptions that originated from certain disoriented Muslims and their friends (non Muslims) which confounded the problem more.

MARRIAGE IN SHARI'A

One of the most distorted concepts of Islam is the real meaning of marriage. Marriage in Shari'a is not a business deal negotiated by two partners, nor is it a secular contract whereby material benefits and obligations are evaluated in contrast to one another. It is something solmen, and sacred sacred. It is a contract involving a man and a woman in which they pledge themselves to live together as husband and wife and their co-existence governed by the rules of Sharia. It is never seen as the enslavement of one partner

by another. Moral charity, spiritual elevation, social integrity, human stability, peace and mercy constitute the major elements of marriage. It is contract to which God Himself is the first witness and the first party, it is concluded in His Name in obedience to Him and according to His ordinances. It is a decent human companionship. Authorizea and supervised by God. It is a sign of His blessings and abundant mercy as He clearly says in the Holy Qur'an.

> "And among His signs is this, the He created for you mates from among yourselves, that you may dwell in tranquility with them. And He Has put lover and mercy between your (hearts). Verily in that are signs for those who reflect".[5]

It is evident, therefore, that marriage in Islam is a means of permanent relationship and continues harmony not only between man and woman but also between those and God. To insure this result, Islam has laid down certain regulations to give every possible assurance that marriage will serve its purpose fully. Among these regulations are the following:

1. The two parties should acquire a fair knowledge of each other in away that does not involve any immoral or deceptive and exploitative behaviour. Acquiring fair knowledge here does not meant the Western idea or modernization as some called it of boy friend and girl friend relationship, where the parties will have the canal knowledge of each other before the actual legal contract on the aggreement that they are going

to marry each other. This is unIslamic and unlawful and it is either adultery or fornication hundred percent.

2. The Shari'a gives woman the right and duty to choose her husband who is a suitable match, worthy of her respect and love, and capable of making her happy; her parents have only the duty to counsel. The sunna of the Prophet (S.A.W.) does not give the parent the power to give their daughters in marriage to whoever they like against the wishes of the daughters, and it goes further to establish that such a forced marriage is void and not binding. On this ground she is acting within her own rights if rejects the imposition of a husband on her by her parents especially in our society in which custom gives the parents the rights to sell their daughters out to business men or to seek favours from powerful men by giving their daughters kindness and fairness to parents; but this does not imply blind submission to them in such a crucial matter as the choice of a life - partner, when it is quite clear that they are not acting in the interest of the their daughters.

3. Woman has a right to demand a dowery from her suitor according to her standards and also according to his means. If she wishes, she may disregard this right and accept him with a little dowery or to return it to him after receiving it. Therefore the practice now going on among some people of the community, whereby

a father would give away his daughter to somebody as "sadaka" is wrong and unIslamic, because his daughter is not his property so that he can give her away the way he likes. Both of them they are servants of Allah; and by thy way, the right of dower belongs to the daughter exclussively. The injunction of dower on man is to ensure the woman that she is wanted, needed, and that the man is prepared and willing to undertake his responsibilities, financially and otherwise. Dowery is also a symbolic gesture indicating that, the woman will be secure, and that the man is not looking for any material gains as his motive for entiring the marriage.

4. The Sharia made it a duty on the husband to maintain his wife. She is entitle to that by virtue of marriage. If she happens to have any property or possessions, that will be hers before and after marriage; the husband has no right whatsoever to any portion or share of his wife's property. This is to restrict marriage to its noble purposes and disentangle it from all unworthy objectives.

With all these measures, it can besseen that Islam has given all possible assurances to make marriage a happy companionship and a solid foundation of continuous harmony and permanent peace. But in view of the fact that human behaviour is changeable and sometimes unpredictable, Islam takes a realistic outlook on life and makes allowances for all unexpected events. Marriage, as has been said, has decent and noble purposes which must be fulfilled. Islam does not accept or recognized any marriage which is not functional and effective.

There can be no nominal or idel marriage. There must be a successful marriage or no marriage at all. Marriage is too solemn a contract to be stationary or non effective. So if it does not serve its purpose or function properly, it may be terminated by divorce with conservation of all rights of the parties concerned. This is because there is no point of in keeping a nominal and worthiless contract, and to save human kind from being tied by vows which cannot be honoured.

When the Islamic marriage, which is based on the said regulations and governed by the said precauttions, doest not function properly, there must be some very serious obstacles in the way, something that cannot be overcome by reconciliation. In a situation like this, idivorce is allowed. However, it has to be the last resort, because it is described by the Prophet (S.A.W.) as the most detestable of all lawful things in the sight of Allah. But before taking this final and desperate step, some attempts must be made in the following order:

1. The two parties involved must try to settle their disputes and solve their problems between themselves.
2. If they fail, two arbitrators, one from the husband's relations and the other from the wife's, must be commissioned to try to make peace between them and settle their differences. Qur'an says:
   And if you fear a breach between them twain appoint two parties, one from his family and the other from hers. If they wish for peace, God will cause their reconciliations, for God Has full knowledge and is acquainted with all things".[6]

3. If this attempt also fails, divorce may be applied. Divorce, is therefore a remedy, a cure, an exceptional rule which chooses the lesser evil and avoid the greater one. Divorce opens a way for either party to seek agreeable partner in order to lead more comfortable life in the new home. Qur'an reads:

> "But if they disagree and part, God will make them richer out of his abundance; for God is that who care for all and is all wise".[7]

After the divorce takes place, there is a waiting period during which the divorces is completely supported and maintained by her former husband. She cannot marry another man before the expiration of this period. The waiting period is another chance for both to reconsider their attitudes in a more serious manner and deliberate on the reflections of their separation. If they desire during that period to reunite, they are permitted to do so. In fact they are ecouraged to reunite because separation in this way usually helps them appreciate one another more. When the waiting period experes, the divorces is free to marry another man. They are no longer obliged to one another.

TOWARDS PROPER CONTRACT OF MARRIAGE

Islamic Law is a believers Law in the sense that it is binding primarily on those who believe in it. It rests therefore on faith and conviction. The Law is clearly outside the realm of academicians or secular authorities. Its responsibilities lies only on the generality of the Muslims. They are the subject of the Law, they represent

the Law and the Law represent them, they are loyal to the Law for the Law atticulates their beliefs, ideals and aspiration, and sets forth their duties and their rights. The academicians live outside this realm for they live in a dream world, unrelated to the people. The secular authority also live outside this realm for it is bent on furthering secularism and discouraging all religious beliefs. As a law that rests on faith and conviction, it follows that Islamic law can only operate when the believers consciously decide to implement it. A more proper observance of the injunction of the laws of Islam depends on the willingness of the Muslims to obey and follow the dictates of Islam. The injunctions of Islam as presented in the preceding chapters, can be fully observed in line with their spirit, not by the imposition of reforms in terms of retistration of marriages and divorce as done in some Muslim countries, but rather by inculcating in the minds of the Muslims the fear of God and accountability in the last day in all their action. If that is inculcated in the minds of Muslims, and a proper popularly acceptable Islamic authority emerge, then the reforms for their benefit and in line with the true Islamic spirit will automatically be implemented. Legal sanctions needs executive force, while Islamic Law calls for purified intention, willful, and conscious observance. Legal sanctions come last as a reformative and deterrant measure to erring believers.

LAXITY IN THE OBSERVANCE OF ISLAMIC LAW

Laxity in the observance of Islamic Law which started with the imposition of colonialism on our people, the subsequent systematic and a times brutal suppression and removal of Islam and it substitution with western ideas of life education, government and civilization is what is responsible for the present situation and confusion in the family. That is why there are those Muslims who are devoutedly allegiant to the western fashion of life others to materialism, and there are few others who are staunchly allegiant and desireus of having the proper shari'a as a regulator of their lives. However, those allegiant to materialism and western fashion of life should note that the life would take them to no where. Those youths who are totally disoriented and westernised are the hardest hit. It is only after marriage that they come to grip with reality, that all those love affairs they have been reading in English literatures, are mere fantastis that do not materialised in real life, particularly in a society with different socio-cultural values to the English society like our own.

THE ROLE OF JUDICIARY

Our local courts or Area Courts, in the Northern States of Nigeria, have been allowed, even during the colonial era, to apply and administer the Islamic law of Maliki school (first in all matters but now restricted to only matters of personal status) where the parties are Muslims, subject of course, to the repugnancy clause. From this

humble work, one could really see nothing repugnant to natural justice, equity and good conscience, if the courts strictly applied the law to its latter as provided in the federal constitution and other status.

In Northern Nigeria, Area Courts Upper Area Courts and Shari'a Courst of Appeal have since 1960 been given jurisdiction in the areas concerning Muslims personal laws. Section 242 of the 1979 Federal Constitution and First schedule, Part II of the 1967 Area Courts Edict both provided the same. But from the works of these courts one sees alot of room for improvement especially in the personnel. Judges should be sereened properly so that only those learned in Islamic Law should be appointed. The Area Courts forming the bulkiest portion of all the law courts in the North and treating the greatest number of cases, both civil and criminal, it is said and most unfortunate to note the allegation of malpractices levied against them. Despite the fact that the majority of them are Muslims who are supposed and expected to be the upholders of justice, who are also supposed to be knowledgeable and trustworthy. But surprisingly, they are the very people who are destroying it. For instance, it is not a new story to hear a Judge demanding bribe or squander property of orphans.

Generally speaking at present all cases relating to marriage and other areas of personal status are tried in Area Courts as ordinary civil suits. This creates an immense amount of unnecessary and avoidable litigation. Hence the law and procedure followed in these courts need overhauling not only to the majority of grievancies of the

litigants, but also to create security and stability, harmony and happiness, peace and progress in family relations.

I, basically being a teacher of Islamic Law, and also having served in courts and conversant with realities of life, and the requirement of the Nigerian society, feel that the major areas of reforms in the marriage may relate to the marriageable age, marriage guardianship, registration of marriages and control of polygamy in conformity will the true spirit and fundamentals of Islamic Law.

The Northern States are predominantly of Islamic territory. This is because with the exception of a few states, the bulk of the population in each state is Muslim. This is notwithstanding however, the Governments of these state are not Islamic; provision of Islamic Law, therefore, save which relate to personal status, are not applicable. And even where these provisions are allowed to apply, deviations are found between the theory and the practice. Not only in these respects, but also in other religious undertakings. The root of all these, is the general laxity on the part of the Muslims generally. This laxity has been brought about by the utter loss of hope by the Muslims. They do not seen to know their rights; nor do they care to know. For centuries Islam has been a victim of deliberate distortion in the eyes of the non Muslims. The challenge distonted by the crescent to the across prompted various misrepresentations which a Muslim encounters in the West. The saddest thing about the issue is that it is not only the non Muslims that harbours gross misconceptions regarding Islam but a great number of the followers of Islam

themselves, ever since they came under the impact of western civilisation, are also unable to comprehend the essence of this exquisite, all-embracing code of life. The western society, standing on the exaggeratdd idea of equality between man and woman, has instead of improving the status of women actually degroded her to the status of concubines, mistress and society butter-flies who are employed as mere tools of pleasure-seekers and sex-marketeers hidden behind the colourful screen of art and culture. The women, in their unnatural desire and effort to be the equals of men, have forgotten that motherhood is their greatest privilege and highest honour, and this cannot be achieved except through a valid and legal marriage.

The Western civilisation claims to 'emancipate' women only to exploit her as the means for destroying the home and family. Every effort is made to lure woman away from the home by making the role of the house-wife and mother as mnattractive, unsatisfying and unrewarding. Modern thinkers of almost all shades of opinion now think that the western society is becoming an awful place to live in. historiannsare warning them in most clear terms.

> Prof. Arnold J. Toynbee proclaims that: "In history the ages of disintegration were usually the ages in which the woman has left the home".[8]
>
> The author of the article on "Feminine Influence in politics" arrays a wealth of detail from the history of Greece, Rome, England, France, etc, to prove his them that the disintegration of civilization has always coincided with baneful feminist

movements and their influence in social and political and that:

> The hey-day of their (i.e., the women's) power happened to coincide with greatest degree of degeneracy among the male population.[9]
>
> Prof. C.E.M. Joad, once an enthusiastic supporter of the feminist movement and the leader of the "men's political union for women's enfranchisement" now repents over his mistakes and declares that the real place of woman is not the social circus but the home.[10]

These are the views of some of the leading thinkers of the West. Their reaction against their own sex-culture is now too manifest. They are raffled at the menance of sex-anarchy-the natural offshoot of the so-called movement of feminine emancipation which instead of restoring woman to her natural status "emancipated" her by driving her out of the home and the family, life, by auctioning her feminity in the streets and the bazaars and by making her a society toy. Since it is clear now the westerners whose life style we are imitating started realising the folly, what are we (the westernised Muslims) is still doing. It is high time for every body to wake-up from his sleep and reconstruct our society before it is toolate. This is a duty on every Muslim.

Finally I wish to emphasize the important fact that the moral and spiritual state of a given society or civilization, which in turn determines its over-all internal strength and longevity, is dependent upon the status that

society or civilization gives to its women. This is so because of women's considerable influence over the basic and fundamental pillars of the society as well as their natural influence over men.

A society whose women are sufficiently inttlectually developed, and morally and spiritually sound, is bound to move fast in the pace of development and quest for happiness. But a society consisting of ignorant and enslaved women will continue to move backwards until it is left behind by other societies. The deplorable state of the Muslim society in Nigeria today which manifests itself in spiritual decadence, ignorance, political blindness and aimlessness, does have a strong connection with the chaining of women to certain customs that are not only oppressive to women, but destructive to the general welfare of the entire society.

The paramount duty of the Muslims today is to strive to reconstruct the society, a establish a new order in accordance with the principles of shari'a. Allah has described the Muslim Ummah as the best of Ummah evolved to lead the rest of the human race; this leadership role can only be carried out when the Muslims are guided by the Law of Allah. The construction of the society, however, must begin with the reassessment of the role of the Muslim women: a re-assessment that must reconsider their present status in the light of Śharia. It is to be noted here, that any emergent social order, be it Islamic or non-Islamic, has to undertake bold and energetic steps to raise the status of women and free them from the chains of custom and tradition invented by men for their own gratification.

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