THE DOCTRINE OF IJBAR IN ISLAM WITH PARTICULAR REFERENCE TO ITS PRACTICE IN NIGER STATE

BY

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DECLARATION

I declare that this dissertation has been written by me in the Department of Islamic law under the supervision of Dr. Sani Idris. The information derived from the literature has been duly acknowledge in the text and a list of references provided. No part of this dissertation was previously presented for another degree at any University.

AMINA YUNUSA NDAYAKO — **Signature** — 23/02/2010 — **Date**

CERTIFICATION

This dissertation entitled: THE DOCTRINE OF IJBAR IN ISLAM WITH PARTICULAR REFERENCE TO ITS PRACTICE IN NIGER STATE. by **Amina Yunusa Ndayako** meets the regulations governing the award of the degree of master of law of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This research work is dedicated to the Muslim Ummah.

ACKNOWLEDGEMENT

Here are more than A decorative ritual the completion of this work was made possible in the first place from the critical but constructive remarks of Dr Sani Idris, which gave this work its form shape and style, and for his continuous proof reading. I say may Allah (SWT) reward you abundantly. I wish to express my sincere appreciation also Dr Y.Y. Bambale for providing the necessary guide lines, my gratitude also to Dr. Naiya Sada and Dr. M.B Uthman, may Allah (SWT) reward their effort.

My special gratitude to the staff and Management of Islamic Education Trust Minna for allowing me the use of their library materials. I must also pay a special tribute to the Grand Khadi and Khadis of Shariah Court of Appeal Minna and the upper Shariah Court Bida for their useful case materials I thank my uncle professor Shehu Bida for his time and allowing me the use of his library.

My special gratitude to my father Wg Commander Yunusa (Rtd) for his support and encouragement. This appreciation also extends to my friends and Collegue, amongst whom is Mallam M.D Sulaiman Bursar IBBUL, for allowing me the use of his literatures.

Finally I must appreciate the encouragement and efforts of my husband Alhaji Usman A. Ndayako for his assistance and persistent encouragement in the production of this work.

ABSTRACT

This research work is going to examine the essential element of marriage, and indeed the legal basis upon which it rests according to Islamic law. Islam as a complete way of life has a distinct outlook of life. It aims at producing a unique personality in the individual and a distinct culture for the community based on Islamic ideals and values. The Institution marriage and the family occupy a very important position in this scheme of life. Effort is made in this research to explain the Islamic concept of marriage and the family. It is pertinent to note that marriage forms the basis of an ideal union we consider the concept of guardianship in marriage, as it is one of the features of a valid marriage, it is inline with this concept that this research dwells into Ijbar, this is a doctrine of Islamic family law that confers on the father the right to give hi daughter in marriage with or without her consent. This concept will be considered by different juristic view.

This work is thus, chapterized with, chapter one introducing the thesis and the back ground of the work. Chapter Two, discusses the concept of marriage in Islam and the wisdom behind the Islamic family system. Chapter Three; explains guardianship and its classification in relation to the application of the concept of Ijbar and option of puberty in accordance with different juristic view. Chapter Four, is a detailed

exposition of the practice of Ijbar through relevant case materials in Niger State and its consequences on the society. Chapter Five; concludes this research work, making a summary, considering the problems where any, and making observations and recommendations.

LIST OF CASES

1. Karimatu Yakubu Tafida and Anor Vs Alh Yakubu Tafida Paiko
2. Ndamazhi Audu and Anor Vs Nnaduzuma Audu KWS/SCA/IL/23 1998.
3. Mama Ndawodi and Anor Vs Mal. Ndawodi BD/USC/301/W/2007
4. Alhaji Isa Bida Vs Baiwa SCA/NSW/CO/47/70
5. Usman Gunduma and Rakiya Gunduma Vs Alimako Shagi SCA/NS/CV/60/04.

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

Islam is a complete way of life. It has a distinct outlook on life. It aims at producing a unique personality in the individual and a distinct culture for the community based on Islamic ideals and values. The institutions of marriage and the family occupy a reply important position in the scheme of life.

This research is going to touch on the Islamic approach to life, and gradually explain the institution of the family and the principles on which family relations are built in Muslim society.

Several scholars have in fact noted that Islam is quite open in recognizing the importance of marriage as an Institution that came into existence with the creation of man. The human race is a product of this institution and not the other way round.

The Quran provides that,

> *"O mankind, be conscious of your duty to your Lord, who created you from a single soul, create of like nature, his mate, and from the two created and spread many men and women, and be mindful of your duty to God whose name you appeal to one another and to (the ties of) the womb."*[1]

It may be noted that in this verse, the Institution of the family is shown as the main spring of the human race. Thus the creation of man and woman and the marriage relationship which is permeated with tranquility, love and mercy have been described as signs of God.[2]

The Muslim marriage though is primarily a relationship between the spouses; it in fact builds relationships between two families and even more. The father plays the role of guardianship except he appoints another to act on his behalf, because to make the marriage valid there must be a marriage guardian. Several scholars have in fact noted that Islam is quite open in recognizing the importance of marriage based on mutual consent of the parties and Islamic Jurisprudence is also quite flexible when it comes to the practice of Ijbar. The critics of Ijbar have challenged successfully its reliance on Quran chapter 4:25

> *"....Ye are one from another wed them with the leave of their owners...."*[3]

Arguing convincingly that the verse does not speak about free believing women, but it talks of captives whom "the believers" right hands possess". It is this class of women the verse directs that they should be married with the leave of their guardians in the verse under reference.

In view of the fact there is no other verse of the Quran that alludes to Ijbar; the next point of call is the Sunnah. The following hadith are in support of critics.

> *"On the authority of Ibn, Abbas may God be pleased with both the father and son, the prophet (S.A.W.) was quoted saying: A married woman who wants to remarry has more to say about her choice of a partner than her Waliy for a bikr her consent be sought about her own marriage. Her silence signifies her consent"*[4].

Effort will be made in the course of this research to discuss marriage in Islamic system with its guiding principles.

1.1 BACKGROUND OF THE RESEARCH

Islam as religion has a distinct outlook on all aspect of life and aims at producing a unique personality in the individual and a complete way of life for the community based on Islamic ideals and values.

The marriage institution is a very important one in the scheme of life, and has been a unifying factor between families, tribes, races and nationalities so much that numerous literatures have been written on it but there is still an ample room for further research to be carried out in the field.

Islam builds the family on social ground that is capable of providing reasonable continuity, through security and mutual intimacy. The power of Ijbar is a distinguishing feature of Islamic law, which bestows upon the father/grandfather who can contract a valid marriage for minors which cannot be annulled at puberty[5]. The researcher being a Northern Muslim lawyer could not help but notice the exercise of this power of Ijbar and its implication on the Muslim women, particularly in Niger State of Nigeria. This motivated the researcher's interest in undertaking a study on marriage with reference to power of Ijbar. In this background to the study it is worth

knowing that despite the fact that Islam provided for a marriage guardian (Waliy) its application has been enveloped by the power of Ijbar and whenever there is diversity from the Islamic concept then one should do away with either tradition, cultural life styles and opt for what Allah (S.W.T.). Has sanctioned in preference to the thinking of man, that is why often times than not marital cases end up litigation.

1.2 SCOPE OF THE STUDY

The study focus on the practice of power of Ijbar under Islamic law with reference to Niger State, the study limits itself to the concept of marriage with feature i.e. guardianship according to sunni schools.

However, this research work will deal with the concept of marriage and how it relates to Ijbar considering also the consequences of its practice in Niger State. .

1.3 RESEARCH PROBLEM

It is commonly observe that the scholars of Islamic law who wrote books on marriage and family have various references to the concept of marriage and little on the power of Ijbar, what they often report lacks sufficient description of the manner and circumstances of the doctrine of Ijbar connecting it with guardianship hitherto.

Furthermore, a major problem faced by our Sharia court Judges has to do with interferences from the traditional rulers, District heads, family heads etc on cases bordering the doctrine of Ijbar. These

external forces believe that the practice of Ijbar is absolute and requires no intervention by our courts. Hence, the need for this research although the sharia court judges are often left with no option than to exercise their power of discretion and conduct marriages, but leaves the father with no choice than to either go on appeal or worst still end the biological relationship between father and the child.

It is the aim of these researches to enlighten the mind of the father/guardian as to the extent of his right to exercise Ijbar and its consequences to the society as a matter of fact. The researches conducted far have revealed that the exercise of Ijbar resulted in many broken homes, divorces etc. It is the ardent hope that if these researches are completed, it will be a useful tool to judges, parents' traditional rulers, etc in solving the problems associated with the practice of Ijbar.

1.4 AIMS AND OBJECTIVES

The main objectives of the study are as follows:

1. To critically examine the practice of Ijbar, whether it has any basis in the texts and its usefulness in the society especially in Niger State.
2. To refocus the practice of Ijbar in Niger State suit the changes in the society.

3. To provide the correct insight on the practice of Ijbar as enshrined in Islamic law.
4. To provide a working tool that will help promote marriages

1.5 METHODOLOGY OF THE RESEARCH

Our general context is the Islamic law and society. Our temporal context will be confine to the formative period of Islamic law, that is to the first four centuries or so of Islamic history (roughly from the seventh to eleventh centuries) this period particularly significant because it was the time during which Islamic law developed and Muslim society reached its full growth. The end of that period marked the culmination of a religious legal process to which nothing of major moment had been added. Moreover because little of the basic family structure had changed, it would seem reasonable to take this period as fairly representative of the general outlook of Islam and founders of Muslim society.

However, this historical demarcation will not exclude the use of sources and materials of the later generations.

Other Information is;

1. Primary authorities which are the Holy Quran, and Hadith
2. Secondary authorities consisting of relevant information from leading authorities textbooks on the subject matter journals and Juristic opinion of specialist in Islamic family law.

1.6 LITERATURE REVIEW

Living in a community is a necessity for man-as rightly observed by Ibn Khaldun. This opinion of Ibn Khaldun seems to be the most popular among sociologist that man social life is essential to him. It becomes necessary, therefore to have fundamental principles which define the right of every individual in relation to the right of others.

> *"In Islam the institution of marriage occupies a very important position in a community's scheme of life based on Islamic ideals and values. As such a lot of effort has been made in analyzing this divinely inspired institution in line with the practice of Ijbar and guardianship under Islamic Law"*[6].

Hammudah Abdul-Ati in his book, the family structure in Islam united readers with the basic teachings of Islamic law with regard to marriage. The Author has touched on the meaning of marriage and most relevant to this research guardianship and right of choice of partner (husband). The author did not elaborate on the practice of Ijbar or give details on its consequences. Michael Pickhall: the cultural side of Islam P.166 raised an objection as to the Islamic system on the ground that the parent chooses a husband for the girl who ought to be allow choice for herself he says that social culture is not peculiar of Islam[7].

The Author of Bent Rib, a Journey through women's issues in Islam (1997) made reference to marriage as some act not to be taken lightly, Islam views it (marriage as being of great importance, as the

family is the basic unit on which the community, nation and ummah is built. The Islamic ideal of Marriage is one of harmony love and tranquility not a battle ground or master-slave scenario)[8].

Abdullahi Borek, (1999) women in Islam, wrote the right of a Muslim woman to choose her own husband, he said,

> *"The Tabloid image of Islam presents many negative stereotypes of marriage where under age girls' are forced to marry men old enough to be their grand fathers"*[9].

The authors of the literatures cited above have all discussed marriage and its features but did not go into detail on Ijbar, i.e. forced arranged marriage. Dr. Yusuf Al-Qaradawi's work on the lawful and prohibited in Islam could serve as one of the literatures that buttress the right of the woman/girl to make her choice, he stated that three matters should not be delayed, prayer when it time comes, burial when the funeral has arrived, and the marriage of a single woman when a man of equal status has proposed, (as narrated by Al-Tirmidhi).[10]

Hassan Turabi (1993) women in Islam, Islamic Education Trust publications Minna cited in Page 39, the thought and practice of Muslims have come lately to misrepresent most of the doctrine and normative teachings of Islam on female affairs.[11]

From the above literature review it is quite clear that very few studies have been conducted on Ijbar, majority of the works make analysis of marriage and its features.

The literature review therefore concentrates on works that have been conducted on a similar topic, literatures texts, papers, research papers.

Conclusively, the research acknowledges the work of authors written on marriage but also remarked that there is a gap to be filled in this area of study as there was no work done on Ijbar and its consequences in the Muslim community and scholars, professionals, and Muslim organization do not produce work (Journals, Magazines, Seminar) strictly on Ijbar to explain to the Muslim community on how far its practice can go.

It is the intention of the research, that at the end of this work the Muslim Ummah who come across this work will find it enlightening and women will have more freedom of choice of husband.

The necessity for this research is to give an insight of its practice in Niger State.

1.7 JUSTIFICATION

The essence of this research work is to highlight on the practice of Ijbar in Niger State, as the exercise of power of Ijbar cannot be over emphasized. It should be noted that the significance of marriage will

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be defeated where the spouses have no love, respect and understanding. Indeed Islam recognizes the religious virtue, the social necessity and moral advantages of marriage as such it is the normal course for a Muslim individual to take, and to that effect many Quranic passage and statement of the prophet (S.A.W.) encourage it for example.

> *"And among his signs is that he creates for you mates from among yourselves that you may dwell in tranquility with them he has put love and mercy between your hearts verily these are signs for those who reflect"*[12].

However, Imam Malik, one of the four Imams of the sunni schools of Islamic Jurisprudence, gives a slight restrictive interpretation to this verse and makes the choice of partner by a Muslim Girl subject to the over-ruling power or Ijbar of her father or guardian in the interest of the girl herself to also justify the Quranic authorities, this prophetic tradition explains that,

> *"When a man gives his daughter in marriage and she dislikes it, she has the right to repudiate it. Once a virgin came to the prophet (SAW) and said that her father had married her to a man against her wishes. The prophet gave her the right to repudiate the marriage"*[13].

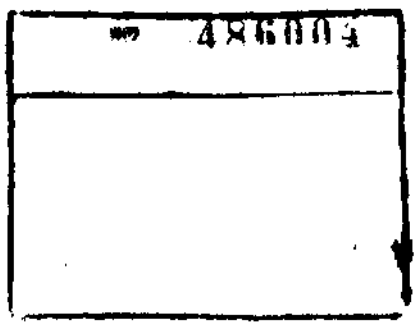
The consent of a woman in marriage is sought for a valid marriage at times the practice of Ijbar produces negative effect i.e. rather than making the institution of marriage an act pleasing to Allah and being a lawful response to the basic biological instinct the reverse becomes the case. Islamic law recognized the crucial role of woman in

preservation of family and societal values so when it comes to choice of spouse her consent should be of paramount importance and discrimination should be avoided. The father should know that the female child may wish to choose her husband, because her choice is prerequisite to the validity of the marital contract.

1.8 ORGANIZATIONAL LAYOUT

This research is divided into five chapters and each chapter is dealing with a distinctive subject matter;

CHAPTER ONE



1.0 Introduction

1.2 Background to the Research

1.3 Research Problem

1.4 Aims Objectives

1.5 Methodology of the Research

1.6 Literature Review

1.7 Justification

1.8 Organizations Layout

This chapter contains the general introduction: it considers the background, information on marriage and the practice of power of Ijbar and its influence on the society.

CHAPTER TWO

2.0 Marriage in Islam

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2.1 Islam and social Responsibility

2.2 Wisdom of Marriage.

This chapter deals with Islamic concept of marriage, social responsibilities and wisdom of marriage.

CHAPTER THREE

3.0 Marriage Guardianship (Al- WILAYAH)

3.1 Classification of Guardianship according to Sunni schools

3.2 Guardianship in marriage, according to Sunni schools

3.3 power of ijbar and freedom of choice of a spouse

3.4 option of puberty.

The chapter examine the concept of guardianship in Islam and the observations made by sunni schools, it also analysis the power of ijbar and option of puberty.

CHAPTER FOUR

4.0 An appraisal of practice Ijbar in Niger state

4.1 Factors that influence marriage in Niger state

4.2 Analysis of relevant case material

4.3 consequence of the exercise of power of Ijbar in marriage

The chapter appraises the practice of Ijbar in Niger state. It refer to factors that influence marriage in Niger state and its consequences also analysis the relevant case material both reported and unreported, reference to such case material from other state as relevant may be cited.

CHAPTER FIVE

5.0 Conclusion

5.1 The Summary

5.2 Observation

5.3 Recommendation.

The chapter concluded the research works, makes summary of the whole work, nothing observations based on the research work and then suggest or make recommendations.

CHAPTER ONE END NOTES AND REFERENCES

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2. Ibid Q30:21
3. Ibid Q4:25
4. Ambali M. A. (2003) The practice of Muslim family in Nigeria second edition p.152
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10. Dr. Yusuf Al-Qaradawi, the lawful and the prohibited in Islam. (2001) Al-Falab foundation for translation P. 172.
11. Hassa T. (1993) (Women in Islam and Muslim society). Islamic Education Trust publishers Minna P.39.
12. Abdullah Y. A (2005) op.cit Q.30:21
13. Reported by Abu Dawud Hadith No: 2469 from Jamal Bo Phd (1995). Gender Equity in Islam basic principles published by American Trusted Publication.

CHAPTER TWO

2.0 MARRIAGE IN ISLAM

Islam or the shariah recognizes marriage as Civil contract capable of being entered by sane, adult and consenting parties, it is the right of the bride and the groom or their legal guardians or agent Wakil to conclude a valid marriage after the exchange of offer Ijab and acceptance Qabul in the presence of witnesses. The word zawaj is used in the Quran to signify a pair or a mate. But in common parlance it stands for marriage since the family is the nucleus of Islamic society and marriage is the only way to bring families into existence. The prophet (PBUH) strongly recommended his followers to go into marriage. The shariah prescribe rules to regulate the functioning of the family so that both spouses can be together in love, security and tranquility.[1]

Islamic law regards marriage as Mandud, i.e. a meaning an act for which reward is due if it is done, and no punishment whatsoever for keeping away from it. This is because of the obvious roles of marriage to regulate man's passion, full mutual harmony of emotions, provide cooperation between two sexes, create the units of society called the family, afford tranquility, peace and ease of body and mind and most importantly to facilitate orderly and organized continuity of man's progeny.[2]

Marriage as a social institution is essentially a civil contracts. Its validity depends on the capacity of the contracting parties, which according to Islamic law consist in having public declaration of the marriage contract are its essential Ijab and Qubul. Muslim marriage is usually a contracted marriage. Although marriage is primarily a relationship between spouses, it in fact builds relationship between two families and even more. That is why other members of family, particularly the parents of the spouses, play a much more positive role in it. This is to show that the welfare of their ward especially the female child is put at heart.

Islam preaches marriage in a most unifying manner as such this could be read from the Quranic Injunctions which emphasizes the importance of marriage as thus,,

> *"And among his signs is that He creates 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 these are signs for those who reflect".*[3]

Muslim jurists have interpreted the above provision of Quran to mean that

> *"Marriage is a religious duty and is consequently a moral safe guard as well as a social necessity. As a religious duty, it must be fulfilled, but like all other duties in Islam, it is enjoined only upon those who are capable of meeting the responsibility involved. The predominant view among the jurist is that, although marriage is a social necessity, it is not absolutely necessary for every individual. Hence, they have developed a rough typology to classing individuals with regard to their marriage ability from the point of view of religion".*[4]

First, some individuals are apprehensive that abstinence may lead them astray. For these, marriage is a religious duty because they must guard against illegitimate sexuality, and marriage is the nature mechanism of such moral protection.[5]

This emphasizes one of the factors that influence marriage in Islam so as to guide against Immorality.

Second, some individuals are capable and desirous of sex but are not so apprehensive of excess; they anticipate no irresistible temptation or lack of self control. For these marriage is preferable to abstinence and even to superogatory devotion, which is voluntarily undertaken to up lift a person's spiritual and moral state.[6]

Third, there are individuals who lack potency, for some reason or other. In this case, marriage is still considered preferable to abstinence by some jurists, while others argue that abstinence is preferable because marriage under such condition will defeat its purpose and deprive the female partners of the moral protection they need and the fulfillment they merit.[7]

In view of these, some observers have been led to stress the contractual nature of marriage in Islam. They maintain that marriage as contract can not be concluded without the mutual consent of the parties involved. It is open for additional, but legitimate, conditions and its terms are, within legal bounds capable of being altered. It is dissoluble if there are grievances leading to an irreconcilable break in

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the marital relations. Sometimes, however, the stress on the socio-legal and contractual elements of marriage tends to obscure the religious aspect; "marriage is a contract, but it is also a covenant." It is not quit accurate, therefore, to designate marriage in Islam as either a secular contract or religious sacrament; it has elements of both.[8]
The intention of the Islamic Shariah is that the marriage tie should be established between a man and a woman who, because of their social background, are likely to develop a bond of love and compassion. Where this likelihood does not exist, it is not desirable to arrange a marriage.

All that has been said so far proves that after the preservation of morality and chastity, the next most important thing in the Islamic Marital law is the bond of love and compassion, between the husband and wife. As long as there is hope that relations will continue to be governed by this bond, the Islamic law strives as hard as it can, to protect the marriage tie.

Thus the Institution of marriage has given man a proper and satisfactory way to gratify his sexual urge without letting it loose, but employing it for developing a permanent relationship of love between wife and husband on one hand, and between parents and children on the other hand, thereby establishing a family system. It is the basic and fundamental link in the growth of human community life and civilization.

This is how marriage has become a social obligation as well as satisfying sexual desire in a lawful-way. It is a means of survival and preservation for the human race. Though voluntary it is commendable and meritorious.[9]

2.1 ISLAM AND SOCIAL RESPONSIBILITY

Islam is a complete way of life, from social, to political to economical with guiding principles from the Holy Quran and Hadith, and this has been from the earliest periods of human history.

Religion and the family are intimately related. Each has an influence upon the other; neither can be fully understood apart from the other. This inter- connection may explain the apparent gap in conventional studies of the Muslim family structure between two unbalance approaches, and the non-normative, sometimes called sociological or anthropological approach. Since the Muslim family system is based on religious principles and norms most writers dealt with the subject from a religious, normative point of view almost exclusively. But this approach has almost always been polaristic. There are those Muslim writers who seem disposed only to applaud the Islamic family system, viewing it from an idealistic standpoint and mistaking what should be for what actually has been, others seem disposed to condemn the system, as if they saw in it an aberration from some abstract universal standard of morality.[10]

This research is considering the social responsibility in Islam, because from a point of view marriage it self is a social responsibility with guiding principles. Neither normative standpoint useful distinctions between what have been called the 'ideological' and the 'behavioral components of the socio-cultural world, or the 'existential' and the normative imperative ideas. In other words, the ideal, ought to be realm is confused with the actual, this is realm. Imprint in both is a tinge of ethnocentrism, of self righteousness, of determinism.

The non – normative approach, on the other hand, too often has paid insufficient attention to the underlying religious moral principles.

There are communities that have by long usage adopted a pattern of behavior which if not contrary to religion is acceptable as a way of life, i.e. modes of marriages and inter family marriages. This research has made a notable phenomenon of our time with the diffusion of Muslim Communities, that is the way people in some Muslim communities, approach Marriages through courtship which is not an acceptable thing in Islam base don morality, it brings about young girls visiting the would be husbands and some even go as far as living with him even before the Marriage. There are marriage issues that have undergone both Legal and arbitral contention, the social and cultural challenges of such a phenomenon have begun to attract the attention of Muslim scholars.

Islam should be seen as not only a form of worship, but also a way of life, it proffers guidance in all aspects of man's need. That is why scholars and intellectuals should engage in probing for Islamic solutions to contemporary problems of life in our society.

The nature of law in Islam has been variously conceived. It is divinely revealed, or socially grounded. Positive or supernatural, immutable or adaptive. Disagreements seem to stem from uncritical use of two equivocal concepts Shariah and fiqh. Shariah 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 fellowmen, and the rest of the universe. "It may be compared in certain respects to some denotations of the western concepts 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 can come only from God[11]

The term fiqh literally donates intelligence or knowledge. Technically, however, it is the name given to jurisprudence in Islam. It does not designate the principle of Islamic laws that are to regulate all aspects of public and private life. It is a subsidiary science of those laws. In other theological language the world is applied to the independent exercise of the intelligence, the decision of legal points by one's own judgment in the absence or ignorance of traditions bearing on the case in question.[14]

Although Fiqh is the science of Shariah and can often be used synonymously the two concepts suggest to the Muslim mind analytically different, but actually related things. Muslims speak freely of different schools or Madhalib of Fiqh but they do not refer to Shariah in the same way. To them Shariah is one comprehensive system of law that is divine in origin, religious in essence and moral in scope. It does not exclude Fiqh, but is not identical with it. In contrast, Fiqh is a human product, the intellectual systematic endeavour to interpret and apply principles of Shariah.[13]

The most characteristics feature of Islamic law may be stated in following proposition: while Islamic Law attempt to "Moralize" Legal action and formalities by placing them in the context of religion and morality, it tends to discharge the formalization or "virtualization" of the religious and moral precepts. This may be correlated with designation of social controls as ultimately moral.[14]

The fact that Islamic Law holds the religious, moral and legal elements as indivisible may suggest that in the Islamic conception of society the mechanisms of social control are likewise indivisible human behavior is so complex that to control it in a comprehensive way there must be an integrative synthesis of religion morality and law. This tendency of Islam may also suggest that the legal system of a society is determined by, and in turn determines the end of that society. Because both the worldly involvement and the other worldly

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 practicality.[15]

In this regard the social life of the true Muslim is based upon supreme principles and designed to secure happiness with prosperity for the individual as well as for the society.

Nowhere in the Quran or the traditions of Prophet (S.A.W) can one find only mention of superiority on account of class or origin or wealth. On the contrary, there are many verses of the Quran and saying of the Prophet (SAW) to remind mankind of vital facts, which serve at the same time as principles of the social structure of the Islamic life. Among this is the fact that humanity represents one family springing from one and the same father and mother and aspiring to the same ultimate goals.

The unity of mankind is conceived in the light of one common parentage of Adam and eve. Every human being is a member of the universal family established by the first father and first mother, and is entitled therefore to enjoy the common benefits as he is enjoined to share common responsibility when people realize these that all belong to Adam and Eve and that these were the creation of God, there will be no room for racial discrimination. In the Quran and traditions of the prophets (S.A.W) there is a constant reminder of this important fact, the unity of humanity by nature and origin.

This is to eliminate social pride and claims to national or ethnic superiority and pave way for genuine brother hood in this respect the Holy Quran provides;

> *"O mankind reverence your Guardian – Lord who created you from single some, created, of like nature, his mate and from them twain scattered (like seeds) countless men and woman; reverence Allah, wombs (that bare you); for Allah ever watches over you"*[16].

The unity of humanity is not only in its origin but also in its ultimate aims. According to Islam, the final goal of humanity is God. From Him we came, for Him we live and to Him we shall all return. In fact the sole purpose of creation as described by the Quran is to worship God and serve His cause, the cause of truth and justice of love and mercy of brotherhood and morality. In the provision of the Quran, it state

> *"I have created Jinns and Men, that they may serve me"*[17]

On this unity of origin and ultimate goal as background of the social life in Islam, the relations between the individual and society are based. The role of the individual is complementary to that of society. Between the two are social solidarity and mutual responsibility. The individual is responsible for the common welfare and prosperity of his society. This responsibility is not only to the society but also to God. In this way the individual works with a sound social-mindedness and genuine feeling of inescapable responsibility.[18]

In short, Islamic law is distinguished by the variety of its sources, by the wide areas of "behavior" it cover as well as range of the

religious, moral and legal principles of action it contains. It assigns to man a greater responsibility and to action more consequences that are perhaps found in comparable system of law or behavior. It sets before man and ends beyond his immediate sense of time and space, conceiving God as an integral part of any action situation[19].

2.2 WISDOM BEHINDE THE FAMILY

Before discussing wisdom behind the family it is pertinence to highlight the family in Islam. The family is a divinely inspired and ordained Institution it was not evolved through human experimentation involving a process of trial and error spread over time. It was an institution that came into existence with the creation of man. The human race is a product of this institution and not the other way round[20].

The Holy Quran provides,

"O mankind, be conscious of your duty to your lord, who created you from a single soul, created of like nature, his mate...."[21]

The verse explains the Institution of family that is the first family of Adam and Eve is shown as the main spring of the human race. It is also significant that one verb wattaadu (be conscious of your duty to) has been used in the verse for reference to God and to al-Arham (the womb: the relations of kinship) faith constitutes the bedrock for the institution of the family. A Muslim is not permitted to marry a non-

Muslim (man) marriage should be among partners who share a common out look on life and morality, and who participate in this co-venture to fulfill their destiny as God's vicegerents.[22]

Abdul-Ati. In his book the family structure in Islam observed that the term family when used alone is ambiguous. The layman and even the social scientist apply it indiscriminately to several social groups which, despite functional similarities, exhibit important point of difference. Many classifications and typologies have been suggested to clarify the term. Yet they have produced, some instance at least, more confusion than clarity. Part of the problem it seems, is the inevitable overlapping of kinship and family boundaries and the inherent difficulty of setting a universally accepted line of demarcation.[23]

Our definition of family makes no reference to the residential factor because the family members may or not occupy the same residential unit. As far as their mutual expectations are concerned, it makes no fundamental difference how or where they reside.

The residential confines may be shared by all members included, or they may be separate and independent. This fact, among others, precludes the unqualified applicability of the family structure in Islam of the sociological concept of nuclear family. Accordingly, the family member share certain mutual commitments that pertain to identity and provision, inheritance and counsel affection for the young and

security for the aged, and maximization of effort to ensure the family continuity 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, private 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 as 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 whole some pattern of sexual intimacy than one in which morality and gratification are joined.[24]

In the Islamic social order, the family is the first and real unit of humanity and the cohesive force which makes civilization possible. A family is established through marriage and grows through ties of kinship into groups, tribes, clans and nations. It is the family, which prepares and trains, with love and affection, the members of the young generation to discharge their social obligations with devotion, sincerity and enthusiasm and to maintain and develop human civilization. Parents earnestly desire the future members of society to be better educated and trained than their selves and to be better equipped to maintain, develop and guard the cultural heritage of mankind. Thus the family is truly the fountain head of the progress, richness and

strength of human civilization. And all this owes its existence to marriage; without marriage there would be no family and no ties of kinship to unite different members of humanity, and therefore, no civilization. It is the family which holds humanity together and therefore makes human civilization possible. It is because of the family's importance that Islam pays special attention to the social problems relating to the family and makes every effort to establish this primary social unit on firm, strong and healthy foundation.[25]

Islam recognizes the religious virtue, the social necessity, and the moral advantages of marriage. The normal course of behavior for the Muslim individual is to be family oriented and to seek a family of his own. Marriage and family are central in the Islamic system.[26]

CHAPTER TWO END NOTES AND REFERENCE

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CHAPTER THREE

3.0 Marriage Guardianship (Al-Wilayah)

There is consensus that (a) the availability of a marriage guardian (Waliy) (b) legality of marriage between the prospective couple and (c) the formal statements of offer and acceptance complete the ingredients of marriage. For the purpose of this research we will consider the concepts of guardianship as an essential element of marriage contract under Islamic law.

Guardianship in marriage is the right conferred or duty imposed on a man, which empowers him to act on behalf of his ward, in the circumstance of contracting her marriage.[1]

Simply stated, marriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently[2].

Whether guardianship is considered as a right conferred on or as a 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[3].

The concept of guardianship, as a mechanism devised principally to protect the honor or pride of the wards family seems to have led to conflicting comments for example, a contemporary writer has noted that, "it is, firstly, the kindred and secondly, the woman

herself, who must be protected from a misalliance; but in no case may the guardian derive any material advantage from arranging a match or consider anything but the best interest of his ward. If he does so his action according to all schools, will be Haram (forbidden and irreligious[4]. Authorities of all schools of law are, according to the same writer, unanimous in characterizing marriage guardianship as the right to assist a woman at her marriage. Guardians are expected to act in the wards interest and, generally speaking, in conformity with her wishes[5].

According to Hammudah Abdul'Ati, this observation appears to confound the Islamic conception of guardianship with the pre-Islamic idea of tribal honor and pride, and to define guardianship as a right over the ward rather than a right of hers or a duty to her. It is probably this misconception which is responsible for the inconsistency of the respective parts of this statement[6].

It is to this end that this research is going to consider the necessity of a guardian and classification of guardianship.

Before we go into the details of classification of guardianship, it is ideal to briefly consider the necessity of a marriage guardian. There are conflicting views on whether it is necessary for a woman or a man to have a guardian to contract her/his marriage for her/him or they can do so independently without a guardian. One view which is the opinion of the majority of jurists upheld by Maliki, Shafi, Hanbali

and Zahiri is that any marriage contracted without a guardian is void. It is therefore clear that there is no valid marriage without a guardian. The persons that are qualified to be guardian according to this opinion are the father and his agnatic male relation, who must be a Muslim male of sound mind, full age and good character.

The profounder with of this opinion support it following provisions of the Quran

> *"When you divorce women, and they fulfill their term (Iddat) do not prevent them from marrying their former husbands, if they agree on equitable terms"*[7]

The jurist interpreted these to be addressed to the marriage guardian, thereby showing the necessity of a guardian in a marriage contract. This position is also supported with so many prophetic traditions in one of them the prophet (S.A.W) is reported to have said

> *"No marriage with out a guardian"*[8]

In another, it is states that,

> *"Any woman who contracts herself in marriage without the approval of her guardian (waliy) that marriage is null and void."*[9]

It is the woman who needs a guardian because she is usually said to lack experience in practical affairs and hence, may be intrigued into commitments contrary to her interest. More so, if she contracts marriage in her own behalf, she may give the impression of being inconsiderate, presumptuous and inclined to intermingle with

men unnecessary –action which would customarily stigmatize her character, for such reasons, the Jurist-argue, that a guardian is required to protect the woman's interest, to safeguard her moral integrity, and to take all possible precautions to maximize the probability of a successful marriage. And, because the fathers love and care for his daughter are usually taken for granted, he is the first man to qualify as her guardian provided of course, that he meets the other requisite of guardianship[10].

It should be noted that marriage preparation according to Islamic traditions must be with a marriage guardian as the habit of choosing a mate without the involvement of family or community elders and without a Wali seems to be contributing too many of the marital problems. The Quran and Sunnah are rich wisdom and the best example of appropriate Islamic behaviors in family life. The requirement of a Wali or Wakkil (guardian or agent) in the marriage process and the tradition of family involvement in arranging the marriage are also important aspects of preparation for marriage. This allows for input from those with good sense and wisdom about the potential spouse's personality, strengths and weaknesses and for them to adequately inspect the reference of the future mate[11].

It is therefore an essential factor in marriage that guardianship is a necessity.

3.1 GUARDIANSHIP IN MARRIAGE; ACCORDING TO SUNNI SCHOOL

The Sunni schools have regard to the position of a marriage guardian, and thus, Imams Malik, Shafii and Hanbali expatiated upon to conclude that a marriage concluded without a marriage guardian should be dissolved, its duration and number of children resulting there from notwithstanding. The Holy Prophet (S.A.W) was reported as saying.

> *"No valid marriage without the involvement of a marriage guardian"*[12].

> *"Any woman who contracts marriage without the approval of her Waliy, her marriage is null and void"*[13].

It is the observation of this research, that marriage conducted by a guardian should be in the best interest of his ward. It is to this end that "Authorities of all schools of law are, unanimous in characterizing marriage guardianship as the right to assist a woman at her marriage. Guardians are expected to act in the wards interest and, generally speaking in conformity with her wishes.

This observation made of marriage guardianship as "the right to assist" appears to confuse the Islamic conception of guardianship with the pre-Islamic idea of tribal honor and pride, and to define guardianship as a right over the ward rather than a right of hers or a duty to her. Muslim Jurist whose insistence on marriage guardianship

seems to consider it a duty rather than a right of the guardianship, or at least synthesis of both[14].

The Shafii, Maliki and Hanbali schools are of the opinion that the Wali (guardian) has sole authority with respect to the marriage of his sane and major female ward if she is a maiden. But if she is a thayyib (a woman who has been married before) his authority is contingent on her consent. He cannot exercise his authority without her permission.

The Hanafii's regard a sane, grown up female as competent to choose her husband, irrespective of her being a maiden or a thayyib. No one has any authority over her, nor any right to object, provided she choose one her equal and does not stipulated less than a proper dower Mahral-Mithli for the marriage. If she marries someone who is not her equal, the wali has the right to object and demand the annulment of the marriage by the Qadi, and if she married her equal but less than the proper dower, the Wali has the right to demand annulment, if the husband does not agree to a proper dower[15].

Most of the Imamiyyah scholars are of the view that a sane girl of full age, on maturing, is fully competent to decide her contractual as well as non-contractual affairs and this includes marriage, regardless of her being a maiden or thayyib. Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance, and irrespective

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of her having a father, a grandfather, or other relative. It is of consequence whether the father agrees or not. The social status of the girl, higher or lower, and whether she marries a responsible or an abject person is of no consequence. No one has a right of objection in this regard.[16] the scholar support this argument by quoting the following verse of the Quran.

> *".... then do not prevent them from remarrying there (former) husband"*[17]

The sunni leaders concur that the guardian is authorized to contract marriage on behalf of the minor or insane ward or female. But the Shafii and the Habali schools have limited this authority to the case of a minor maiden, and as regards a ward, who is a minor thayyib, do not recognize any such authority for the guardian. The Imamiyyah and the Shafii schools consider only the father and the paternal grandfather as competent to contract marriage on behalf of a minor ward.[18]

The Hanafi's give priority to the son as regards Wilayah over his mother, even if he be an illegitimate son. After the son his son given the right to Wilayah and then follow by the father, the paternal grandfather, the full brother (paternal) the full brother's son, the half-brothers son, the paternal uncle, the paternal uncle's son, and so on, From this it is clear that the executor of the wards fathers will, does

not have matrimonial guardianship even if he has been explicitly given this authority.[19]

The Malikis' give priority to the father and after him the Wilayah goes to the executor of his will. Then comes the turn of the son even if he is an illegitimate child, after him comes the brother, the brother's son, the paternal grandfather the paternal uncle and so on. On this order being exhausted the Wilayah will finally lie with the Hakim.

The Shafii scholar gives the father priority in exercising Wilayah. After him the paternal grandfather, the full brother, the half brother (paternal), the brother's son, the paternal uncle, the paternal uncle's son, and so on, will exercise Wilayah in the descending order till it finally reaches the Hakim.[20]

The Hanbalis regard the father, and after him the executor of his will, as those competent to exercise Wilayah after these two, the order follows the pattern of inheritance till it finally reaches the Hakim. According to the Imamiyyah, only the father and the paternal grandfather – and on some occasion, the Hakim are those authorized to exercise Wilayah with respect to marriage Both the father and the grandfather are independent in the exercise of the Wilayah over a minor or over an adult whose lunacy or idiocy precedes his adult hood, that is, when she has been a lunatic or an idiot when a minor and this state has been continued into adulthood. But if lunacy and idiocy has resulted after maturity, the father and the grandfather have

no authority for contacting marriage on behalf of such as an adult. In this case Hakim will exercise his Wilayah despite presence of the father and the grandfather when the father chooses one male and the grandfather another, the latter's choice shall prevail[21].

The marriage contracted by the Wali-be it the father, the grandfather or the Hakim comes into effect if it is not against the interests of the ward. If it is against her interest, then she has the option of dissolving the marriage on attaining maturity.

The Hanafis have observed when the father or grandfather of a minor girl marries her to a person who is not her equal or for less that Mahr AL- Mithli, the marriage will be valid unless it is evident that there has been a misuse of authority. But if such a marriage is concluded on behalf of a minor girl by her Wali who is neither her father nor her grandfather, the marriage will be considered void abinitio. The Hanbali and the Malik school have said, the father may give his daughter in marriage for less than Mahr AL- Mithli, The Shafii school says that he may not and if he does so, the daughter has the right to claim Mahr AL- Mithli, (less than a proper dower).

The Imamiyyah have said if the Wali gives his minor female ward in marriage for less than Mahr AL- Mithli, or contracts marriage on behalf of his minor male ward for more than such Mahr, the contract and the Mahr, will both be valid on there being a good reason for doing so. In the absence of such a reason, only the contract will be valid and

the validity of the Mahr will depend upon the ward's agreeing to it after maturity. If the ward does not agree the Mahr will be regarded as Mahr AL- Mithli.[22]

There is consensus among the schools that a just ruler Hakim can contract marriage on behalf of a lunatic male or female, if he/she has no Wali from among their relatives. This consensus is based on the following tradition.

"The ruler is the Wali of one who has no Wali"[23] this is known as general guardianship. The Imamiyyah and the Shafii schools do not consider the Hakim competent to exercise Wilayah over a minor girl. The Hanafi School gives this authority to the Hakim, but does not consider the contract so concluded as binding. Therefore, the girl can set aside on maturity. Thus the position of the Hanafis is similar to that of the Imamiyyah and the Shafii schools because the Hakim becomes redundant in this matter.

According to the Maliki school, the Hakim is competent to contract marriage on behalf of a minor or a lunatic (male or female) with their equals on their not having any relative to act as Wali. The Hakim also given competence to conclude marriage on behalf of a sane grown – up girl, with her consent.[24]

3.2 CLASSIFICATION OF GUARDIANSHIP

Marriage guardianship is classified according to Maliki, Shafii and Hanbali schools into two: - coercive guardianship Wilayyatu Ijbar and mutual guardianship Wilayyatu-Ikhtiya. Coercive guardianship is the one which the guardian has the right to give, in marriage, the hand of his ward. A guardian with such right is known as Wali Mujbir (Coercive guardian) [25].

3.2.1 Wilayatu-Ijbar

Wilayatu-Ijbar Is the guardianship which confers on the guardian an absolute tutelary authority to impose on his ward the status of marriage whether the latter wishes it or not. This notion is understandable from the deliberations of Muslim Jurists. Ibn Al-Mundhir asserted: "It is the consensus of all that we are receiving knowledge from among the servant that the marriage off, by a father of his minor daughter is allowed if he married her to man of her equal status. He (the father) is permitted to marry her off in spite of her unwillingness or denial[26].

The jurist further concluded that minor females can be married and divorced. It follows, they asserted, that these females at their tender ages of minority have got no legal consent to be sought or considered[27].

The Muslim Jurists also buttressed their stand with many practical traditions among which are the following:

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a. Narration from Sayyidah Aishah (RA) where she said the prophet (S.A.W) married me when I was six years old and the marriage was consummated when I was nine[28].

b. It was also narrated that Ali B. AbuTalib married his daughter Ummulkathum to Umar B. Al-khattab when she was a minor[29].

The Maliki's also rely on this Quranic verses that provide,

"Marry those among you who are single and virtuos ones among your slaves, male or female...."[30]

"when you divorce women, and they fulfill the term of their (iddat) Do not prevent them from marrying their former husbands...."[31]

From the above mentioned practices among other it is a matter of consensus among the Muslim Jurists that Wilayat al Ijbar, i.e. (coercive guardianship, is well established under the shariah.

Notwithstanding, the above position, a dissent has been reported from Ibn Shubrimah and Abubakar al Asam. They disapproved the practices reported from the companions and contended that the marriage between the Prophet (S.A.W.) and Sayyidah Aishah was an exceptional case ordained for the Prophet alone in which none of his followers could follow suit.

This dissent however, could not withstand the consensus of Muslim Jurists and their practices which has been flourishing since the earlier time of companions of the Prophet (S.A.W.) if the practice had been especially for the Prophet alone, the Sahabah were first folk to understand it from the Prophet (S.A.W.) as they did in other

specified cases. And since they did not understand as such, and since the reverse was their practices. It is inconceivable to think that some jurists of latter generation would come and approve the practices of the earlier generation under the pretext of an understanding which cannot be supported with any authority. We therefore, uphold the consensus of Muslim Jurists which cannot be defeated with mere conjecture [32].

This is the stand of the shariah on the concept of Wilayat al-Ijbar. But in practice many controversies arose on the personality of the guardian, the ward and their conducts under the institution of marriage.

3.2.2 WALI MUJBIR

This is another restriction to the bounds of wilaya at-al-ijbar, which is the coercive guardian. In the area of consensus i.e. in the case of minor virgins, the Jurists have restricted this post to the father, the grandfather, or the appointed legal guardian by the father. Other relatives, i.e. agnates and kindred's, are disqualified to be coercive guardians. But the Hanafi jurists who allow other relatives to be coercive guardians in the absence of the above-mentioned persons compensated their laxity with recommendation of the option of revocation for the minors at the age of puberty. On the controversial cases, all the jurists have agreed unanimously that the father alone

can be coercive guardian on matured virgin and minor matrons. They also agreed that the master of slaves alone is allowed to be coercive guardian on his slaves[33].

And those who can be under such guardianship are: -

1. A person, whether male or female of incomplete legal capacity or of no legal capacity at all. These consist of female or man minor or insane. There is no difference between virgin bikr and matron thayyib except that if an insane woman is a matron and her insanity is intermittent, her guardian must wait until she is in her sanity and then seeks her consent. This is because, according to Maliki School, the reason for the coercive guardianship is the virginity or minority of a woman[33].

The Hanafi jurists concur with the Maliki jurists on coercive guardianship upon minor and insane persons the reason for such type of guardianship, according to them, is minority and insanity[35].

Shafii school also has the same view, except that coercive guardianship, according to them, cannot be exercised in respect of a minor matron ath-Thayyib as sagirah) because, the basis of coercive guardianship, to them, is virginity only, which is not available with a minor matron[36]. They support this with Hadith of the Prophet (S.A.W.)

> *"A matron has more right regarding herself than her guardian and virgins permission or consent should be sought regarding herself (in marriage) and her permission is her silence"*[37].

They interpret the term ath-Thayyib (which means matron) to include both minor and adult. Thus, a minor matron has more right, regarding herself than her guardian, and accordingly she will not be given in marriage without her consent and permission. And since she is a minor and she cannot know the meaning and implication of permission, then she should not be married until she becomes of age when she will be able understand them[38].

2. Virgin who is sane and of age and is not an anis (a spinster) however, they differ regarding "anis thus Ibn Wahab holds that she will not be married without her consent[39].

Shafii and Hanbali schools agreed with Maliki School on the issue, while Hanafi School differs from them. As it has already been explained, the Hanafi School, are of the view that guardianship in marriage is an essential requirement, if the woman is sane and has attained majority, whether she is virgin or matron. The Hanafi view is in line with the prophetic tradition that says virgin's permission should be sought regarding her when she is given marriage.

Thus according to Hanafi School it is not right to give the hand of a virgin without her consent. Moreover it was reported that a virgin girl was married by her father against her wish and she complained to the prophet (S.A.W) the prophet have her option to ratify or to repudiate the contract[40].

Maliki jurist and those who agree with them on the other hand, support their view on this issue with Hadith of the Prophet (S.A.W) reported thus,

> *"Matron has more right regarding herself in marriage than her guardianship and virgin permission is sought regarding her".*

Since the position of matron is that she has more right regarding herself, than her guardian, the position of virgin will not be like that which means her, guardian has more right, regarding herself, than her. And this is Ijbar in its real sense[41].

This is to say that Ijbar is exercised on virgins only and this is so because of their lack of experience and non-exposure to life. ie, the social life of mingling with the opposite sex freely.

The mature sane matron is one who has not been disvirgined through marriage and whether the marriage is valid or invalid but through some other means i.e. beating athletic, zina, or rape, this is because the reason of such type of guardianship is the ignorance of the woman about marital affairs, and once she is disvirgined through any other means than marriage, the ignorance is still there, as such the guardianship will remain. Mature matron whose moral corruption is obvious and her guardian is not able to restrain her, such a woman can be married coercively by her guardian in order to protect the evil of her being unmarried[42].

With this summary the bounds of Wilayatul – Al Ijbar can be seen to be very limited. It is the minors (virgins, matron and male) alone, even with the controversies there in, that can be married without seeking their consent and that is coercion. Matured virgins can refuse the choice of their guardian if they have got their own. And where this is the situation the law permits the wards, choice to prevail over their guardians. It is therefore, a case of no coercion. The case of slaves is unwarranted because our society has been freed from master and slave relationship.

The Waliy Mujbir of these minors is their fathers, or their grandfathers in the absence of fathers, or the appointed legal guardians by their fathers. And up till the present time, nobody can claim next of kin to minors before marriage rather than their fathers or grandfathers in the absence of fathers, in a situation where mothers cannot come in. We can conclude that what remains as an issue of Wilayat-al-Ijbar is in the relationship between the minors and their fathers or grandfathers in matters of their marriage[43].

The hullabaloo about the problems ensuing from the Wiliyatu-al-Ijbar can either be attributed to the ignorance of the people about the doctrine or to the fault in the machinery of the law itself. Despite the fact that the society only recognizes the fathers or grandfathers as next of kin to the minors grandfathers in their compassion towards the minors. Shariah does not leave the minors at the mercy of their

fathers. Whenever it can be proved against the fathers, under the doctrine of wilayat-al-Ijbar, any act that would be detrimental to the interest of the minors, the injunction is placed on them restrictively. They may also be considered Saboteurs for any hindrance from their part which cannot be defended in the Shariah[44].

Exceptions to the rule under Wali Mujbir

All Muslim Jurist agree to the mature virgin whose father legally declared that she has attained majority and as such he has henceforth, left her affairs in her hand, this declaration is legally called at-Tarshid. The same rule applies in the case of a guardian who is a wasiy. This is the view of Maliki School. While Hanbali and Shafii schools do not agree with this, according to them, such women can be married under coercive guardianship, which is, virginity is available in her own case[45].

Mature virgin, who has dwelt with her husband for one complete year and she denies having intercourse with the husband, after separation through divorce whether the husband agree with her claim or not. This is so if there is no certainty, that the husband had intercourse with her, thus if it is certain that the husband had no intercourse with her then the coercive guardianship can be imposed on her[46].

3.3.3 (Waliyatu-Ikhtiyar)

Mutual guardianship is the one in which the guardian has no right to marry off his ward without her consent, but instead there must be mutual consent between the guardian and the ward. And after they have mutually agreed, then the guardian takes the charge of contracting the marriage. Those who come under this type of guardianship are, mature, matron, who has been disvirgned through a valid or invalid marriage about the invalidity of which there is no unanimity of Muslim Jurists, or there is unanimity of the Muslim Jurist about it, but it legally prevent the infliction of hadd punishment on the spouses, for one reason or another. This type of woman will not be married by the guardian unless she consents to the marriage regarding the husband and the sadaq.

Thus if the guardian married her out without her consent the marriage is voidable, and cannot be valid unless, she consents to it, because Prophet (S.A.W) said

"Matron has more right regarding herself than her guardian[47].

Exception to the rule of Wilayat Ikhtiyar,

Is a minor about whom there is fear, regarding her religion is to say she may be morally corrupted or regarding her worldly life, such as where it is feared that her property may perish or may be damaged, if she is not married, or that she is poor and there is no one to maintain

her in such situations, the guardians has the right to get her married if she reached 10years, after consulting a Qadi[48].

Though the age of marriage is not stipulated as ten years, so the age i.e. ten years should not be specifically stated, but it should be put as when she experiences menstrual/monthly course. Some of the Fuqaha (Jurist) as well as the muffasirun exponents of the interpretation of the Quran put the age of maturity at 18years others put it at 21years. But interestingly, the other marks of maturity as placed by Islam which are Ihtilam (wet dream) for male, and haidah (menstruation for female, are not attained at any particular age. As these are attained at varying ages, depending on the environment, climatic condition and other factors, the age of marriage ordinarily cannot be fixed.[49]

The fuqaha, jurist support that the age of marriage is not fixed by virtue of the content and interpretation of Qur'an, which provides as follows: -

> *"And if you are in doubt as to the prescribed period for such of your women as have despaired of monthly courses, then know the prescribed period for them is three months and also for such as do not have their monthly courses yet ....".*[50]

To this end, guardianship in marriage under Islamic law is considered imperative in a valid marriage. And men are chosen specifically for this purpose as they are placed above women as protectors and maintainers of women.

Requirement of guardianship:

There are some conditions that must be fulfilled before a person can be a guardian in marriage. Some of these conditions are agreed upon by the Muslim Jurists, while they differ about others. The ones that are agreed upon are: -

1. Complete legal capacity: This is constituted by attaining majority and having sanity and freedom. Thus, a minor, even if he is Mumayyz, cannot be a guardian, Likewise insane and stupid person. This is because these categories of people have no full right to deal in and control their affairs (due to their incomplete capacity) let alone to control other people's affairs.
2. Unity of religion: That means both the guardian and the ward must be Muslims. This is by virtue of the following Quranic verse:

   "And as for the believer both men and women are friends and protectors (awliya) of one another".[51]

Moreover, the purpose of guardianship is to protect the interest of the ward. And this could be achieved well when the guardian and the ward belong to one and the same religion.

However, there is an exception to this rule. That is when the Imam (the Muslim leader) or his representative becomes the guardian, because he can be the guardian of Muslim and non-Muslim.

But the conditions about which the Muslim Jurists differ are: -

(a) Being male: According to Maliki, Shafii and Hanbali jurists, the guardian has to be male, while according to Hanbali jurists this is not a condition.

(b) Moral uprightness al-Adalah, that is to say the guardian must be observing his religious duties and abstaining from committing major sins (al-kaba'ir) such as zina and drinking alcoholics, etc.

Thus the Maliki school (according to the famous view and the Hanafi school hold that moral uprightness. is not a condition of guardianship, the reason is that the basis of guardianship is the sympathy the guardian has for his ward and his consideration to protect the wards interest. And immorality and lack of moral uprightness of the guardian do not presumably prevent him from being sympathetic to his ward and to protect her interest. Moreover, guardians, during the lifetime of the Prophet (S.A.W) and after his death, used to give the hands of their wards in marriage, and there is no single report to the effect that one of them was prevented from giving the hand of his ward in marriage for the lack of moral uprightness.

The Shafii and Hanbali schools, on the other hand, are of the view that moral uprightness is a condition for becoming guardian, and

therefore, a fasiq cannot be a guardian. They support their view with the hadith in which the Prophet (S.A.W) was reported to have said,

"There is no valid marriage without a guardian who is a Murshid".

And they interpreted the term "Murshid" to mean "upright" and a Fasiq is not upright so he cannot be a marriage guardian.

However, the hadith upon which the holder of this opinion rely, is a weak hadith, and secondly, the term "Murshid (in the hadith), does not mean "upright" but instead, it means a rational person who can guide another person to what will benefit that person. And fasiq has the ability to do that, for the sympathy he has for his ward and desire for what will benefit the ward.

The schools concur that it is necessary for wali that he be an adult, Muslim male. As to the condition of adalah it is required in the Hakim who is acting as wali, not for a relative acting as such, except by the Hanbali School which considers adalah as necessary for every wali regardless of his being a relative or a Hakim.

(c) Rationality (RUSHD) that means good and proper dealing in property and other affairs, and lack of stupidity. That is to say the guardian does not spend in unnecessary luxuries and lustful desires, even if they are not unlawful.

Rationality with this meaning is not a condition in guardianship, according to Maliki and Hanafi schools, except that the Maliki School holds, that a stupid person cannot be a guardian unless his ward assents.

But according to Shafii and Hanbali schools, rationaility with this meaning is a condition in guardianship[52].

3.3 POWER OF IJBAR, AND FREEDOM OF CHOICE OF A SPOUSE

Ijbar in Islamic law, is the right of a Waliy to decide whom his ward should marry with or without her consent, this power is exercisable only by the father of the woman when he plays the role of Waliy on his own daughters. This is a distinguishing feature of Islamic law that bestows upon the father or grandfather who can contract a valid marriage for minor, which cannot be annulled at puberty[53]

There are criticism on the power of matrimonial constraint given to the father by the law to give his virgin daughter in marriage regardless of whether or not she loves the proposed husband. The rationale behind, this power is apparent, it serves as a safety measure in the interest of the girl herself. It is a known fact that a father has more maturity and experience in life than the daughter. If on one hand the daughter looks for an ostentatious youth, the father will find means of livelihood, and good character for the welfare of the girl.

Despite this, a father is required to seek his daughters consent thought not necessarily for him to act upon it. The consensus has been established among the Muslim jurists that the father has every right to marry off his daughter who is a minor without any permission. They substantiated this consensus with many textual evidences and practices of venerable companions. One of such verse of the Quran which states as follow;

> *"Do not prevent them from marrying*
> *There husbands when they agree among*
> *Themselves in a lawful manner".*[54]

Imam Malik thus makes the choice of partner by a Muslim girl subject to the overriding power of Ijbar of her father or guardian in the interest of the girl herself.

It may sometimes happen that in her immaturity or over zealousness the girl may like to marry a man about whom she has distorted information or who does not posses a good character or who lacks proper means of livelihood. And in such circumstances it is preferred and made incumbent upon the girl's father or guardian, that in her best interest, he must restrain her from marrying such a worthless man and find a suitable person to be her husband.[55]

It is exercisable only by the father of the woman when he plays the role of Waliy on his own daughters, provided the ward falls into any of the following categories;

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(a) A Bikr, i.e. woman who has never married. It does not matter whether she is minor or an adult of forty to fifty years of age. It also makes no difference whether she is still a virgin or she lost her purity and chastity as a result of fornication or any other cause.

(b) The father in his capacity as Waliy marriage can exercise Ijbar on his daughter who has ceased to be a virgin as a result of a valid marriage but there has been separation as a result of death or divorce before she attains the age of puberty.

(c) A virgin whose marriage is contracted, dissolved and she remains a minor while she has not spent up to one year in the matrimonial home.

(d) The father has the right to exercise Ijbar on his daughter, married or not, adult or minor who dose not possess full faculty of reasoning[56].

If a woman is a virgin' of sound mind, and adult, i.e. has reached the age of puberty, it is lawful, according to some jurist, for the father to give her in marriage with or without her consent, provided the prospective husband is suitable and of equal status.
The explanation offered is that such a woman has had no marital experience is in no position to know where her real interest lies. She is as inexperienced as the girl who is underage. These jurists do not deny the Traditions of the prophet where he is reported to have said

that the consent of a virgin is to be sought and her silence is evidence of her approval. But they interpret these tradition as meaning that it is only 'commendable', not necessary, to seek the girls consent[57].

On the other hand, in the light of these Traditions and according to the majority of the companions of the prophet, other jurist deny such authority to the father and hold the girl's consent a necessary condition for the validity of her marriage. This is the position which, according to some leading jurists is in conformity with the teaching of the prophet, the spirit of Islamic Law, and the common interest.[58]

If a woman is 'virgin, whether adult or under age, and her, father gave her in marriage, without her consent, to a husband who is not her equal, the general view is that such a marriage could be annulled. The reason is that the father has done something contrary to her interest and in violation of his trust. As a legal guardian, he is authorized only to do what is beneficial to his ward. Marrying her to an unequal suitor is neither in her interest nor to her benefit. However, there are opinions held by a minority of jurist. These are;

a. the marriage is valid because equality in marriage is not a necessary condition, and the 'defect' of inequality does, not invalidate the contract.
b. the marriage is invalid only if the father was aware, before the contract of the husband's unequal status.

c. the marriage is invalid if the girl is underage; otherwise, the contract is formally legal, but she may revoke it by other means if she so desires[59].

A woman who is of age and is a widow or divorcee is free to make her own choice. The father may not force her to marry against her wish. These are supported by the Traditions of the Prophet and by common practice, because such a woman is experienced and would normally understand the implications of marriage. She is unlikely to be easily misguided. Contrary to this 'consensus' a particular jurist, Alhassan al Basri said that the father has the right to marry her off even if she objects. Another early jurist said that her right holds only if she is a dependent of his and a member of his household. Both opinions are said to be very unpopular among the jurists. However, the opinion of the predominant majority is divided on whether it is the age or previous marital experience which is the significant element in the situation. According to some jurists, if the woman has had a former marriage, she is free to make her own choice even if she is underage. With her experience, she can well protect herself. Other jurists maintain that if she is underage, whether or not she has been previously married, the father may marry her off with or without her consent. It is argued that her previous marriage dose not change the fact of her being underage. All jurists agree that it is at least

commendable, though some hold it necessary, for the father to seek the consent of his maiden daughter before he gives her in marriage[60].

Limitations to the power of Ijbar.

The power is limited in some respects, for example where a father is an imbecile or the proposed husband is ill, insane, or suffering from leprosy or incurable diseases. In this situation the power lapses and the daughter could not be therefore forced in marriage unless she consents. Likewise the power lapse where a father delegates to his daughter the power to choose her husband in this case he cannot force her in marriage to a person of his choice[61]. In view of this the case of Karimatu Yakubu and 1 or Vs Yakubu Paiko & 1 or in suit no CA/K/805/85,[62] is relevant in that case the father gave Karimatu, the right to make her choice, he has according to the judgment of the court of Appeal, waived his right of Ijbar.

Detailed analysis will be made in a subsequent chapter. The father in his capacity as waliy of marriage forfeits this right in respect of a bikr, a woman who has never married but granted permission by the father to fend for herself by stopping to perform his responsibility on her, such as granting her permission to feed, cloth and house herself. The father has the right to decide whom his daughter, who is not in good state of mind, marries as he decides that of a bikr, i.e. daughter who has never contracted marriage, no matter how old she

is, he has no right to make decision in respect of his daughter who he has granted the right to manage her affairs by herself, in the presence of two witnesses stating that I allow you to manage your affairs.[63] The father does not exercise the right on thayyib, a woman who had either on contracted marriage but it was dissolved and she intends to remarry, provided she has attained adult hood and enjoys control of her faculty. In case of a girl who is married but has not an attained adult hood, he can still exercise the right except if she has completed up to one year in the matrimonial home.

The father can delegate his right of Ijbar while the master has the right of Ijbar over his female slave whether she is bikr or thayyib. All other categories of awliya, such as son, brother and uncle need to obtain the consent of their wards before giving out their hand in marriage.[64]

With these facts in mind, it may become clear why there are seemingly conflicting views on the question of the children's consent and the nature of parent authority. The underlying reason is probably that some observers tend to simplify or polarize the problem of consent which as Hob house has put it, is no simple one.[65] Of all the decisions one makes in life, few are as important as who one choose to marry or live with. Make a bad choice and you can spend your days and nights mired in unhappiness or consumed by anxiety or depression, conditions that not only rob your health but undermine

your physical health as well. You might be consigned to economic instability or subjected to physical or verbal abuse or you might find yourself struggling as a single parent. The consequences of a choice, and of marital dissatisfaction or even disruption, are far-reaching extending even to the next generation.[66] In an attempt to understand and appreciate, Ijbar, this research will dwell on the option of puberty.

3.4 OPTION OF PUBERTY

Option of puberty is know as Khiyar-al-bulugh:

This is the option given to a minor child to repudiate her marriage when she attains puberty. This could also be termed option of revocation at age of puberty.

The term buligh is used for someone who has attained the age of puberty (bulugh) this is the age of majority in Islamic Law, however, the terms "major" and adult" are being avoided, as they indicate a person who is usually older than the baligh. The age of bulugh depends on the actual physical puberty of the individuals concerned, and may start at twelve for a boy and even lower for a girl. In the absence of any physical signs of puberty, the presumption of puberty is linked to different ages determined by the fugaha.[67]

Among the Muslim jurist, Hanafi Jurist have recommended an option of revocation of marriage conducted under the doctrine of wilayat al-Ijbar. This can be seen as a restraint to the laxity shown in

extending the right of coercion to agnates and kindred on the basis of their nearness to the minor wards. Other schools of law have restrained the privilege of Ijbar at the initial point for instance; Maliki Jurists limited it to the father and his appointed legal guardian while shafi jurist reserved it for the father and the grand father. Hanbali jurists reported two views, the first opinion reserve it for father alone, while the second opinion extend it to the grandfather. Zahiri jurists restricted it to the father alone. For this reason, they did not recommend option of revocation for the minor wads under wilayat al-Ijbar. [68]

The recommendation for option of revocation in the Hanafi School was made where the guardian of the minor wards happens to be some other person rather than the father or the grandfather. They recommended that a minor ward, male or female, has the option whenever he or she reaches the age of puberty if he or she likes, he or she sustains the marriage and if he/she dislikes the marriage he/she may revoke it. They contended that the kinship of other relative rather-than the father or the grandfather is imperfect.

And this imperfection impairs compassion. Thus, the aim and objective of wilayat al - Ijbar becomes frustrated. Never the less, this frustration is removable by the option of revocation and as such it is recommended.[69]

Hanafi jurist stipulated that the exercise of this option requires the pronouncement in a law court. Similarly, they stated that the ward is requested to react to the marriage immediately he or she knows about it after his or her maturity and knowledge about the marriage, kept silent, this silence should constitute his or her consent. The requisition of the knowledge is made a condition because he or she cannot react to something he/she does not know about. While Imam Maliki distinguished between an extended and a short delay. The reason for disagreement is whether (the existence of) acceptance by both parties simultaneously is a condition for the validity of the marriage contract.[70]

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CHAPTER FOUR

4.0 AN APPRAISAL OF THE PRACTICE OF IJBAR IN NIGER STATE

The salient features of marriage have been discussed in the preceding chapters. The foundation of the family life should be studied and understood in the context of Islam, because they cannot be understood in Isolation.

The practice of Ijbar is as old as the existence of man, where by parents play key role in the establishment of their wards marital life. Thus it becomes an all-embracing significance of the institution of the family. If this institution is weakened or destroyed, the future of the entire culture and civilization will be threatened. In the course of this study, effort will be made to explain the practice of Ijbar in Niger state.

There is a reasoning that stress that the Muslim family is matrilineal as well as patriarchal in certain respect the status of the conjugal units determined by that of its male head; identify with him structurally, this means that he holds the balance of power and is the decision maker. Leader, especially of the "instrumental" type, is his, as he is the provider for family and the bearer of its social status.[1]

In conjugal union in societies, like the Nupe community, the practice mostly is that the head of the family determines whom his female child marries and into what family. Structurally, this means that he holds the balance of power and he decides for his child.

There are indications that a wife could raise the low status of her husband it is reported that a young woman complained to the Prophet (S.A.W) that her father had married her off to a cousin of hers, with out her consent, in order to improve his ignoble condition that she did not consider him to have the same social standing as her self. The prophet (SAW) allowed her to revoke the marriage if she wished, but she replied that she had no objection to the marriage. Rather, she wished women to understand that their father had no authority over their daughter's affairs.[2]

This clearly indicates that the woman could raise the lowly status of her husband. But it is uncertain that this action could be socially acceptable and psychologically assuring in a stratified society, or whether it could be implemented as a commendable pattern. The advocates of social equality in marriage seem to think it highly improbable.

Marital union being a special variant of the general category of social inter action, is subject to extraordinary control mechanisms. In no society is a person completely free to marry whom she wishes, the choice is necessarily limited by a number of factors, one of such limitations is the law of endogamy and exogamy. As Merton has put it "all marriages are inter marriages in the sense that the parties to the contract derive from different social group of one sort or another. This follows immediately from the universal incest taboo, which forbids

marriage at least between members of the same elementary family unit and derivatively restricts marriage to member of different groups.[3]

While all marriages are in this sense intermarriage or exogamous, the extent of exogamy, and derivatively of endogamy varies from group to group and from time to time.[4]

Marriages that arise mostly in aristocracy, especially in royal nobility is to a very large extent endogamous. Having made this observation, family marriages among the Nupe-Fulani regard themselves as related and most families of the nobility are more or less closely related by marriage. Following Islamic practice encourage parallel cousin marriage these type of marriage in Niger State could be termed (Auren Zumunta) i.e. family arranged marriage. It could thus be associated to Ijbar. In this type of arranged marriage the father is seen as having sole right over his virgin daughter by relying on the power of Ijbar. Often times the daughter is given time to produce a suitor and if she fails to get one or gets one whom is not acceptable to the family, the father opts to make his own choice.

By illustration, this research will consider the locus classicus case of Karimatu Yakubu and another Vs Yakubu Paiko & Anor in suit No CA/K/805/85 the 19year old Karimatu (Appellant) was given in marriage by her father. The case which started from the Area court went to the court of Appeal Kaduna before it's finally determined. At the Shariah Court of Appeal Minna, it was reasoned that since

reasoned that since Karimah was a bikr in Sharia having no previous experience of marriage her father, under Maliki law had the power of Ijbar over her marriage by this power he could marry her to a man of his choice irrespective of her preference. Her marriage by her father to the 2nd respondent was therefore valid. But at the court of appeal it was decided thus, that where the father had given her the right to choose between two or more suitors he lost this power of Ijbar and marriage contracted without her consent may be dissolved.

This arrangement is either made at a very tender age of the spouses that is before the attainment of puberty as in form of betrothal or, it may be that, it is the man who sees the woman and likes her, if the families are closely related, either by Kinship or friendship then the families will arrange with the woman's family. In most cases they ignore the consent of the woman involve or even where it is the parents that arrange this relationship they ignore the consent of both parties.

As opined by Aisha B. Lemu, life in arranged marriages are far more lasting and stable as families that arrange such marriages do it base on insight and experience. They do it on a broad base considering family background, education, ambition and so many other things[5]

This position of Ijbar given to the father is to safe-guard the interest of his ward because it is extremely important that in every family there

should be a head that may give orders to and settle things among the members of the family.

However, bearing in mind that only the father can exercise the power of Ijbar except where he gives up the right, there is a practice in the Nupe community where the eldest person in the family is the head and also the one to play the role of Waliy for every member of the family that is, (nieces and nephews), often times the exercise of the power of Ijbar is not done in the interest of the ward, because the uncle who plays the role of waliy might not be doing it in good faith.

It will seem in appropriate for the girls' biological father to go against the choice of her uncle as waliy as it is a practice.

It will interest us to know that the lower the social standing of the parties, the greater the woman's freedom of marital choice and expression of her wishes[6].

Some of the guardians lack the potency to arrange marriage for their wards and often times it is their own selfish interest that is protected.

Another substantive issue is the father's betrothing his ward to a man she does not even know, though he must have seen a rear display of good character in the prospective suitor, this is usually done even before she attains maturity. In this case the mother will be informed of these arrangement so as she might monitor and advice the girl about her fathers intentions. At this point of the relationship

between the two families, often times the woman's parents receive gifts from the prospective suitor.

With respect to betrothal of the female child, there arouse instances, where the guardian betrotheds her to more than one suitor, and the highest bidder eventually marries her. This practice contradicts the teachings of Islamic values, as it seems that the girl's interest is not considered here.

This authority may be based on custom, law, veneration for parents, the power to disown the children, or the mere recognition of the children's helplessness and dependence on the parents. It is however, a wise custom among Muslims to involve family in any important decision. This gives the future couple the required backings and the family bond helps in difficult situations to maintain the continuation of the marriage.

4.1 FACTORS THAT INFLUENCE MARRIAGE IN NIGER STATE

Before we discuss the factors that influence marriage in Niger State we will consider factors that influence marriage in Islam. The main purpose of the creation of Eve was to be a companion to Adam to love one another, procreate children and live in peace and tranquility to the commandments of Allah and the directions of its messenger.

To this end there are enabling factors created to influence marriage in the Muslim's way of life.

Marriage as an institution should be entered into with clear intentions as ordained in Islam, and that is why what human beings considered first is the religious factor as this places more emphasis on the marriage institution, and prescriptions have been made by the Quran which states:

> *"And among His signs is this, that He created for you mates from among yourselves, that you may dwell (live) in tranquility with them and He has put love and mercy between your hearts...."*[7]

Also in order to achieve modesty and complete one's Imam, marriage is prescribed by the Prophet (SAW)

> *"Marriage is my tradition whosoever keeps away there from, is not from amongst me."*[8]

As such celibacy is not considered a virtue in Islam or taken as a means of getting closer to Allah as it is done by other religions. The Prophet (SAW) orders Muslims to get marriage as soon as they can. The family is the nucleus of the Islamic society, and marriage is the only way to bring about such an institution. Extra-marital relations are categorically condemned and prohibited.[9]

It is pertinent to consider the religious background of the family as Islam states for one to marry a pious woman among other things. Another factor is the social factor; as Muslims one should respect the concept of Ibadah, as every good deed every service to humanity, every

usual productive effort, and every good word is part of a true Muslims worship of his creator. In considering the social factor one could say that marriage is a means of emotional and sexual gratification, mechanism of tension reduction, a means of legitimate procreation and social placement, an approach to inter-family alliance and group solidarity, an act of piety.

It should be noted that there is no more whole some pattern of sexual relation than that which join gratification with consciousness. It also prevents moral laxity in the Muslim society where so many Muslim women roam the streets who are of marriageable age, still relatively young and fertile, progeny apparently were highly desirable and were received with enthusiasm, reproduction is considered a social necessity or service, and sound health a gratifying state of mind.[10]

Another factor is the economic influence of a family, the financial capacity to pay the dowry and fulfill the obligation of marriage is considered as an essential factor. The man should be able to take care of his bride and maintain her as no family will give out their daughter to a man who has no means of sustenance.[11]

There is also what one could term the environmental factor that influences marriage, as marriage is a necessary step for providing a healthy environment for nurturing and rearing the children, because children are the fruit of our generation and the future men and women

of our Ummah. Through good marriages, we furnish them with love, mercy, compassion, guidance, and seriousness that they need for proper growth and development.[12]

Marriage can also be arranged between two families for political reasons, either because the man is a politician or a traditional title holder he would be considered as a march for the woman or the man might want to take the daughter of a politician or one highly placed in the society politically.

The finer qualities of life have been laid down by the factors that influence marriage. All these factors help in protecting the institution of marriage to enable it play its positive role in making the Islamic society.

In the light of the foregoing, the factors that influence marriage in Niger State will not be any different from the factors that influence marriage in Islam as Niger State is partly Muslims.

The factors that influence marriage as discussed supra could be elaborated, as marriage fulfills Allah's law for the reproduction, preserving kinship ties, contrary to Zina, it establishes the paternal relationships between the children and their parents, giving them feeling of dignity and self esteem. That strengthens the feeling of love and care within the society.

Marital relationships are thus, being considered for religious reasons as it is apparent that one, who marries, perfects half of his

religion let him seek the other half by living a righteous life. For this reason people are encourage to marry as these will give the society a moral and purified outlook.

When considering the social factor, the fact that mutual alliance will be adopted is of importance.

As most families prefer to arrange marriages considering the background and the influence of the spouses, if the man is highly respected, influential or a religious person people would want to be associated with the family.

Niger state being a community with diverse tribe, often times parents consider the choice of their ward and most cases prefer their ward's to belong to the same tribal lineage.

The economic factors is also a major reason that influence marriage because parents feel a sense of relieved when they marry off their daughters believing that they are in safe hands, they therefore need not to bother about her expenditure, especially where they have an extended family.

Looking at the political factors, some families often arrange marriage for their ward to gain political recognition; to this end even tradition title holders are being considered to give the woman prestige of royalty.

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It is evident from the above discuss, that the religions, social, economic environmental and political factors have a distinct out look on Islamic family setting.

4.2 ANALYSIS OF RELEVANT CASE MATERIALS.

It is in the light of this research, effort is made to analyse case materials as it relates to the practice of Ijbar. In making analysis, the facts of the case will be briefly stated and issues for determination outlined, such issues that have relevance to Ijbar.

Lets consider first, the locus classicus case of Karimatu Yakubu & Anor Vs Yakubu Paiko & Anor.[13]

The first Appellant is a nineteen year old daughter of first Respondent, Alhaji Yakubu Tafida Paiko. He succeeded in convincing the first Appellant to drop one of the three suitors and choose the second respondent, but she later changed her mind to the second appellant. Despite her outright rejection of the second respondent the father went ahead and contracted her in marriage to him. Hence the suit, seeking for the dissolution of the said marriage on the ground that it was conducted against her consent. Both lower courts dissolve the marriage but on appeal to the Sharia Court Appeal it was held that under the strict interpretation of the law under Maliki school, a father has the right to marry his virgin daughter without seeking her consent irrespective of her age, but if he wishes he may consult her, and that

the father had rightly exercised his power of compulsion in marrying the first appellant to the second respondent. On further appeal to the court of appeal it was held that the father after dissuading the first appellant from marrying one of her three suitors, permitted her to choose between the second respondent and second appellant. It shows that he had given her independence to choose the person she liked. And that under Islamic law if a father does that, he has given up his power of Ijbar.

The issue at hand here is that; the power of Ijbar on his daughter has been upheld, but since he on his own volition decided or considered her matured enough to decide things for herself accorded her the privilege of making a choice, and then he would not be heard to say that he is exercising his power of Ijbar.

Reference is also made to the decided case of the Shariah court of appeal Sokoto. The case of Alhaji Isa Bida Vs Baiwa[14] the Respondent is daughter of Alhaji Isa Bida, this case went on appeal from the Sharia Court Sokoto where the court of Appeal held as follows:

(1) There can be no right of Ijbar, after the father, having considered his daughter to be mature enough to decide things for herself, allowed the daughter to choose a husband.

(2) The mere fact that a relative of a suitor had leprosy could not disqualify a suitor who is healthy, among other things.

The cardinal issue decided in that case was the competence of a father to compel his virgin daughter in marriage after he had accorded her the privilege of choosing the person she liked to marry.

Under Islamic law if a father does that he has lost the power of Ijbar. Another case here is the case of Ndamazhi Audu Yafazhi and Anor Vs Nnadzuma Audu,[15] the principles highlighted here for determination are

i) Every thing is legitimate until it is prohibited by law.

ii) A previously marriage woman who intends to remarry has more to say about choice of her husband than the Waliy (marriage guardian)

iii) The hierarchy of Wilayah (marriage guardian) is first the son, grandson, the father, brothers, uncle and then the Muslim community leaders.

iv) Once a Waliy of Mujbir class allows a Bikr to make a choice, he cannot go back to withdraw such right.

v) The right of Ijbar can only be exercised by the direct father of a Bikr

Before we dabble into the issues, the facts will be briefly stated. The respondent is a daughter of 1st Appellant and was brought up by the second appellant. She instituted a court action against the Appellants before the lafiagi Area court grade 1 in its case 198/98 decided on 22nd September, 1998 to seek the trial courts orders (a)

that the Appellants should allow her marry a man of her choice and (b) that he should be compelled to contract the marriage with whoever she chooses.

Both PwI, Ndagi Zubair and PWII Musa Naibi testified that the Appellants turned down their plea to allow the respondent marry Liman of Shaaban. She tendered the record of proceedings of the Lafiagi Area court Grade1 in it case 259/97 filed and decided on 2nd November 1997.

The 1st Appellant confirmed that he disapproved that the Respondent marries Liman after she had consented to marry Ndagi and that was at the instance of Liman.

The second Appellant was represented by Muhammad Jiya who introduced himself as a cousin to the Respondent.

He averred that the Respondent agreed to marry Ndagi after due consultations with her and her parents.

That the Respondent initiated court action in the trial court to terminate her betrothal to Ndagi the trial court then directed that her consent be obtained.

While the family concedes to her dropping Ndagi, she is adamant to marry Liman. The second Appellant finally urged the trial court to order the Respondent to marry neither Ndagi nor Liman. The court annulled the betrothal of the Respondent to Ndagi and upheld the marriage between her and Liman.

The cardinal issues to be considered from the principles earlier stated is whether, (a) A previously married woman who intends to remarry has more to say about the choice of her husband than the Waily (guardian) the Respondent was betrothed and never gave her consent to marry Ndagi, in the record of proceeding of civil case No 259/97 proved that the betrothal of plaintiff to the said Ndagi was terminated while it was an order of this court that 1st Defendant should allow the plaintiff marry the person of her choice. They state that Sharia stipulates that,

> *"A Muslim man is lawful to marry a Muslim woman if both of them do not fall under the prohibition laid down in Quran, chapter 4 V22-24.*

The Holy Prophet (SAW) said,

> *"The widow and Divorced woman shall not be married until her consent is obtained and virgin shall not be married until her permission is obtained, her silence may indicate her consent."*[16]

The trial court, in the opinion of the Appellant counsel is not called upon by the Respondent to pronounce on the reasonability or otherwise of her prayers to order the Appellants to allow her marry whoever she choose and compel the Appellants to approve her wish. Rather the court is to give verdict, based on Islamic law, on whether the respondent's prayers are lawful or not and whether the stand of the Appellants, especially 1st Appellant, is within or outside the power Islamic law has given him as the father of the Respondent. The kernel of the suit at the trial court then the court of appeal, read, the verses

of the Holy Quran 4;22-24 cited by the trial court do not support its holding because they state whom the Respondent should not marry. They do not restrict the power of her Waliy (1st Appellant) in respect of the persons outside the listed degrees of prohibition. The trial court fails to support its order that 1st Appellant should be allowed to marry the person of her choice with any authority. In the matter at hand the Appellant counsel did not consider the translation of the Hadith of the Prophet contained in Bukhari and Muslim 67\43 as correct translation rendered by the trial court, they prefer the translation rendered by Aishah Abdul-rahman at tarjumana and Yaqub johnson of Al-Muwatta, Imam Malik, Diwan press pg 2461 that states thus;

> *"A woman who has been previously married is more entitled to her person than her guardian and a virgin must be asked for her consent for herself and her consent is her silence".*

To our mind, whether the Respondent is a Thayyib or Bikr this Hadith does not say that the tail shall wag the dog. Nor does it allow the violation of Qur'anic injunction that say:

> *"Marry them with the leave of their people"*[17]

The final word lies with the Waliy in case of bikr though she may be consulted. There is world of difference between consent and choice of a person a bride likes. The Hadith gives the Appellant (father) the power to initiate and give the Respondent, right to consent. in the light of the forgoing the Respondent counsel argue that neither Hadith,

Quran 4:22-24 nor any other Islamic authority support the trial courts order that the appellants should allow the respondent to single handedly decide whom she would want to marry and on top of that twist the hands of the appellants, to approve whatever the respondent like and contracts the marriage for her the way she chooses. To do that is to change the order and the well – established hierarchy in Muslim family set up. That is the last thing a court is set up to do.

In the same light the order of the court (that is in case the Appellants decline, the leaders of Muslim community should take it up) has no support in Islamic law. Admittedly the generality of Muslim are empowered to contact marriage for certain class of Muslim women but the paternal relation take priority over them as they come in only in the absence of the paternal relations. Another issue that arose in this case by the learned counsel for the Appellants (waliy) is whether the trial court ought to have regard to the age of the Respondent and the right of the Appellants as her father and guardian respectively to compel their under aged daughter as well as their grown up virgin girl or daughter in marriage. He further submitted that the trial court did not address its mind to the age of the respondent and the right of the appellants as Waliy of marriage of the respondent. He referred to the respondent as a Bikr, a lady who has never contracted any valid marriage as well as Tuhfatul Hukkam pages 35 and 36, paragraphs 360-363 and submitted that the rights of the appellants still subsist

over the respondent as her Waliy. He submitted further that the respondent did not obtain the approval of the Appellants to marry any man. There is nothing on record that she was allowed to introduced or marry any man. Rather the record shows that she had been betrothed to one Ndagi DWI and DWII testified to the claim that she consented to her marriage with Ndagi.

Reacting to the third issue the learned counsel for the Respondents (Bride) submitted that the trial court is right in its decision to compel the Appellants to allow the Respondent to marry a person of her choice. There was evidence that the Respondent has introduced a man of her choice to the 1st Appellant (as contained in page1last paragraph of the trial court record of proceedings.) By Exhibit A, the Respondent is no more a Bikr. (Maiden)

Even if she is a Bikr the father has no unlimited power of Ijbar. As in the case of Karimatu Yakubu and anor Vs Yakubu Paiko and anor (Supra) having been given choice-power of Ijbar is lost.

This issue in the case of Respondent is another Jaohar; i.e the soul and heart of this appeal. The Respondents unsuccessful initiatives to move the Appellants to approve her wish to marry Liman Mahmud as well as the subsisting order of exhibit"A" do not in any way raise respondent's status from that of a Bikr to that of Thayyib . Her alleged illicit association too does not change her status to

Thayyib. As stated in Jawahirul-Iklil volume 1 pages 277-278 and I quote.

"The father has the right of Ijbar on a woman who is not in control of her faculty as well as a Bikr, a woman who has never contracted a valid marriage even if she is fully grown up living with her father after attaining Adulthood for a long time and she is known to have been managing her affairs. The age between 30, 33,35,40,45-60 are of different views, he has that right in each case. She does not become Thayyib as a result of void marriage. The learned counsel hold that the respondents move to marry Liman Mahmud does not change her status since they are all abortive. It is a valid marriage that changes the status from Bikr to Thayyib, Karimatu Yakubu (supra) cited by the learned counsel for the respondent is distinguishable from the instant appeal. Karimatu had been granted Tarshid. In this case the respondent had not been granted any such Tarshid. The learned counsel for the Appellant (the father) has not shown us the bases of the order in Exhibit "A" as well the intervention of the trial court. We ask what is unreasonable in the Appellants, especially 1st Appellant with holding his approval for the move of the respondent. We want to refer to page 179 of the Prophets Biography by Mohammed Rida, Abubakar and Umaru sought the hand of Fatima in marriage from the apostle of God, S.A.W. He turned down the request of both of them. Umaru said, Oh Aliyu you are for her. When the news reached, Fatima

she bursted into tears. The Apostle of God went to her and said: why are you crying? I swear by God that I have married you to the best of them in knowledge, gentleness and consideration and best of them in health.

In the light of the forgoing it indicates that the Prophet has chosen a husband for her and has consoled her on the good there is. In a case of disagreement between the Waliy and his ward who is a Bikr like the instant appeal, it is our considered opinion that the right of Ijbar granted and restricted rightly to the direct father of the lady in question applies. The bases include (a) Jawahirul-Iklil volume ii, page 277-278 (b) Ashalul-madarik, volume II pg. 70, the latter says:

> *"The father has the right to impose his decision on his daughter who has never contracted a valid marriage, even when she becomes an adult".*

The Appeal was allowed in this case and power of Ijbar was restored on the marriage of the Respondent to 1st Appellant, who is the direct father of the Respondent.

Based on the judgment of the appeal court it is the observation of this research that the principle of Ijbar as practiced under Maliki school is well founded as the father has to exercise this power in the case of a Bikr, her age not an issue.

The right of the father to exercise Ijbar should be of consideration in any case at hand. We also look into the case of Mama

Ndawodi & Anor Vs Mal. Ndawodi. Suit No BD/USC/301/CV/2007.[18]the complainant filed her civil suit against the defendant seeking the indulgence of the court on the following terms.

1. That she has chosen Isah Emigba and the defendant should allow her to marry him.
2. That in the event the defendant refused her request, this Honourable court to act as Waliy to conduct the marriage between her and Isah Emigba.

The defendant was served but refused to appear instead, he directed the biological father of the complainant to appear on his behalf this court ruled without hesitation that the biological father of the plaintiff should serve as 2nd defendant to answer the prayer of the plaintiff. The defendant on the other hand informed this court that though he is the biological father of the plaintiff he cannot say any thing unless what his senior brother said. He further told the court that all his children are use to being married off by his senior brother. Marriage in their village is by exchange and already Muhammad Tabo has sought her hand in marriage. The defendant concluded that, they are not use to forcing their daughters to marry against their wish only that his daughter has accepted to marry Muhammad Tabo.

The plaintiff counsel submitted that this matter was not new to the defendant because, Isah's families have sought the hand of the plaintiff in marriage but the defendant always refused. The counsel argued that the plaintiff is matured and willing to marry. The plaintiff's counsel went further to state that even Islamic law has given top priority to matured girl to chose a husband and since the biological father has refused to say any thing the court should act as Waliy between his client and person of her choice.

The issues for determination are two.

1. Whether Mama Ndawodi's father can marry her to a man of his choice.
2. Whether the plaintiff can choose a man she wishes to marry on her own.

The plaintiff's counsel submitted as thus, under Islamic Law, it is not allowed for a father or anyone else to compel a young lady to get married to one she does not like even if he is suitable. She must give her assent tacitly or verbally to the effect that she accepts the man selected by them to be her husband .And she has the right to disagree with their choice, and they rely on the prophetic tradition as cited in Sahih Muslim .They further submitted, that as a Muslim one should avoid what is not permissible by the prophet, where a man compel his daughter to marry a man she does not want .If a girl is married by threat or coercion then the marriage can be nullified.

The attitude of the defendant toward his daughter is very barbaric marriage by exchange under Islam is prohibited. He informed this court that in their area marriage is used to be contracted in exchange or in reciprocal gesture .This act is compared to the period of jahilliyah.

To this end we understand that in exercise of power of Ijbar the interest of the daughter be considered .The court observed that the father has not declared any interest in his daughters affairs and insisted on his brothers opinion to marry his choice base on selfish interest, the court therefore ruled thus, The defendant has succeeded in saying nothing that will urge this court to support his assertion. Therefore, the application of the plaintiff must be granted and it is hereby granted. The plaintiff is allowed to marry a person of her choice and the court without hesitation appointed a Waliy to conduct her marriage. The crux of this matter is that the father on whose hand lie the power of Ijbar has refused to act as one.

One of the measures taken to protect the minor interest and prevent misjudgment is in curtailing the persons that may exercise such power. Thus it is not all those who are qualified that have the power of compulsion. This power is a special power to curtail its abuse according to Maliki law it was vested on the father or his executors only. Even the executor cannot impose the power unless the father pointed out to him the bridegroom and has stated when the marriage

is to take place and the sadaq must be equivalent to that of her equal. In the opinion of Shafii it is only the father and the father's father and if the daughter lost her virginity either by accident or through illicit relation the power ceased. According to Hannafi law, the power vest on the father and other agnatic relations.[19]

While under the Hanbali law the power vest on the father(s) only,18 the refusal of the biological father to say does not give the 1st defendant every right to impose his power in exercising Ijbar.

Reference is also made to the case Usman Gunduma & Rakiya Gunduma Vs Alimako Shagi.[20]

This case went on appeal the appellants being dissatisfied with the ruling of the upper shariah court, on the following grounds, that.

1. The trial Judge erred in law when he held that Rakiya (2nd appellant) a girl of eighteen years does not have the right to marry until her paternity is determined by the court.

Particulars

a. The second appellant is 18 years old and a virgin.

b. She is desirous of getting married and in fact has a suitor

c. Meanwhile her father, the first appellant is contesting her paternity at the Upper Sharia Court Paiko.

2 The trail judge erred in law when he held that paternity of a girl child must first be determined before such a girl can have the right to the appointment of a Waliy for purposes of marriage.

a. That under Islamic law, marriage of a girl is not dependent on the determination of her paternity.

b. Paternity and marriage have different legal consequences under Islamic law.

c. The right of marriage ensures upon maturity while the issue of paternity can be resolved at any time.

Relief sought

An order allowing the appeal, setting aside the ruling of the lower court and appointing a Waliy for the second respondent so that she can marry the man of her choice

The facts of this case, is that the appellant Rakiya Gunduma who is 20 years at the time of this appeal was refused the right to marry except her paternity is known. In Islamic law she is encourage to get married and the issue of paternity is not an Islamic impediment to once right to marriage. Paternity is only important in two aspects,

1. For the purpose of Responsibility
2. Inheritance.[21]

In any case even if Rakiya has a father or her paternity is not known she will not be bound by the choice of her father, the counsel made reference to a Hadith in fiqhu sunna vol. II

The court finally ruled that the judgment of the trial court be quashed, base on the paternity of the Appellant, that is an issue that can be

determined after her marriage, and as for a waliy of her marriage, the court appoints the village head of Paiko to serve as her Waliy.

From the proceeding of this case, it is of note that guardianship is essential in marriage. In the view of Sunni school a just ruler can be appointed a guardian is applicable here.

In practice many controversies arose on the personality of the ward and their conducts under the institution of marriage. This research work is not to contradict the practice of Ijbar but to bring out salient issues for determination.

It is our observation that the misapplication of the doctrine of Wilayat Al-Ijbar cannot be blamed upon the Shariah itself. The fault is with the interpretation of the Shariah in the country that guardians are constantly misusing their authorities of Ijbar in forcing their wards to marry husband whom they dislike because they are after affluence and personalities of high respectable social status who might be bankrupt religiously and morally. It is therefore left for the Shariah Courts to oversee the appropriate application of the doctrine.

Some of the cases end up at the trial court, ruling in favor of the guardian and in most cases the plaintiff may not afford to pay for appeal so she ends up with the choice of her father.

4.3 CONSEQUENCES OF THE EXERCISE OF IJBAR

In Islam the Muslim girl is not allowed to choose her own husband she is to be sought with honor with her parent permission, and she is to be consulted and her consent obtained. Ijbar is the right of a waliy to decide whom his ward should marry with or without her consent this power is exercise able only by the father of the woman when he plays the role of waliy on his daughters.

As opined by Aisha B Lemu, life in arranged marriages are far more lasting and stable than in the average western family. It seems that where parent or relatives with much insight and experience propose marriages, they do it on a broad basis considering family background, education, ambition, likes and dislikes and so many other things.[22]

In exercising the power of Ijbar in marriage the guardian should consider the interest of his ward with utmost fear of God that is why for the affection of a father compared to another, the power of Ijbar is placed on him. So when he contracts marriage for his daughter it is with intent that he wants the best for her. The ward may refuse on reasonable grounds, considering the consequences of the exercise of Ijbar and bearing in mind that, marriage is believed to be base on mutual consent, love, affection and kindness. Where there is no such probability it is undesirable to establish them in the relation of man and wife when the element of love, mercy and kindness is no longer

there and its place is taken by indifference, hopelessness, hatred and disgust. The law inclines towards removing Ijbar forces a girl to marry a man she does not love or have affection for, then one of the objects of marriage has been defeated. There are instances were the girl accepts her father's choice of husband, only to please him and bearing in mind that she will opt out of the marriage as soon as she gets in by not pleasing the husband and eventually seeking for divorce under the umbrella of khul. (Divorce at the instance of the wife).

FAMILY DISCORD

There are situations where the girl refuses to accept her father's choice, this may result into family discord either between her and the father or both family of the girl and the family of the man chosen for her.

The father believes that his authority should be respected and accepted, whether the choice is in her interest or not, this believe is either associated with the custom, respect for parents, the power to disown the children, or mere recognition of the children's helplessness and dependence on the parents.[23] In other situations, the mother being the closest to her daughter is often invited or advice to speak to her child and counsel her to accept the father's choice or she will be seen to taking sides with the daughter, if all effort to convince the daughter fails the father may even threatening to divorce her mother.

FORCED MARRIAGE

Though this form of marriage is similar to arranged marriages, but the use of violence may occur here, as the father might resort to use physical torture on his daughter; in our community where it is the eldest person that speaks for the family, then the father might not even be involve in the exercise of power of Ijbar on his daughter, as probably he has an elder brother, this brother steps into the fathers shoes and acts as wali even contrary to the fathers opinion on the choice made by the assumed wali (guardian).

In an unreported case of Amina Ahmad a twenty-seven year old, graduate of statistics,[24] her marriage was arranged and she was forcefully wedded to the man who is highly placed in the society though she was married in absentia. Ever since it has been about a year now and she has refused to move into her husband's house and neither has she had anything to do with him, her father has refuse to accept any new suitor, and the husband has refuse to divorce her, this as rightly observed is just a way to punish her. Forced marriages are usually rooted in cultural practices parents and guardians drag their daughters into it for many cultural reasons which tend to serve their own selfish interest only. Such reasons include acquiring or retaining honor and pride fulfilling marriage pledges that have been agreed at their children's birth irrespective of later realities and feelings of the

victims, fulfilling economic or political aspirations, and maintaining tribal identity and affiliation among others.

ADVERSE REACTION OF THE DISINTERESTED SPOUSE

In marriage companionship each partner seeks increasing fulfillment with children in the family, the feeling of love and compassion of sacrifice for others, of tolerance and kindness are translated into reality and imparted in character where there is no such between the husband and wife the family becomes disintegrated. As she refuses to accept her fathers choice, if eventually she is forced into the marriage

(i) She might threaten to kill the husband or even herself.

(ii) She might seek for divorce at her instance in a court of law, or

(iii) She might even sue her parents challenging their imposition of the husband she has refused on her.

(iv) There are also instances where the woman may elope with the man she loves, or even after the marriage has been contracted with the man her father chooses, she will eventually look for a way out of his home and if care is not taking end up living a promiscuous life style as she might not be welcome by her parents.

In communities like ours, this research has gathered, that marriages conducted by way of Ijbar where the girl is forced into the marriage, she resorts to filling for divorce, and running from one district head to the Emir if she cannot afford the cost of litigation.

Though Ijbar is not forced marriage if the girl consents, but it becomes forced marriage if she is coerced into a relationship against her wish and under duress. Duress includes both Physical and emotional pressure. In view of this, some parents who want to exercise their power of Ijbar often pull the girl out of school and forced them to drop their education to become wives over night. The parent indulge in this practice especially where the selected partner has spent a lot on the girls household or where he has contributed to the girls up bringing even without the girl knowing .They cannot say no and they cannot turn to any one for help, if they go to their relatives, they are told it is their fault. And if they go to the police, it is dismissed as family problem. Victims of such marriages on the other hand see the practice as infringing on their right to choose a husband. The act also makes them suffer devastating psychological pains this becomes associated with rising rate of divorce, broken homes, domestic violence. Young girls forced into marriage often become estranged from their families, they feel they have no one to speak to about the situation and the only option left to them is to run away.

Most young girls flee their marriage and their marital homes and take to prostitution; forced marriage should not be an excuse for promiscuity as they have no one to support them, economically. But the victim should try as much as possible to fight for what they want, as in the case of 19year old Nafisat Laushi (unreported) who was reported to have taken her father to court for allegedly forcing her to marry against her wish. She want the high court in the central city of Jos to stop her father from making her marry some one she does not love, while according to her, infringing on her right to choose a husband,[25]

Child abandonment; Some women even after having children, insist on leaving the marriage, they often leave their kids at the mercy of step mother or their grand parents (paternal) because they loathe the man that fathered the children. These children as they grow are being reminded of their mother's short comings. And where they cannot fight against the marriage the only option left is for the woman to make up her mind to stay in the marriage as long as he is good to her and as time goes on she may begin to love him.

Though it is with great significance that Islam emphasizes guardianship, the object of all these precautions is to protect and safeguard the legitimate conjugal right of the girl, especially when she is virgin and very young. It also gives her position status and honor as a wife in the society and the husband and wife can lead a respectable

and decent life in the community. This is why the Shariah gives parents and guardians the right to watch the interests of the girl in her marriage in spite of this; the choice is left with the girl.

The Islamic law has taken into consideration the question of compatibility and suitability between a man and a woman before contracting their marriage. The Shariah commands and approves that (Kafa'at) equality between the two people should be kept in mind at the time of their marriage. This is desirable and more conducive to a happy and successful marriage. Those men and women who are so close or equal to each other in respect of their moral, education religious inclination, family ways and connections, culture and ways of living, are more likely to develop a relation of affection, kindness and love. It is also probable that because of their relationship the two families may become still closer to each other. On the other hand, with those who have no such closeness and resemblance in these matters, there is a danger that they will not be able to unite their home life or their mental and spiritual relationship. This is the significance of Kafa'at in the Shariah. According to Shariah it is desirable that marital relationships should be established between people who are most likely to unite with feelings of love, affection, and kindness. Where there is no such probability, it is undesirable to establish them in the relation of man and wife.

This clearly shows that, after morals and purity what is considered to be an important object in the Islamic law of marriage is love and kindness though some marriages are not founded on love between the couple, but are established after marriage, but in our society now the spouse go into courtship before marriage believing it will enable them study one another. It is the opinion of this research that were the couples seek themselves in marriage they tolerate each other more, and are more patient in whatever circumstances.

However, the marital relationship should be founded on the dictates of Shariah.

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CHAPTER FIVE

5.0 CONCLUSION

This study attempted to address some social problems relating to guardian's rights in the choice of a spouse for his ward. Some of these problems would pertain to the past, some to the future course of the Muslim family. In this compilation, the pertinent rules have been laid down according to the Holy Quran and Hadith which serve as the only reliable authority and source of knowledge towards which every Muslim should turn up to, for the needs of this worlds and even the hereafter. Though scholars have derived rulings from shariah and given legal verdicts. Hence the people are commanded by Allah (S.W.T) to have recourse to the pious scholars of religion. And that is why the shariah Law system in Nigeria is with the view of the Maliki school.

5.1 SUMMARY

This research contains five chapters each giving a distinct outlook.

Chapter one: dwell on the general perspective of this research its scope, the background of the research, its problem, its aim and objectives methodology used and also outlining the organizational layout.

Chapter Two: considers; the Islamic concept of marriage, touching on the social responsibilities of Islam and wisdom of

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marriage. Bearing in mind, the Islamic family provision and there basis in sharia.

Chapter Three: Examines the concept of guardianship in marriage, considering opinion of Sunni Leaders base on the exercise of power of Ijbar and freedom of choice of a spouse viz-viz option of puberty. This chapter seems to cover the main discussion of this research.

Chapter Four: In this study it could be observed as probably the most interesting as it contains the appraisal of the doctrine of Ijbar making references to case materials in Niger State. At this point the reader may experience admiration, comparison or contrast of ideal normative character of one system and the behavioural often deviate representations of another system, custom or religion.

Chapter Five: is the concluding chapter and all issues discussed are necessary and important thus their detailed discussion being inevitable is contained in the preceding chapters and this concluding chapter has left space for the observations and recommendations of the research work.

5.2 OBSERVATION

This research has made its observation in line with the events of our time were it seeks to protect the wards interest and where otherwise is the case.

Observations will be outline in line with findings made in the course of this research:

1. **ARRANGED MARRIAGE:** This type of practice is done by the parents of the spouses, it could either be at a very tender age of the spouses that is before the attainment of puberty as in form of betrothal or, it may be that, it is the man who sees the woman and likes her, if the families are closely related, either by Kinship or friendship then the families will arrange with the woman's family. In most cases they ignore the consent of the woman involve or even where it is the parents that arrange this relationship they ignore the consent of both parties.

   As opined by Aisha B. Lemu, life in arranged marriages are far more lasting and stable as families that arrange such marriages do it base on insight and experience. They do it on a broad basis considering family background, education, ambition and so many other things.[1]

2. **RIGHTS OF THE FATHER AS A GUARDIAN:** The practice of Ijbar by the father of the bride has been an acceptable phenomenon in Islam, the father is conferred with this right because only him can exercised this power in the best interest of his ward. This is because of the love for her and interest in the protection of her honor and consideration for her welfare except

he assigns this to his executor pointing out the groom and the amount to be paid as sadak. But there are variance in the manner it is practiced. As often times the parents exercise this power of compulsion in their own interest and because of their dependants on men for livelihood or to enrich themselves for which ever reason they tend to abuse this right which is to serve as a blessing for the bride, more so where she is inexperience. Such marriages that are base on selfish interest often times than not end up in problems, as the man will see himself as superior to the woman's family and a source for their well being. If he lacks fate and fear of Allah (SWT) he might at the slightest provocation treats her with disdain, as he believes she has been bought or imposed on him because of his affluence.

3. **FORCED MARRIAGE:** The fathers in exercising the right of Ijbar over his ward often apply force a nd violence until she succumbs to the fathers' choice. They face torture and humiliation, and in some cases she is being drag to the husband's house.

5.3 RECOMMENDATION.

This research work recommends in line with the observations made;

It is highly recommended that where marriages are arranged, the parties may be involved. They should also be informed of the benefit and blessings they receive in the arrangement marriage made.

It is our submission that where the parties are involved in this arrangement, they will feel more honoured.

Base on the right of the father as the guardian, he should always consider the interest of his ward as that is the essence of Ijbar which is to protect their ward and honour her more. It is also advice able that the guardian does not put worldly things in mind for the exchange of his daughters hand in marriage.

To avoid family discord or disintegration, the father should not apply violence on his daughter where she refuses, he should either use subtle words or get people who she relates with to convince her, and explain to her the benefits he sees in it for her as women are soft hearted and easily convinced she might succumb.

The father should know that he only can exercise the power of Ijbar on his ward except he waives this right as in the case of Karimatu Yakubu Tafida and 1 or and Alh. Yakubu Paiko and 1 or (supra)

It is also highly recommended, that only the father can exercise this power of Ijbar and not another ,if another waliy other than the waliy of appropriate hierarchy arrogates the powers of guardianship to

himself, though the latter may be present and keep mute, the marriage contract is not valid.[2]

It is also recommended that, the father should not use torture whether physical or mental as it might lead the woman to resort to unruly behaviour. If the woman refuses, to avoid family discord it is advisable that she shows respect to her parent as often times if marriage are based on sentiments of the moment that often do not develop into more permanent relationships.

He as the father should act in the best interest of his ward, and where the issue of betrothal comes in, he should inform her before she becomes exposed to the outside world by been allowed to mingle freely with the opposite sex.

The woman should be given at least a chance to know whom she is going to spend the rest of her life with.

Parents who intend to apply this doctrine should curtail the social interaction of their ward. This study also recommends that considering marriage as a social contract, a noble and sacred contract, nonetheless, it leads to a number of relationships.

In view of the foregoing recommendations, it is pertinent to note that the parents, Shariah Court judges and traditional rulers should understand that the role they play should be in the interest of their ward and beneficial to her well being. As none of the proclaimed problems such as prostitution, rapid dissolution of marital ties

between the spouses and motivation of criminal instinct in women, can be ascribed to the doctrine of Ijbar the reason is that the minors alone are the wards under the doctrine. And their father or grandfather is the guardian. These guardians are responsible for the upbringing of these wards in an Islamic manner. If this guardian fails in this primary assignment the failure awaits them in all subsequent assignments.

If the misapplications of this doctrine, as well as many other doctrines of the Shariah are rectified we are very sure of achieving their goals and objectives. The past renewable generation of this Ummah applied them appropriately and reaped the reward of virtue.

CHAPTER FIVE END NOTES AND REFERENCES

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