

**A CRITICAL ANALYSIS ON THE IMPACT OF THE CONCEPT OF *IJBAR* ON
THE PRACTICE OF CHILD MARRIAGE UNDER ISLAMIC LAW**

By

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DECLARATION

I declare that the work in this project entitled “*A Critical Analysis on the Impacts of the Concept of Ijbar on the Practice of Child Marriage under Islamic Law*” has been carried out by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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CERTIFICATION

This project entitled “*A Critical Analysis on the Impacts of the Concept of Ijbar on the Practice of Child Marriage under Islamic Law*” by Muhammad Tukur MUHAMMAD meets the regulations governing the award of the degree of Master of Arts in Law (M.A. LAW) of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

To Allah (S.W.T.) for the bounties of mercy He bestows on me; to my parents and all the people who in one way or the other contributed in seeing through my education at this level; and also to anyone interested in the subject.

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ABSTRACT

This study critically analyzes the impact of the concept of ijbar on the practice of child marriage under Islamic law. While child marriage is widely criticized by the feminists on the basis of human rights, its practice is nevertheless defended on the basis of Islamic law and culture. This is because, ijbar is a concept related to marriage guardianship (wilayat-un-nikah) and it connotes the power entrusted upon parents/guardians to marry off his ward in order to secure the protection of his/her welfare and in instances where it becomes apparent that the parent/guardian acted wrongly or in defiance of the rationale of ijbar, certain safeguards were instituted to cope with the situation. This involves the exercise of the option of puberty (khiyar-ul-bulugh) under which the marriage would be annulled. Prompted by the raging debate and desire for the urgent need to reform Islamic family law whereby a drastic curtailment or even the abolition the concept of ijbar vis-à-vis the practice of child marriage is advocated by the West globally, the main objectives of this research work therefore, is an attempt to critically analyze the contemporary debates for and against child marriage in Islamic law. It is argued that, while puberty marks the legal criteria of Islamic adulthood and in the absence of fixed marriageable age in addition to the exercise of coercive marriage guardianship, the practice of Islamic child marriage goes to secure the welfare of minors and the protection of their best interest in life and in view of this, it was observed that to prohibit or even restrict Islamic child marriage and the exercise of the role of coercive guardianship, is to call for disruption of the moral foundation behind the Islamic institution of the family and at the same time aggressively enforcing western secular family values that delays marriage while paying the least concern on premarital sexual indulgence among teenagers. Further still, it has been argued that the current move by the international community for the curtailment of ijbar and the abolition of child marriage together with recent reforms directed towards these ends in the Muslim world is nothing but motivated by the western conspiracy against population growth in third world countries, more particularly in the Muslim world. Therefore, the study concludes with the firm recommendation that the Islamic concept of ijbar vis-à-vis the practice of child marriage by Muslims should be accordingly maintained and that as a matter of human right, Muslims must be allowed sufficient freedom to practice the tenets of their Islamic personal law, in particular, to have recourse to the practice of child marriage where they deems so.

LIST OF ABBREVIATION

1	AP	Additional Protocol
2	AU	African Union
3	CRC	Child Rights Convention
4	EU	European Union
5	ECtHR	European Court of Human Rights
6	HR	Human Rights
7	ICCPR	International Covenant on Civil and Political Rights
8	ICESCR	International Covenant on Economic, Social and Cultural Rights
9	IHRL	International Human Rights Law
10	OIC	Organization of Islamic Countries/Conference
11	UDHR	Universal Declaration of Human Rights
12	UK	United Kingdom
13	UN	United Nations
14	US	United States (of America)

LIST OF STATUTES

INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights of 1981

Cairo Declaration of Human Rights in Islam 1991

Convention on the Elimination of All Forms of Discrimination Against Women

Convention on the Rights of the Child 1989

International Covenant on Civil and Political Rights [**ICCPR**] (1966)

International Covenant on Economic, Social and Cultural Rights (**1966**)

Protocol to the African Charter on Human and People's Rights on the Rights and Welfare of the Child

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1964

Universal Declaration of Human Rights (1948)

NIGERIAN STATUTES

Constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011)

Child Rights Act 2003

LIST OF CASES

Alhaji Isa Bida v. Baiwa, (1980) Sharia Law Report, Vol. 1, p. 38

Karimatu Yakubu Paiko & Another v. Alhaji Yakubu Paiko and Another (1985)
Unreported, Court of Appeal, Kaduna, Suit No. CA/K/805/85

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In the present generation, the marriage of minors especially by and among Muslims is one of the topical legal issues that have attracted the attention of feminists and modern human rights scholars who concern themselves with the protection of the rights of the girl-child across the globe albeit from secular conception. With this development, national and international communities are therefore increasingly recognizing child marriage as a serious problem, both as a violation of girls' human rights and as a hindrance to key development outcomes.¹

The practice whereby a child is married off early under the influence or compulsion (*ijbar*) from its parents is somewhat a religious and customary practice among Muslims particularly those who follow the Maliki school of Islamic law which sanction the role of matrimonial guardian (*wali*) as one of the essential elements of validity (*arkan*) to a marriage contract under Islamic law. The matrimonial guardian (*wali*) may be one with power to enforce marriage on his ward, i.e., *wali mujbir* and such a guardian (*wali mujbir*) is possessed of the power to compel his ward in entering into a marriage contract for purposes that are viewed as satisfying the best interests of the child in question vis-à-vis the wishes of parents to ensure that the child is prevented from getting plunged into the dexterities of immorality and its attendant social consequences in the society.

On the other hand, the critics of the Sharia has likened the concept or practice of *Ijbar* with forced marriage, wherein contrary to this perception, mutual consent of both parties

¹ICRW (2011) *Solutions to End Child Marriage: What The Evidence Shows*, International Center for Research on Women (ICRW). Available online at www.icrw.org/childmarriage

(*ridha al-Zawjain*) is ever an essential requirement to the formation and validity of a marriage contract under Islamic law.

Feminists have, in the name of health, poverty, population and fertility control together with the quest for the attainment of universal basic education globally with particular attention on the girl-child, the practice of early or child marriage have come to be abominable altogether in the Western society, it being largely a prohibited practice in several countries.

In fact, in the slogan of the feminists, it is regarded as a “harmful traditional practice” that impedes the developmental rights of the child. Thus, the move for the abolition of the so-called child marriage has transcended from Western society to other African and Asian countries and it has deeply crept into the Muslim world. For example, the Ottoman *Mecelle (1917)*² was the first regular modern legislation forbidding the marriage of minor children. This was followed later by a law in Egypt which prohibits the registration of marriages of males below eighteen and females below sixteen years of age.³ In the Indian sub-continent, the *Child Marriage Restraint Act of 1929* also prohibited the marriage of males below eighteen and females below fourteen years. Later in Pakistan, the marriageable age of females was raised to sixteen by the *Muslim Family Laws Ordinance of 1961*.⁴

In all these pro-modern and reform minded legislations, one basic thing is observable, that is to say, the crux of the matter is regulation of marriageable age as a legal device to

² Ottoman Law of Family Rights 1917

³ Raza Naqvi, S. A. Modern Reforms in Muslim Family Laws – A General Study, *Islamic Studies* (Journal of the Islamic Research Institute, Pakistan) [1974] Vol. XIII, No. 4, pp. 235-252 at pp. 237-238

⁴ Ibid

delay marriage. But under classical Islamic family law, age of the parties bears no legal weight as physical puberty is the basis of majority and this stance of the law poses challenge to the modernist and western oriented Muslims in some Muslim countries. As it become open that under the sharia, once a child attains puberty, he/she becomes eligible for marriage, to counteract this possibility, modern family law scholars have therefore recognizes devising a specified age as an essential qualification for marriage with eventual prohibition of child marriage under threat of penalty.

However, contrary to popular opinion especially in the West, the sharia establishes no specific age to wait for marriage. Islamic law permits a marriage contract of young children to be entered into years before the marriage itself is actually executed or ratified. In other words, the marriage contract is drawn up, but the contract is not executed until a later date. So, even though the marriage contract can be concluded, the girl will not be handed over to the husband until many years afterwards. Thus, a father can marry off his young daughter to a man before she comes of age, but the husband may not consummate the marriage until after she attains maturity.

It is pertinent to mention that, the fact that it is permissible in law to marry a young girl does not mean that it is permissible in practice to have intercourse with her. Rather, that should not be done until she is able for it. For this reason, it is understood that the Prophet (saw) delayed the consummation of his marriage to A'ishah (RA) until such time when A'ishah (RA) had attained physical maturity.⁵ Therefore, the reality is that the Prophet (saw) was just betrothed to Aishah (RA) when she was an immature girl, but the marriage was only consummated upon her becoming a mature adult.

⁵ Sahih Muslim, English translation, Vol. 9, p. 206
<http://www.islamqa.com/index.php?ref=22442&ln=eng>

It is interesting also to note that, when minors are married off early, it was never meant to permanently bind such young ones into the bond of marriage against their wishes but in their overall best interest. In that, under Islamic law, there is safeguard against eventual dissatisfaction by the minor and these safeguard is manifest in the concept of *khiyar al-bulugh* (option of puberty). It means, while an immature daughters' marriage can be arranged by her guardian (*wali mujbir or wasiyyi*), she has the right to annul the marriage at the attainment of the age of puberty, if she is not compatible with the husband or simply dislikes him.⁶

In Nigeria, the institution of an Islamic marriage is within the purview of Shariah legal system (being one of the three streams of legal systems flowing in Nigeria).⁷ It therefore implies that, Muslims are at liberty to follow the dictates of their religion in matters of marriage including the latitude to have recourse to the practice of *ijbar* as per the teachings of the Maliki School that is followed by Muslims in Nigeria. This position has further reinstated the legal challenges to the regulation and reform of matters that have to do with Islamic marriage including the legal possibility for the prohibition of child marriage among Muslims by legislative authorities in Nigeria

1.2 STATEMENT OF THE RESEARCH PROBLEM

Over the centuries, Islamic family law has been able to maintain its unique and differing characteristic in recognizing no fixed age limit for parties to a contract of marriage thereby allowing the practice of child marriage. This being still the applicable legal

⁶ Tuhfat al-Muhtaj and al-Umm

⁷ See Item No. 63 of the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

position to those who intend to follow classical understanding of earlier Muslim jurists on the issue in some Muslim countries (including among Muslims in Nigeria), the development of international human rights law as well as feminism jurisprudence have continued to pose legal questions as to the protection of the rights of the child from sexual abuse and early marriage.⁸

In that, an attempt has been made to codify minimum age and consent for marriage,⁹ which to proceed from the hypocrisy theory, it is viewed by some analysts as an effort to curtail or reduce active fertility period especially of the girl-child by delaying marriage to a later age in the name of education in order to put a check on population growth more so in the absence of prohibition of polygamy and child spacing policies in majority of Afro-Asian countries inhabited by Muslims. These developments are perceived by many Muslims as derogatory to the legal position under Islamic law. In that, it poses and continues to pose legal challenges as to the compatibility of human rights law with Islamic law on child marriage on the one hand and the acceptance of its abolition by Muslims in Nigeria who, at all times, desires the practice of Shari'ah in the alternative.

To the feminist conception on the issue, any marriage wherein the couples are below the age of 18 years is a child marriage and that it is a fundamental human rights violation to do so. In their view, child marriage disproportionately affects young girls who are much

⁸ Proponents of child rights has identified child marriage as constituting one of the most severe forms of child abuse with a disproportionately negative impact on the girl child. It is both a cause and consequence of the most severe form of gender discrimination. The practice harms girls by denying the right to education and health, as early marriage leads to early childbirth for which girls are mentally and physically unprepared. See

⁹ See The 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (Article 2); The Child Rights Convention (Article 1); The Convention on the Elimination of All Forms of Discrimination Against Women (Article 16); The Child Rights Act 2003; Protocol to the African Charter on Human and People's Rights on the Rights and Welfare of the Child; etc.,

more likely to be married as children than young boys.¹⁰ Some international estimates indicate that worldwide, more than 60 million women aged 20–24 were married before they reached the age of 18 years.¹¹

The issue is that, what implications does the above stand and yearnings of feminists and advocates of child marriage abolition have on the teaching of the sharia on the issue? Is the Islamic family values that are targeted for reform under the pretext of child marriage to absolve western values in place of the sharia? Or, are they really philanthropists that sympathize to the causes of the child? In the face of this challenges, have the sharia failed to take to the fore the best interests of the child in failing to recognize a fixed marriageable age? Or, is the exercise of the power of *ijbar* in all certain circumstances naturally prejudicial to the interest of minors?

By and large, has the guidance of the sharia on the issues relative to child marriage primitively obsolete as to give way for the ascendancy of the morally corrupt and deficient modern western civilization in family affairs? Or, are Muslims especially in Nigeria possessive of the right to conduct their affairs as per the teachings of their religion including on the possibility of child marriage without the least encroachment by secular authorities?

¹⁰ Mathur, S., Greene, M. & Malhotra, A. (2003). *Too Young to Wed: The Lives, Rights and Health of Young Married Girls*. Washington, D.C: International Center for Research on Women (ICRW); UNICEF. (2005). *Early Marriage: A Harmful Traditional Practice: A Statistical Exploration*. New York, NY: UNICEF; Save the Children. (2004) *State of the World's Mothers 2004*. Westport, CT: Save the Children.

¹¹ UNICEF. (2007). *Progress for Children: A World Fit for Children Statistical Review*. 6, 45. New York: UNICEF.

Furthermore, is the concept of *ijbar per se* a mischievous practice that hinders the plights of minors? Or, is its misapplication giving rise to its present criticisms? At whose interests is the practice of *Ijbar*, to the minor or his/her parents or both? How harmful is the practice of early or child marriage in our contemporary society? To the Muslims, is it a religious or traditional practice? In this era of human rights, would its compulsory abolition as a matter of law not amount to human rights violation, such as the right to culture and freedom of thought, conscience and religion?

This research would, therefore, look into these legal issues and problems with a view of articulating a practicable and sustainable way out that would bridge the gap between the advocates of its abolition and those for its practice particularly in the Muslim community of Northern Nigeria.

1.3 AIMS AND OBJECTIVES OF THE RESEARCH

The principal aim of the research work is to critically analyze the impacts of the concept of *ijbar* on the practice of child marriage under Islamic law. The research focuses upon the following specific objectives:

1. To examine the spirit and wisdom behind the power of *ijbar* and whether it is protective of the rights of the child within the framework of the sharia.
2. To examine and analyze whether in the contemporary setting, the concept and practice of *ijbar* by and among Muslims is in its totality a mischievous practice; or, whether it is of particular advantage to the rights of the girl-child having regards to the child's best interests in life.

3. To examine and analyze the contemporary concern of feminists in objecting to child or early marriage particularly among Muslims in Northern Nigeria with a view to reasserting its continued practice or abolition among Muslims in Nigeria.

1.4 SCOPE OF THE RESEARCH

The scope of this research will be restricted only to the reflection on the rationale of the law and/or practice of child marriage under Islamic law vis-à-vis the concept of *Ijbar*. A particular emphasis would be given to an analysis on its practice by Muslims in Northern Nigeria. The legal regime will focus primarily on Islamic Law and where necessary, to comparatively consider the Nigerian laws on the subject.

1.5 RESEARCH METHODOLOGY

Doctrinal method of legal research was primarily employed. Recourse has been made to published legal materials on the subject, i.e., books, journals, conference and seminar papers, statutes, case law, etc.

1.6 LITERATURE REVIEW

The question of child marriage vis-à-vis the concept of *ijbar* has been a topical issue of concern before the international community, more particularly the feminists and child rights advocates; and as such, a lot has been written on the subject ranging from books, articles to seminar and research papers.

The famous Muslim scholar on the subject of Islamic family law, **Hammuda Abd al-Ati**¹² has, in one of his books, eloquently presented the arguments surrounding essential nature of child marriage in Islamic law. He argued that child marriage is more of a

¹² Abd al-Ati, H. *Family Structure in Islam*, American Trust Publication (1977) pp. 72-73

betrothal that implies deferring consummation to a later date; that preliminary arrangement may have been made at an early age, but consummation usually take place when the parties were fit for marital congress which depends, among other things, on their physical conditions. He succeeded in identifying two interrelated issues on child marriage in Islamic law, the legitimacy of child marriage and compulsion in marriage (*ijbar*). He further elaborated that Islam sets no age limit on marriage and that consummation is subject to the attainment puberty.¹³

Similarly, the well-known Muslim scholar, **Prof. M. A. Abdur-Rahim** in his famous book, *The Principles of Muhammadan Jurisprudence*,¹⁴ has in his chapter on family law, discussed capacity to enter into marriage contract as well as guardianship for the purposes of marriage. He dwelt on the rationale behind marriage guardianship, stating that it is allowed because of necessity for securing proper and suitable match and that when a minor is given in marriage by a guardian other than the father, he/she can exercise option of puberty (*khiyar-ul-Bulugh*) and thus refuse to be bound by the marriage.¹⁵

However, it may be noted that, as regards both Hammuda Abd al-Ati and Prof. M. A. Abdur-Rahim, these Islamic writers had expounded enormously on the topic as at the time when feminism jurisprudence has not grown wild as it does in these days. Consequently, their discussion could not be said to have adequately captured current feminist's criticisms against the Islamic child marriage. Therefore, our attempt to further delve into this aspect of Islamic law would deal with it contextually under the general argument

¹³ Ibid. at p. 76

¹⁴ Abdur-Rahim, M. A. *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafii and Hanbali Schools*, All Pakistan Law Publishers, pp. 226-339

¹⁵ Ibid, pp. 330-332s

that, child marriage is a viable mechanism under the Shariah for the protection of the rights of girl-child contrary to what obtains or the way it has been conceived and applied by the West today. And, the feminists perspective of considering Islamic child marriage as hampering the future of the girl-child in terms of education, negation of reproductive rights and health implications, etc., are baseless criticisms that seeks to satisfy western imperial interests in the Muslim world.

Khurram Murad, in his book titled, “*Shariah: The Way of Justice*”,¹⁶ has discussed woman’s consent as an essential legal condition for marriage in Islam. He further explains that if such consent is not being obtained in Muslim societies today, the problem is a result of social circumstances, not of the legal provisions of the shari’ah and that the situation must change once the shari’ah is implemented.¹⁷ While agreeing with this author, it is intended to further the discussion in the sense that notwithstanding the presence of the Islamic concept of *ijbar* vis-à-vis the legality of the practice of child marriage, the consent of the girl-child is still reckoned with and the false allegation by western literatures of associating the Islamic child marriage as being “force marriage” is not only biased but untenable.

Abul A’ala al-Maududi¹⁸ while discussing essentials of marriage contract, only talked about the discretionary role of women in the formation of marriage contract emphasizing that the consent of a woman is an indispensable condition of marriage in Islamic law.¹⁹ He altogether neglected or failed to envision the interrelationship of child marriage within

¹⁶ Khurram Murad, (1981) *Shariah: The Way of Justice*, The Islamic Foundation, London

¹⁷ Ibid, pp. 13-14

¹⁸ Abul A’ala al-Maududi, *The Laws of marriage and Divorce in Islam*, Islamic Book Publishers, Safat, Kuwait (1983, 1st ed.) pp. 69-70

¹⁹ Ibid, at p. 70

the context of consent to marriage within the framework of marriage guardianship. But, given the status of the author as pro-Islamic Muslim scholar, his omission to include discussion on Islamic child marriage and its modern criticisms would not be taken as a bye-passive approach to sideline its existence.

Likewise, **Prof. I. A. Doi** in two of his books²⁰ while discussing the concept of marriage has treated the requirement of free consent of parties to marriage alongside power of *ijbar* but he did not focus on the position of child marriage in Islamic law. In the recent edition of the book,²¹ the choice of partner and the power of compulsion (*ijbar*) have been discussed, stating that *ijbar* is a safety measure in the interest of the girl concerned whereby, if in view of immaturity or over-zealousness, a girl is proposing to marry a man possessing a bad character or a man lacking proper means of livelihood, her guardian may stop her from marrying that man and instead, finds a suitable person to whom to give her in marriage.²² While only the substantive Islamic principles are discussed, what in our view, is left un-discussed in this book, is the modern challenges posed by the feminists and women's rights activists.

Abdulmalik Bappa Mahmud in his book titled "*Marriage under Islamic Law*",²³ has discussed issues relating to Islamic child marriage but his choice of words or style in his treatment of *ijbar* and the attendant role of *wali mujbir* under the heading "compulsory marriage" is misrepresentative of the Islamic concept of *ijbar* as being synonymous to

²⁰ Doi, I. A. *Shariah: The Islamic Law*, Ta-Ha Publishers, London (1990) p. 123; Doi, I. A. *Women in Shariah (Islamic Law)*, (1983) p. 70

²¹ Doi, I. A and Clarke, (2008) A. *Shari'ah: Islamic Law*, Ta-Ha Publishers, London, pp. 206-208

²² Ibid, p. 207

²³ Mahmud, A. B. (1981) *Marriage Under Islamic Law*, Gaskiya Corporation Ltd., Zaria, Nigeria, pp. 41-42

“compulsory marriage”. This is because; if *ijbar* is synonymous to compulsory marriage as the author tend to mistakenly give such an impression, what then is the value of Islamic requirement of free consent in marriage. Thus, he mistakes *ijbar* with compulsory marriage when nothing of the sort exists under Islamic law. In fact, any practice that would otherwise constitute compulsory marriage is out rightly un-Islamic. But, that apart, notwithstanding his treatment of marriage guardianship under the title “compulsory marriage”, his exposition on the subject has adequately depict the rationale of the sharia behind guardianship in marriage as being protective of the welfare and interest of the minor concerned.

Prof. I. A. Aliyu²⁴ in his book on the protection of the rights of women has discussed women’s right to choose a partner for marriage, accept or reject marriage proposal; their consent being a prerequisite to the validity of a marriage contract in Islamic law.²⁵ That it is obligatory upon guardian of a woman to seek her consent to marriage and that this is the reason why the Shari’ah objects to marrying a woman forcefully to a man she doesn’t like rendering such a marriage void or at least voidable.²⁶ This author, while being expert on Muslim family law and existing as at the time when feminism jurisprudence is corrosively encroaching upon the tenets of Islamic law, has however shy away from considering the vitality of discussing contemporary debate surrounding child marriage and its practice in Islamic law vis-à-vis consent to marriage and the role of legal guardian thereto.

²⁴ Aliyu, I. A. *Protection of Women’s Rights under the Shariah*, Dakwah Corner Bookstore, Jeddah, Saudi Arabia (2010, 1st ed.) pp. 36-40

²⁵ Ibid, at p. 36

²⁶ Ibid

Muhammad Khalid Masud, in an article titled, “*The Sources of the Maliki Doctrine of Ijbar*”,²⁷ had discussed extensively the doctrine of *ijbar*, but as it is evident from the title, he mistook it as available only within the framework of the Maliki School to the disregard of its existence in other schools of Islamic jurisprudence. Likewise, motivated by western orientalism, he seeks to trace its origin to Arab custom to the neglect of its juridical basis from the Qur’an, Sunnah and the consensus of Muslim jurists. His treatment of its origin in terms of what he termed “formal and material sources” left his discussion on the subject somewhat confusing without any articulate stance, for his concluding remarks on the subject, are quite strange and opposed to the spirits of Islamic law.

In his perplexing view, M. K. Masud considers that: “(1) the element of compulsion in *ijbar* ... has been over stressed by its proponents as well as the proponents; (2) an analysis of the formal sources cited and rational justification given in favour and against the doctrine shows that the origin of the doctrine cannot be traced to any explicit formal source; (3) the origin of the doctrine can be more satisfactorily traced to custom, as its material source; (4) its close association with local custom explains more satisfactorily the conflicting opinions of scholars, their continued criticism and the varying judicial interpretations; (5) the customary basis of the doctrine also explains the persistence or disappearance of the doctrine in actual practice.”²⁸ These incredible explanations of M. K. Masud, are indicative of modern secular prejudice against the impacts of the exercise of *ijbar* by parents and guardians in influencing child marriage in Islamic law.

²⁷ Masud, M. K. (1985) *The Sources of the Maliki Doctrine of Ijbar*, *Islamic Studies [A Journal of the Islamic Research Institute, Islamic University, Islamabad, Pakistan]*, Vol. 24, No. 2, pp. 215-253

²⁸ *Ibid*, pp. 246-247

Muhammad Lawal Dabo, in his article titled, “*Towards a More Appropriate Application of the Concept of Coercive Guardianship [Ijbar in Islamic Family Law]*”,²⁹ have discussed generally the rudiments of marriage guardianship and that of the concept of *ijbar*, but his approach and treatment of the subject follows closely that of M. K. Masud who, in one way or the other, is apologetically motivated by Western orientalism in his critique on the subject. But unlike M. K. Masud who follows the footsteps of J. Schacht to submit that the origin of *ijbar* is traceable to Arab custom, M. L. Dabo has reinforced juristic consensus with regard to the legality of *wilayat al-Jabr* although he still partially entertained feminist’s critique on the subject.³⁰

The Nigerian academics **Olufem, Abdurrazaq and Olayemi**³¹ in their paper have reviewed the legal issues surrounding the law on marriageable age in Nigeria and have concluded with a recommendation on the abolition of the practice of child marriage in Nigeria. However, they have to some extent, treated fairly what obtains under the general law in Nigeria as well as under customary law and Islamic law vis-à-vis the recent position under the *Child Rights Act*. These authors first opened their discussion with the general statement that there is no acceptable and universal marriageable age. But the authors remain contradictory when somewhere else in their discussion, they alluded to the assertion that the *Child Rights Act* is in conformity with universally accepted age of

²⁹ Dabo, M. L. (2006) Towards a More Appropriate Application of the Concept of Coercive Guardianship [Ijbar in Islamic Family Law], *Journal of Islamic and Comparative Law*, Vol. 26, pp. 101-120

³⁰ Ibid, pp. 111-112

³¹ Olufem Abifarin, Abdurrazaq F. F. and Olayemi Sola *Reflections on Marriageable Age, Child Rights Acts and the Health of the Child in Nigeria*, A Paper available online at <http://unilorin.edu.ng/publications/abdulrazaqff/Reflections%20on%20Marriageable%20Age,%20Child%20Rights%20Act.pdf>

marriage.³² Pertinently, they misconceived the philosophy of child rights under Islamic law as synonymous to that of the *Child Rights Act* of Nigeria while trying to lay foundation for its acceptance by Muslims. Furthermore, these contribution of the writers perpetuates the Western conceptions and traditions manifest in the secular principles of international law as the ideal standard to be emulated by Muslims in Nigeria, i.e., that child marriage is but a child abuse, that early marriage thrusts upon girls marital and reproductive responsibilities for which they are neither physically nor mentally mature to carry out.³³

Tonja Khabir,³⁴ in his paper opined that “to fully comprehend the practice of childhood marriage particularly in Nigeria, it is pertinent to understand Islamic religious tradition and its significance in the country. So, where many are instituting sessions and granting funds for sexual education, the task would be to get at the heart of the tradition in order to change the situation. This means simultaneously working for reform of traditions in order to keep children safe. It is a hard job to do, but it is most certainly being done.”³⁵ He further stated that the idea of child marriage can be reformed through religion citing Egypt as an example. That in Egypt, child marriages saw heavy reform in the 1920’s through Islamic law. The Indian *Child Marriage Restraint Act of 1929* prohibited the underage marriages. While the author calls for reform through religion, he has however failed to let us know his own understanding of child marriage in Islamic law, i.e., the nature of child marriage in Islamic Family Law vis-à-vis its practice in Nigeria let alone

³² Ibid, at p. 177

³³ Ibid, at p. 173

³⁴ Tonja Khabir, *The Role of Islam in Childhood Marriage Case Study: Nigeria*, A Paper Presented at the 17th Annual Convention of the Global Awareness Society International, May 2008, San Francisco, CA, USA

³⁵ Ibid

the methodology to be employed in such a reform using the Shariah, but he only kept on speculating about reform. Further still, is he calling for the application of Judeo-Christian methodology of reforming religious law to meet secular ends as was the case in Christendom following protestant reformation?

Prof. M. T. Ladan³⁶ in one of his papers has highlighted child marriage and child betrothal as parts of the discriminatory, harmful and exploitative practices within the rudiments of the Child Rights Act.³⁷ He has also identified some of the challenges to non-passage of the Child Rights Act by some Northern States in Nigeria. He identifies non-reflection of local peculiarities that are cultural, customary or religious in character in the drafting processes of the Bill, citing child and forced marriages as an example.³⁸ In another publication edited by **Prof M. T. Ladan**,³⁹ the right to consent to marriage and to exercise option of puberty has been identified by the feminist as parts of women's right in Islamic law.⁴⁰ Yet, they inconsistently went further to brand “*early child/forced marriages*” as parts of the feminists so-called “harmful practices” affecting the rights of women and girl-children in Northern Nigeria.⁴¹ It is wondered, by what standard are such practices rendered harmful to the well-being of women and the girl-child in particular?

The Prof. M. T. Ladan has however, shun away from tying the feminist's legal questions surrounding child marriage in his discussion to the problems and challenges thereto

³⁶ Ladan, M. T. *The Child Rights Act, 2003 And The Challenges of Its Adoption By State Governments In The 19 Northern States*, A Paper Presented on 23rd July, 2007 at a One-day Interactive Forum for Sokoto State House of Assembly Legislators Organized by the Sokoto State Ministry of Women Affairs and UNICEF, held at Sokoto State House of Assembly, Sokoto.

³⁷ Ibid, at p. 5

³⁸ Ibid, at p. 11

³⁹ Ladan, M. T. (2005) *A Handbook on Sharia Implementation in Northern Nigeria: Women and Children's Rights Focus*, League of Democratic Women (LEADS- NIGERIA)

⁴⁰ Ibid, pp. 71-72

⁴¹ ibid, pp. 78-80

prevalent in Nigeria, especially the perspective under Islamic law and whether the issue of child marriage is among the obstacles to the non-acceptance of the Child Rights Act by Shariah practicing States in Northern Nigeria. Therefore, the author's call⁴² for reflecting positive socio-cultural and religious factors that seek to promote the best interest and welfare of the child is of no avail or rather remain a moot call as, as far as Islamic law is concerned, no dichotomy exists as to positive or negative socio-cultural and religious features in any elements of the law, i.e., so far as the Act initially seeks to outlaw child marriage, the standard remain the same – that Islamic law is opposed to the Child Rights Act in Nigeria.

Akin to the approach of Prof. M. T. Ladan but with profound Islamic motivation, **Dr. Bala Babaji**, in his paper titled "*Harmonizing the Child Rights Act 2003 With Cultural and Religious Values in Nigeria: A Muslim Perspective*",⁴³ had offered an articulated critique on the Nigerian *Child Rights Act 2003* particularly in terms of: (a) its conflict with the socio-religious background of Muslims in Nigeria; (b) its unconstitutionality as regards the breach of the requisite procedure to be employed in its enactment, i.e., breach of the principles established under section 12(3) of the 1999 Constitution; (c) its encroachment on the jurisdiction of the Sharia Court of Appeal through the introduction of Family Courts, etc. While he remained opposed to the onward prohibition of child marriage under the provisions of the CRA as being contra-Islamic and unacceptable by Muslims, he nevertheless failed to further assess the Western conspiracy behind the move for the abolition of child marriage especially among Muslims in Northern Nigeria. Quite

⁴² Ibid, at p. 17

⁴³ Babaji, B. (2005) Harmonizing the Child Rights Act 2003 With Cultural and Religious Values in Nigeria: A Muslim Perspective, *Journal of Islamic and Comparative Law*, Vol. 24, pp. 14-

still, he entertains the unfeasible view that the provisions of the CRA are harmonizable with that of Islamic law, when he alludes to the fundamental disparity inherent in the two systems of laws.

Additionally, certain pro-western minded Muslims in Nigeria like **D.O.S. Noibi**, in his book titled “*Islamic Perspectives (A Comprehensive Message)*”,⁴⁴ he dedicates a chapter on “*early marriage, education and social responsibilities – the Islamic Point of View*”; whereby without adequate empirical data, he orientally condemned the practice of Islamic child marriages especially in Northern Nigeria on the pretext of embracing modern secular education. He endeavored to employ sources of the Sharia to justify undertaking western secular education to the disregard of the rationale and moral justification of child marriage in Islamic law.

Furthermore, some pro-western feminist advocates in Nigeria like **Maryam Uwais**,⁴⁵ while writing on the compatibility of the Child Rights Act [CRA] with Islamic legal principles, she has touched on child marriage whereby an analysis on her remarks indicates that she is opposed to the practice of Islamic child marriage in Nigeria and consequently supportive of its abolition under the pretext of education and health while actively seeking to justify the pegging of minimum marriageable age using the standard of the sharia. To the disregard of the sharia-based criticisms leveled against the provisions of the CRA by Muslim scholars which are quite real, tangible and derogatory

⁴⁴ Noibi, D.O.S. (1988) *Islamic Perspectives (A Comprehensive Message)*, Shebiotimo Publications, Ijebu-Ode, Lagos –Nigeria

⁴⁵ **Maryam Uwais**, *Compatibility of the Child Rights Act with Islamic Legal Principles*, An Online Article Available at <http://telegraphng.com/2013/07/compatibility-of-the-child-rights-act-with-islamic-legal-principles/> accessed on the 4th September, 2013

to the socio-religious pursuit of Muslims in Nigeria, she turned a blind eye over the blemish content of the CRA while pressing for its acceptance and/or enforcement among Muslim population in Nigeria.

Equally, another Nigerian feminist advocate, **Ayesha Imam**, in an online publication titled “*Women, Muslim Laws and Human Rights in Nigeria*”⁴⁶ has discussed issues related to child marriage under Islamic law in Nigeria. In her open hostility against the reintroduction of sharia in Northern Nigeria, she adumbrated thus:

While the passing of the first Sharia Act in Zamfara State in November 1999, was clearly political opportunism, it sanctioned and encouraged both the growth and the expression of extremely conservative Islamism in much of northern Nigeria, often claiming to implement ‘Sharia’ by extra-legal means. In addition, there are a host of practices, with no legal basis at all, which are being imposed on society in the name of ‘sharianization’. These include the widespread imposition of dress codes on women, attempts to force women to sit at the back of public vehicles, and a midnight curfew in Gusau. Many of these are enforced by extra-legal groups of young men vigilantes - sometimes openly supported by the state government as in Zamfara, but sometimes with attempts to control and stop them from taking the law into their own hands, as in Kano state.⁴⁷

As it has been discussed elsewhere in this research work, these groups of the so-called women’s rights activists are being sponsored by the West to cause social disruption particularly in Northern Nigeria and the above remarks of Ayesha Imam, no doubt, lend credence to this assertion. Above all, her aggressive comments on the practice of Islamic child marriage vis-à-vis the exercise of the power of ijbar, is perhaps, highly reprehensible and further reinforces our considered view in chapter four of this work, that

⁴⁶ Ayesha Imam, *Women, Muslim Laws and Human Rights in Nigeria*, An online article under the auspices of the Africa Program of an NGO “Independent Research, Open Dialogue & Actionable Ideas”, available at: <http://www.wilsoncenter.org/publication/women-muslim-laws-and-human-rights-nigeria-0#> accessed on the 4th September, 2013

⁴⁷ Ibid

the feminists never cater for the interests and welfare of the girl-child nor her positive future as they advocate, but to dilute her Islamic moral upbringing and get her plunge into the dexterities of sexual immoralities as is common in the west today whereby sexual freelance is the social norm provided contraceptives is employed.

Moreover, Ayesha Imam herself is sternly concerned with the resentment of sex education by Muslims in Northern Nigeria and this correlates our view that the feminist are opposed to the idea of Islamic child marriage vis-à-vis the exercise of the power of *ijbar* simply because it defy the satisfaction of Western strategic interest of population control in the Muslim world especially in Northern Nigeria. Ayesha Imam's words are an expose on this conspiracy of the feminists:

This is having serious consequences for women's reproductive rights. For instance, sex education is being removed from school curricula. Attempts have been made to prevent non-governmental organizations from running sexuality education workshops (on family planning and reproductive health care, for example). The father's right to control the marriage of a never-married daughter (*ijbar*) is being re-asserted, and child marriage is being advocated again.⁴⁸

1.7 JUSTIFICATION/SIGNIFICANCE OF THE RESEARCH

The writer is of the view that the intended research is justifiable and of significance for it would be beneficial to all stakeholders to the social welfare of children in the society. Thus, the research would be very helpful, relevant and beneficial to Government in the formulation of law and policy on child rights in Nigeria; to Shariah/Area Courts' Judges in their application of Islamic Law in the resolution of issues of marriage guardianship (*ijbar*); to Lawyers in handling briefs on matrimonial causes relating to Islamic child

⁴⁸ Ibid

marriages; to parents and guardians in fostering and attaining happy and successful marriages of their children; families in maintaining filial ties; to the society in the reduction of rates of sexual immorality among young and teenage girls; etc.

1.8 ORGANIZATIONAL LAYOUT

This research work is structured into five chapters as follows:

Chapter One: primarily deals with the General Introduction identifying the Statement of the Research Problem(s), Aims and Objectives of the Research, Scope of the Research, Literature Review, Justification/Significance of the Research and Organizational Layout.

Chapter Two: provides overview on the concept of marriage under Islamic Law; its meaning, nature, scope, legality, objectives, classifications, essential requirements, matrimonial rights and obligations of spouses, etc.

Chapter Three: deals with the concept of marriage guardianship under Islamic law; and the chapter focuses on the requirement and role of matrimonial guardians (*wali*) and the issue of consent to marriage under Islamic (family) law.

Chapter Four: discusses and analyzed the concept of *ijbar* and its impact on child marriage in Islamic law. The chapter focuses on the peculiarities of the concept of *ijbar*, its cessation and limitations as well as the remedies and safeguard against improper exercise of the power of *ijbar* by parents and guardians. The chapter further examined and analysed Islamic position on marriageable age and its impact on the practice of child marriage; the impact of *ijbar* on minor's consent in marriage; an analysis on contemporary arguments for and against *ijbar vis-à-vis* the practice of child marriage; and

a cross analysis on the proponent's and opponent's views on child marriage vis-à-vis the concept of ijbar.

Chapter Five is the final chapter and it contains the summary of all the preceding chapters. It contains observations and recommendations and the concluding remarks on the work.

CHAPTER TWO

THE CONCEPT OF MARRIAGE UNDER ISLAMIC LAW

2.1 INTRODUCTION

This chapter discusses the concept of marriage generally, highlighting its nature and basic legal requirements. The chapter have also examined the significance, wisdom and objectives of marriage under Islamic law. However, the chapter aims at laying a foundation for the proper appraisal and analysis of the Islamic concept of marriage guardianship (*wilayat-un-nikah*) vis-à-vis the exercise of the power of *Ijbar* (compulsion) by certain classes of guardians over the marriage affairs of minors. The overall objective is to analyse in the succeeding chapters, the impact of *ijbar* (compulsion) on the practice of child marriage under Islamic law.

2.2 DEFINITION AND NATURE OF MARRIAGE IN ISLAMIC LAW

Marriage in its Arabic term “*Nikah*” or “*Zawaj*” literally refers to uniting (*aqd*), or intercourse (*mut’ah*); and in its legal sense, Muslim jurists regards *nikah* as an agreement resulting in the lawful sexual enjoyment between a man and a woman which is also termed by the jurists as *milkul mut’ah*, i.e., ownership of confined right of sexual enjoyment.⁴⁹ Al-Zuhaili explains that by virtue of the marriage, such right of enjoyment of the wife is restricted only to the husband whereas the enjoyment of the husband by the wife is subject only to it being shared among other co-wives of the husband.⁵⁰

⁴⁹ Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhi*, Dar al-Fikr, Damascus, Syria (1985, 2nd edn) Vol. 7, p. 29; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 6; Aliyu, I. A. (2000) *Marriage under the Sharia: its Position and Objectives*, Journal of Islamic and Comparative Law, Vol. 22, p. 14; El-Imairi, M. T. Personal Status in Islamic Law According to the Maliki System, Unpublished Manuscript, Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello University Zaria, p. 1

⁵⁰ Wahbah al-Zuhaili, op cit., Vol. 7, p. 29

In the book *al-Hedaya*, marriage is described thus: “*Nikah* in its primitive sense means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law, it implies a particular contract used for the purpose of legalizing generation.”⁵¹

By its nature, marriage is among the most basic principles of human civilization and is the first basis of the whole social structure.⁵² It is the central idea behind the Islamic family law. This is because, family is the basic unit of human society and the foundation of Islamic family is laid through marriage.⁵³ Therefore, marriage in Islamic law bears the nature of permanent filial relationship, it being of the nature of contract that cannot be made contingent on a future event. It cannot also be expressly entered into for a limited time because, as M. A. Abdur-Rahim has pointed out, if marriage were allowed for a limited period of time, it would fail to fulfil most of its essential purposes.⁵⁴

Furthermore, by its nature, marriage in Islamic law is one of the *muamalat* (transactions) aspects of the sharia which regulates civil life of Muslims. In the terminology of *Fiqh*, *muamalat* generally refers to contractual transactions or agreements to which the mutual consent of the parties is required. Thus, marriage is one of the contractual transactions that require the mutual consent of the spouses, it being the institution that governs family life in Islamic law.⁵⁵

⁵¹ Burhanuddin al-Marghinani, *Al-Hedaya*, translated into English from Persian rendering by Charles Hamilton, Kitab Bhavan, New Delhi ed. (1963) p. 25

⁵² Ali, Maulana Muhammad (nd) *The Religion of Islam*, S. Chand & Company Ltd., New Delhi, India, p. 602; Habibi, Syed Ahmad Moinuddin (1975) *Lectures on Muslim Law*, Allahabad Law Agency, Pakistan, p. 23

⁵³ Abdur-Rahim, M. A. (1958) *The Principles of Mohammedan Jurisprudence*, Lahore, p. 226; Habibi, S. A. M. (1975) *op cit.*, p. 23

⁵⁴ Abdur-Rahim, M. A. (1958) *op cit.*, p. 328

⁵⁵ Ali, M. M. *op cit.*, pp. 600-601

On the other hand, when seen from the religious angle, marriage in Islamic law is an *ibadat* (devotional act). The various *ahadith* quoted above on the significance of marriage lend credence to this position, i.e., it is provided in several hadith to the effect that whoever marries completes half his religion; that there is no monkery in Islam; that marriage is the *Sunnah* or way of the Holy Prophet (saw) and he who abstain from it is not from among his *ummah*; that the Almighty has undertaken to help three persons one of whom is he who marries with a view to secure his chastity;⁵⁶ that marriage is equal to jihad; etc.⁵⁷ All these Prophetic traditions points to the religious aspect of marriage. Moreover, Imam al-Ghazali (the famous Muslim jurist and philosopher), regards marriage as a means “of attaining nearness to God.”⁵⁸

Some Muslim scholars view marriage in Islamic law as an embodiment of the elements of both civil (*muamalat*) and sacrament (*ibadat*). In supporting the view that marriage in Islamic law is not purely a civil contract but it also bears a feature of sacrament, Syed Khalid Rashid has identified certain reasons why marriage cannot be regarded as merely a civil contract. This is because, unlike civil contracts, marriage cannot be made contingent on a future event. So also, unlike civil contracts, marriage according to the Sunni sect cannot be made for a limited period of time.⁵⁹ With these factors in consideration, it would be improper to regard an Islamic marriage as a purely civil contract.

⁵⁶ See Badrul Zawjain and Uthman ibn Abi Bakr (nd) *Bughyatul Muslimin wa Kafayatul Wa'izin wa al-Muta'azzin*, Al-Maktabah al-Sha'abiyah, Beirut, Lebanon, p. 27-39

⁵⁷ Syed Khalid Rashid (1979) *Muslim Law*, Eastern Book Company, Lucknow, p. 55

⁵⁸ Quoted in Rashid, S. K. *op cit.*, p. 56

⁵⁹ Rashid, S. K. *op cit.*, p. 56

Similarly, the well-known Islamic jurist M. A. Abdur-Rahim was of the view that “The Muhammadan jurists regards the institution of marriage as partaking both of the nature of *ibadat* or devotional acts and *muamalat* or dealings among men. It is founded on contract for which the consent of both parties is essential.”⁶⁰ It may therefore be understood that under Islamic law, marriage by its nature involves elements of *ibadat* (devotional act) which bears religious obligation between man and his creature - the Almighty Allah on the one hand, and *muamalat* (contractual transaction) which in essence, carries civil obligation between man and his fellow beings.⁶¹

2.3 SIGNIFICANCE OF MARRIAGE IN ISLAMIC LAW

The importance with which marriage under Islamic law is best known is that it is part of the *Sunnah* (established way or teachings) of the Holy Prophet (saw). It is stated in a Hadith that the Prophet (saw) lays emphasis on getting married and that on one occasion, the Prophet (saw) was reported to have said in connexion with certain people who plan of fasting in the daytime and keeping awake during the night busy with acts of worship while keeping away from marriage. The Hadith provides thus: “I keep fast and I break it, and I pray and I sleep, and I marry, so whoever inclines to any other way than my *sunnah*, he is not of me.”⁶²

In another Hadith, the significance of marriage is emphasized thus: “O assembly of young people! Whoever of you has a means to support a wife, he should get married, for marriage is the best means of keeping the looks cast down and guarding the chastity; and

⁶⁰ Abdur-Rahim, M. A. *op cit.*, p. 327

⁶¹ See Rashid, S. K. *op cit.*, p. 53

⁶² Sahih al-Bukhari, Chapter 67, Hadith No. 1; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 7; see also Ali, M. M. *op cit.*, p. 602

he who has not the means, let him keep fast, for this will act as castration.”⁶³ It may therefore be understood from these *ahadith* that the practice whereby a person withdraws from socialization by shunning away from marriage is a disapproved act under the sharia. In fact, the Prophet (saw) has emphatically forbid celibacy in a hadith to the effect that there is no monasticism in Islam.⁶⁴

Furthermore, in another hadith, the significance of marriage is portrayed as follows: “the man who marries perfects half his religion ...” This indicates the degree of importance with which marriage is endowed in Islamic law, to the extent that it serves as a fulfilment of half of a Muslim’s religious duties towards Allah. Above all, it is stated in the book *Mishkat al-Masabih* that “matrimonial alliances increase friendship more than anything else.”⁶⁵ Likewise, it is through marriage that the paternity of children is established and it is as well the basis upon which consanguinity is built and also the basis upon which affinity across different families or tribes is founded.⁶⁶

2.4 LEGALITY OF MARRIAGE UNDER ISLAMIC LAW

The legality of marriage is a matter established by the provisions of the Holy Qur’an and that of Prophetic hadith as well as the consensus of Muslim jurists.⁶⁷ The Holy Qur’an in numerous verses has enjoined Muslims to marry and these verses among others include

⁶³ Sahih al-Bukhari, Chapter 67, Hadith No. 2; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 7; see also Ali, M. M. *op cit.*, pp. 602-603

⁶⁴ Sahih al-Bukhari, Chapter 67, Hadith No. 8

⁶⁵ *Mishkat al-Masabih*, Chapter 13, Hadith No. 1; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 7; see also Ali, M. M. *op cit.*, p. 603

⁶⁶ Abdur-Rahim, M. A. *op cit.*, p. 326; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 7

⁶⁷ Wahbah al-Zuhaili, *op cit.*, Vol. 7, p. 31

the provisions of chapters 4:3,⁶⁸ 24:32-33,⁶⁹ 13:38,⁷⁰ 16:72⁷¹ respectively. The various Prophetic hadith that establishes the legality of marriage has also been considered above while discussing the significance of marriage under Islamic law.

Additionally, Muslim jurists have generally classified the legal position of marriage into the five basic legal criteria in Islamic law, i.e., *wajib* (obligatory), *mubah* (supererogatory), *mandoub* (recommended), *makhrouh* (objectionable), and *haram* (prohibited).⁷² These various juristic classifications of the legal position of marriage have been discussed below.

2.4.1 *Wajib* (Compulsory)

According to Imams Abu Hanifah, Ahmad ibn Hanbal and Malik ibn Anas, marriage is obligatory for certain categories of individuals and this is in circumstances where a person is capable of it in terms of wealth and for fear of illicit relations.⁷³ To the Maliki

⁶⁸ *And if you fear that you shall not be able to deal justly with the orphan-girls, then marry (other) women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice.*

⁶⁹ *And marry those among you who are single (i.e., a man who has no wife and the woman who has no husband) and (also marry) the Salihun (pious, fit and capable ones) of your (male) slaves and maid-servants (female slaves). If they be poor, Allah will enrich them out of His Bounty. And Allah is All-sufficient for His creatures' needs, All-knower (about the state of the people). And let those who find not the financial means for marriage keep themselves chaste, until Allah enriches them with His Bounty...*

⁷⁰ *And indeed We sent Messengers before you (O Muhammad), and made for them wives and offspring...*

⁷¹ *And Allah has made for you Azwaj (mates or wives) of your own kind, and has made for you, from your wives, sons and grandsons, and has bestowed on you good provision...*

⁷² Al-Jaziri, A. *Al-Fiqh ala al-Madhahib al-Arba'ah*, Dar al-Fajir, Cairo, Vol. 3, pp. 268-269; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12

⁷³ Doi, I. A and Clarke, A. (2008) *Shari'ah: Islamic Law*, Ta-Ha Publishers, London, pp. 200-201; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12

School, it is obligatory (*fard*) for a Muslim to get married even though he may not be in a position to earn his living, on the conditions that:

- a) He fears that by not marrying, he will commit *zina*;
- b) He is unable to fast in order to control his sexual passion, or where he can fast but his fasting does not avail him of sexual desire;
- c) He does not have a maid;⁷⁴
- d) So also, for the woman, marriage is also obligatory on her if she is unable to earn her living or if she fears illicit relations.⁷⁵

It may be observed that the Maliki point of view emphasizes more on the protection of morals to the extent that in taking the view that marriage is obligatory, they use control of sexual desire and fear of illicit relations as the yardstick notwithstanding whether one is able to earn a livelihood. Similarly, the Hanafi School considers marriage obligatory subject to the following four conditions:

- a) If a person is under a reasonable belief that he will commit *zina* if he does not marry;
- b) If a person is unable to fast, or where one is able to fast but the fasting does not avert his sexual desire;
- c) If he does not have or cannot possess a slave woman;
- d) If he is able to pay the dower and is capable of earning a living.⁷⁶

⁷⁴ Ibid

⁷⁵ Mawahib al-Jalil, Vol. 2, p. 304 cited in El-Imairi, M. T. op cit., pp. 3-4; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12

⁷⁶ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Doi, I. A and Clarke, A. (2008) op cit., pp. 201-202; El-Imairi, M. T. op cit., pp. 3-5

To the Zahiri School, marriage is obligatory in view of the literal interpretation of the injunctions of the Qur'an and Sunnah on marriage. It is stated by Al-Sarkhasi in *al-Mabsud* that the Zahiri opinion relies on a hadith whereby it was reported that the Prophet (saw) has once said to Ukaf ibn Khalid, are you married and he replied no and the Prophet (saw) said to him: "get married because you are among the companions of Satan". In another narration, it is said: "if you are from among the Christian monks, then be with them but if you are with us, then get married because a *muhajir* from my *ummah* is one who dies leaving a family."⁷⁷

It is explained further by Muslim jurists that getting preserved from the evils of *zina* (adultery and fornication) is obligatory and this cannot be attained without marriage;⁷⁸ and as a matter of principle, any obligatory act that cannot be accomplished unless accompanied with or through something, such a thing is also compulsory. That is to say, for one to protect himself from *zina* which is obligatory to do so, whatever can aid to accomplish this (i.e., marriage) is also obligatory.⁷⁹

2.4.2 Mandoub (Recommended or Sunnah)

The most considered view by Muslim jurists is that marriage in its origin is deemed to be *mandoub* (recommended).⁸⁰ Ibn Juzayy al-Kalbi has stated that in general terms, marriage is recommended but the Zahiriyyah considered it obligatory. In his critique to the Zahiriyyah who considers marriage obligatory, Al-Sarkhasi has argued that among the evidence that marriage is Sunnah is the fact that the Prophet (saw) has circumscribed

⁷⁷ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Al-Sarkhasi, *al-Mabsud*, Vol. 4, p. 193

⁷⁸ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Aliyu, I. A. op cit., p. 17

⁷⁹ Ibid

⁸⁰ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Al-Sarkhasi, *al-Mabsud*, Vol. 4, p. 193

explicitly the pillars of Islam from among the obligatory ones without specifying marriage to be among them and that among the Companions of the Prophet (saw), there are those who did not marry at all but by doing so, they have not been disapproved or orchestrated by the Prophet (saw).

It was further pointed out by Al-Sarkhasi that the way marriage prevents a person from getting involved in *zina*, fasting also does similar thing as it has been stated in a prophetic tradition to the effect that “O assembly of young people, whoever is able to marry should marry *and whoever is unable should keep fast*. That in the final analysis, marriage is *mandub* (recommended), it can only be understood as obligatory for those whose souls have been inclined to women to the extent that they cannot be contented without them.⁸¹

It is recommended in respect of a person capable of it in terms of wealth, and has sexual desire but can control himself, i.e., he has no fear of getting embarked into illicit sexual relations. It is also recommended in respect of a person who desires having children.⁸²

2.4.3 Mubah (Permissible or Nafil)

Marriage is supererogatory (*mubah*) for a man who can control himself and does not hope for offspring and marriage will not prevent him from performing his religious obligations. Imam Shafii ordinarily considered marriage to be permissible.⁸³

2.4.4 Makhruh (Disapproved/Objectionable)

It is *makhrouh* (objectionable or disapproved) in the case of a person who has no sexual desire and does not thereby fear for himself commission of illicit sexual relation but has a

⁸¹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Al-Sarkhasi, al-Mabsud, Vol. 4, p. 193

⁸² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Doi, I. A and Clarke, A. (2008) *op cit.*, pp. 200-201; El-Imairi, M. T. *op cit.*, pp. 3-5

⁸³ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Doi, I. A and Clarke, A. (2008) *op cit.*, p. 200; El-Imairi, M. T. *op cit.*, pp. 4-5; Aliyu, I. A. *op cit.*, p. 14

fear of not being able to fulfill marital obligations. That is to say, marriage is disapproved in respect of a person who possesses no sexual desire at all or a person who has no love for children or one who has the conviction that by virtue of marriage, he may slack in remitting his religious obligations.⁸⁴ This is to preserve the sanctity of legal obligations arising out of the bond of marriage, i.e., in order to avert a situation whereby one of the spouses is obliged to remain in perpetual depravity as regards the enjoyment of some of the fruits of marriage due to the failure or neglect of the other spouse; then, it is conceived that the best thing in such circumstances is to refrain from getting married.

2.4.5 *Haram* (Forbidden)

It takes the legal position of being *haram* (forbidden) when it is in respect of a person who is incapable of it in terms of wealth and who has no fear of getting involved in illicit sexual relations. That is to say, it is prohibited to marry in circumstances where a person does not possess the means to maintain his wife or where a person suffers from a serious illness or contagious disease that may affect the wife and his children.⁸⁵

2.5 OBJECTIVES AND LEGAL EFFECTS OF MARRIAGE UNDER ISLAMIC LAW

The institution of Islamic marriage is not an empty venture without certain objectives in focus. It is worthwhile that it is undertaken to satisfy some legitimate purposes established by the sharia. These objectives have been expounded by Muslim jurists from the texts of the law. The famous Islamic writer Ameer Ali has stated that, “marriage is an institution ordained for the protection of society, and in order that human beings may

⁸⁴ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Doi, I. A and Clarke, A. (2008) *op cit.*, pp. 200-201; El-Imairi, M. T. *op cit.*, pp. 4-5; Aliyu, I. A. *op cit.*, p. 14

⁸⁵ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 10-12; Doi, I. A and Clarke, A. (2008) *op cit.*, pp. 200-201; Aliyu, I. A. *op cit.*, p. 14

guard themselves from foulness and unchastity.”⁸⁶ So also, Baillie while relying upon the texts of the *Kanzul Daqa’iq*, the *Kifayah* and the *Inayah* had summarised some of the objectives of marriage as follows: “marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man.”⁸⁷

M. A. Abdur-Rahim has also concisely put forward some of the objectives of marriage in Islamic law, and to quote his words, he stated thus:

The Mohammedan law has ordained the institution of marriage sanctioning thereby sexual relations between two members of the opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning livelihood.⁸⁸

In his description of marriage under Islamic law, M. T. El-Imairi, stated that marriage “is an institution having certain rules and regulations whereby a male and a female are permitted sexual relations for finding comfort and happiness within themselves and for the procreation of children with a view to the preservation of human species and their true genealogy”.⁸⁹

From the various discussions of Muslim scholars that have been considered above, at least, the main objectives of marriage from the Islamic point of view may be distilled as follows:

⁸⁶ Syed Ameer Ali (1929) *Mohammedan Law*, Students’ 7th ed., p. 97 cited in Rashid, S. K. *op cit.*, p. 53

⁸⁷ Baillie, Neil B. E. (1865) *Digest of Mohammedan Law*, London, p. 4 cited in Rashid, S. K. *op cit.*, p. 54; See also Mulla, Dinshah Fardunji (1955) *Principles of Mohammedan Law*, 18th ed. by M. Hidayatullah and Arshad Hidayatullah, N. M. Pripathi Private Ltd., Bombay, p. 282

⁸⁸ Abdur-Rahim, M. A. *op cit.*, p. 327

⁸⁹ El-Imairi, M. T. *op cit.*, p. 1

2.5.1 Protection of Chastity and Morality:

One of the primary purposes of marriage is extinguishing sexual passion; it preserves one's soul from the evils of *zina* whereby the attainment of this is a great moral achievement. Umar (RA) was reported to have said: "any youth that marries has preserved 2/3 of his religion, let him fear Allah regarding the remaining 1/3".⁹⁰ In fact, the attainment of sexual morality is the focal point of considering marriage as an obligatory act by some Muslim jurists under Islamic law because; satisfaction of sexual passion through marriage safeguards the chastity of man.⁹¹

This major objective of marriage is even referred to by several verses of the Holy Qur'an and also the provisions of several *ahadith* of the Prophet (saw). In fact, protected, respectable and chaste women as against those predisposed to illicit affairs are the precursors of moral preservation in marriage and in line with this, the Holy Qur'an enjoins that:

lawful to you in marriage are chaste women from the believers and chaste women from those who were given the Scripture (Jews and Christians) before your time when you have given them their due *Mahr* (bridal-money given by the husband to the wife at the time of marriage), desiring chastity (i.e., taking them in legal wedlock) not committing illegal sexual intercourse, nor taking them as girl-friends."⁹²

Similarly, the provisions of Qur'an 4:25 lends credence to moral preservation in marriage as against illicit sexual indulgence, it provides thus: "... *so marry them with their family's*

⁹⁰ Al-Sarkhasi, al-Mabsud, Vol. 4, p. 194; Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 6

⁹¹ Aliyu, I. A. (2000) *Marriage under the Sharia: its Position and Objectives*, Journal of Islamic and Comparative Law, Vol. 22, p. 14

⁹² Qur'an 5:5, culled from al-Hilali, M. T. and Khan, M. M. *Translation of the Meanings of the Noble Qur'an in the English Language*, King Fahd Glorious Qur'an Printing Complex, Madinah, K.S.A.

*permission and give them their marriage portions decently [so that they live] a protected life [in marriage], not indulging in illicit affairs, nor having secret lovers.”*⁹³

Moreover, to protect moral excellence, husband and wife are described by the Qur’an as being garment to each-other, Qur’an 2:187 provides: “... *they are garments for you and you are garments for them.*”⁹⁴ A husband and wife must protect each other from harm just like a garment protects the body from any harm and discomfort. A husband and wife who fulfill each other’s sexual needs will protect each other from fornication and adultery, just like a garment protects the body from harm. Therefore, scholars agree that this verse confirms that both husband and wife must fulfill each other’s sexual needs. It is the nature of garments that they bring comfort, dignity, and keep one from indecency and harm. A husband and wife must exercise their rights within the Qur’anic paradigm of love and mercy.⁹⁵

It is also evident from various Prophetic traditions that marriage averts the eyes, assures more relief and virtuousness and is above all, a devotional act. The Prophet (saw) was reported to have addressed the assembly young men thus: “*O, the assembly of young men! Whoever among you has the means let him get married, for it averts the eyes and assures more relief and virtuousness.*”⁹⁶ It is said by I. A. Aliyu that for this reasons, sexual intercourse through marriage is regarded by the Shariah as an act of devotion (*ibadah*) for which the spouses are rewarded.

⁹³ Culled from Thomas Ballantine Irving, Khurshid Ahmad and Muhammad Manazir Ahsan (1979) *The Qur’an: Basic Teachings*, The Islamic Foundation, United Kingdom, p. 198

⁹⁴ Ibid, p. 199

⁹⁵ Kevin el-Karim, loc cit., p. p. 73

⁹⁶ Reported by Bukhari and Muslim

These position is on the basis of the hadith narrated by Muslim on the authority of Abu Dharr (RA) that the Prophet (saw) was reported to have said, “... *and in the sexual act of each of you there is a charity*”. And when the Companions became surprised and asked him: “O Messenger of Allah! When one of us fulfills his sexual desire, we will have some reward for that?” he replied, “Do you (not) think that were he to act upon it unlawfully, he would be sinning? Likewise, if he has acted upon it lawfully, he will have a reward.”⁹⁷ This establishes the legality of sexual satisfaction through marriage within the limits set by the sharia on the one hand, as well as the disapproval of suppressing sexual passion for whatever reason in such a way that may render one likely to indulge in illicit affairs on the other hand.⁹⁸

2.5.2 The Preservation and Continuity of Human Race:

The continuity of human species rest upon procreation which is not feasible except through the sexual union of man and a woman, of which the legal umbrella for it as far as Islamic law is concerned, is the institution of marriage. The Holy Qur’an has explicitly refers to this in the following terms: “*Mankind, heed your Lord who has created you from a single soul, and created its mate from it, and propagated many men and women from them both.*”⁹⁹ The Al-mighty made the entire humankind to originate from a single soul (Adam) thereafter its mate (Eve) was created and their progeny spread to became the source of humanity under the aegis of marital union. The Holy Qur’an further buttress the

⁹⁷ Reported in An-Nawai’s Fourty Hadith, translated by Ibrahim, E. and Daview, D. J. (1977) The Holy Qur’an Publishing House, Syria, pp. 84-85 cited in Aliyu, I. A. (2000) *Marriage under the Sharia: its Position and Objectives*, Journal of Islamic and Comparative Law, Vol. 22, p. 15

⁹⁸ Maududi, A. A. (1983) *The Laws of Marriage and Divorce in Islam*, Islam Book Publishers, Safat, Kuwait, p. 7 cited in Aliyu, I. A. op cit., p. 15

⁹⁹ Qur’an 4:1

functionality of conjugal union towards procreation: “*Your wives are tilt for you, so go to your tilt, when or how you will ...*”¹⁰⁰

2.5.3 Sustenance of Mental Peace, Mutual Love and Affection:

Marriage serves as a flat form for spouses to enjoy the company of each-other in a state of mental peace, harmony, love and affection whereby solace and tranquility would descend their matrimonial life. In respect of this objective of marriage, the Qur’an command to “*live together in excellence, love and mercy*”, and in the words of the Prophet (saw): “*The most perfect of believers are those most perfect of character; and the best of you are the best of you to your spouses.*”¹⁰¹ It may be understood from the provisions of these Qur’anic verse and Prophetic hadith that excellent inter-personal relationship is the bedrock of marital congress and that the attainment of this character is among the best Islamic social virtues.

Moreover, ideal matrimonial relationship as per the teachings of the sharia has been described by the Holy Qur’an in the following terms: “*Among His signs is [the fact] that he has created spouses for you from among yourselves so that you may console yourselves with them. He has planted affection and mercy between you; in that are signs for people who reflect.*”¹⁰²

In another similar verse, the Holy Qur’an provides: “*He is the One Who has created you (all) from a single soul, and made its mate from it, that he might find comfort with her.*”¹⁰³

This verse, according to Maududi, has described this objective in a tone that suggests that

¹⁰⁰ Qur’an 2:223

¹⁰¹ Kevin el-Karim, *Response to the lies and distortions of christian missionaries about the position of women in islam*, p. 73, available online at: www.answering-christianity.com

¹⁰² Qur’an 30:21

¹⁰³ Qur’an 7:189

in the eyes of Islam, the very concept of marriage is the concept of love and compassion. The spouses have been created that they may enjoy peace in each other's company.¹⁰⁴

From the foregoing discussion, it may be understood that the legal effects flowing from a valid marriage may encompass the following:

1. Sexual intercourse between the two spouses becomes lawful;
2. It makes the paternity of children born of the union legitimate;
3. The wife becomes entitled to her dower;
4. The wife becomes entitled to maintenance;
5. The husband becomes entitled to restrain the wife's movement in a reasonable manner;
6. There is established a mutual right of inheritance between the two spouses;
7. The prohibition regarding marriage due to the rules of affinity comes into operation;
8. The wife is obliged to observe *Iddah* (waiting period) after the dissolution of her marriage or upon the death of her husband before she can legally remarry;
9. Stipulations entered into, either during the formation of the marriage or subsequently, becomes enforceable provided they within the ambit of the sharia;
10. So also, in Islamic law unlike in English law, neither the husband nor the wife acquires interest in the property of one another.¹⁰⁵

¹⁰⁴ Maududi, A. A. (1983) *The Laws of Marriage and Divorce in Islam*, Islam Book Publishers, Safat, Kuwait, pp. 9-10 cited in Aliyu, I. A. *op cit.*, p. 17

¹⁰⁵ Abd al-Ati, H. *op cit.*, p. 146; Rashid, S. K. *op cit.*, p. 57-58; Fyzee, Asaf Ali Asghar (1964, 3rd ed.) *Outlines of Mohammedan Law*, Oxford, p. 111; Baillie, Neil B. E. (1865) *Digest of Mohammedan Law*, London, p. 13; Habibi, S. A. M. *op cit.*, p. 23

It may be noted that some scholars like M. T. El-Imairi considered some aspects of the legal effects of marriage outlined above as parts of the rights of Allah incumbent upon spouses in marriage. That is to say, in his observation, M. T. El-Imairi classified prohibitions of affinity, inheritance, *iddah* and paternity of children as parts of the rights of Allah accruing upon marriage.¹⁰⁶ By any token, such rights or legal ordainment of the Sharia does not come into being unless by virtue of a valid marriage contract and should therefore be seen as the legal effects of marriage.

2.6 ELEMENTS AND FORMALITIES OF MARRIAGE IN ISLAMIC LAW

It is noteworthy that one of the most distinguishing features of Islamic law marriages is that it requires no irksome formalities, it would thus be constituted without the requirement of any ceremony, and neither does it require a special rite nor officiating priest.¹⁰⁷ Nevertheless, for there to be a valid marriage contract, the law requires the presence of the following elements:

2.6.1 *Sigha* (Formula):

This consists of offer (*ijab*) on the part of one party to the marriage and acceptance (*Qabul*) by the other party at the appointed venue (*majlis*) using the appropriate words *nakahtu* or *zawwajtu* or any other words that properly expresses the intention of marriage in the language understood by the parties. It can be expressed by the parties themselves or by their agents. In case of legal incompetency, such as minority or unsoundness of mind,

¹⁰⁶ El-Imairi, M. T. *op cit.*, p. 98

¹⁰⁷ Fyzee, Asaf Ali Asghar (1964, 3rd ed.) *Outlines of Mohammedan Law*, Oxford, p. 88; Abdur-Rahim, M. A. (1958) *op cit.*, p. 328-329; Rashid, S. K. *op cit.*, p. 66

the guardians may validly execute these formalities of marriage contract on behalf of their wards.¹⁰⁸

At the time of its formation (and even thereafter), certain conditions or stipulations by either party to the marriage may be entered into provided that such conditions are legal, reasonable and not opposed to the spirit of Islamic law. In cases where an illegal and unreasonable condition is appended to a marriage contract, the condition alone and not the marriage itself will be treated as invalid.¹⁰⁹

2.6.2 Dower (*Sadaq*):

Sadaq or *Mahr* refers to the dower which a prospective husband is required by law to offer to the wife, it being according to juristic consensus, one of the essential elements of validity to contract of marriage in Islamic law.¹¹⁰ The legal obligation of payment of dower is referred to by several verses of the Holy Qur'an and the *Sunnah* of the Prophet (saw).¹¹¹ The subject matter of dower can be anything which qualifies as property (*maal*) under the sharia, including but not limited to a handful of dates, a pair of shoes, husband's services rendered to the guardian of the wife, teaching Qur'an to the wife, etc. As to the minimum and maximum amount of dower, the Hanafi School regards 10 Dirhams as the minimum amount of dower while the Maliki School consider 3 Dirhams

¹⁰⁸ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 22-27; Fyzee, A. A. A. *op cit.*, p. 88; Rashid, S. K. *op cit.*, p. 56

¹⁰⁹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 22-27; Rashid, S. K. *op cit.*, pp. 58-60

¹¹⁰ El-Imairi, M. T. *op cit.*, p. 29

¹¹¹ See Qur'an 4:4 which provides: "And give the wife dower as a free gift..."; Qur'an 4:24 which provides: "except for those prohibited, all women are lawful for you provided you seek them with your property and give them their dowers as appointed ..."; Qur'an 5:6 which provides: "lawful unto you in marriage are not only chaste women who are believers, but chaste women among the people of the book revealed before your time when you give them their due dowers and desire chastity, not lewdness nor secret intrigues ...".

as its minimum. Shafii and the Shia did not agree to anything as the minimum amount of dower. The Sunni Schools do not limit the maximum amount of dower but among some sects of the Shia, there is a tendency not to stipulate for a sum higher than the maximum fixed by the Prophet for his favourite daughter Fatima (RA), i.e., 500 Dirhams.¹¹²

Unlike the critics of dower who sees it as selling the wife or her personality, the Islamic concept of dower is never equivalent to bride price under any custom nor purchase price or consideration as in any other civil contracts. In fact, the famous Muslim scholar M. A. Abdur-Rahim on the basis of *al-Hedaya* has precisely described the status of *sadaq* in the following terms: “it is either a sum of money or other form of property to which the wife becomes entitled by marriage ... it is an obligation imposed by law on the husband as a mark of respect for the wife.”¹¹³ Similarly, Baillie had also captured the proper description or status of dower in Islamic law as he said:

Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman.¹¹⁴

Dower according to the time when it is payable, is broadly categorized into two kinds, namely: (i) specified (*Mahr al-Muthamma*) and (ii) unspecified (*Mahr al-Mithl*). The specified dower is also further divided into: (a) prompt dower (*Mu'ajjal*), and (b) deferred dower (*Muwajjal*). The specified dower is that which its amount has been settled or determined by the parties at the time of the marriage or afterwards. Prompt dower is

¹¹² Rashid, S. K. *op cit.*, p. 81; Habibi, S. A. M. (1975), *op cit.*, pp. 37-38

¹¹³ Abdur-Rahim, M. A. *op cit.*, p. 334

¹¹⁴ Baillie, Baillie, Neil B. E. (1865) *Digest of Mohammedan Law*, London, p. 91 cited in Rashid, S. K. (1979), *op cit.*, p. 77

payable on demand whereas deferred dower is payable on the dissolution of the marriage by death or divorce.¹¹⁵

Where the bridegroom is a minor, his father may settle the amount of dower. However, the Hanafi School maintained that the father is not personally liable for the dower but the Shia are of the view that a father will be so liable. As regards marrying off a minor female with a dower lesser than that of her equal (*mahr al-mithl*), Shafii, Dawud Zahiri, Ibn Hazm, Muhammad and Abu Yusuf held the view that it is not permitted of a father to marry off his female ward with a dower lesser than that of her equal and where he does so, the marriage would not be binding on her. But Abu Hanifa holds that it is allowed for a father to contract the marriage of his minor daughter with a lesser *sadaq* only that it is not permitted of other guardians to do so.¹¹⁶

The unspecified dower on the other hand, is that which has not been fixed at the time of the marriage or thereafter and by the time its settlement becomes due, it is to be determined with reference to the social position of the wife's family and her own personal qualifications, e.g., regard must be had to the amounts of dower fixed in case of the wife's sisters or paternal aunts, and according to *al-Hedaya*, accounts must also be taken of the wife's age, beauty, intellect and virtue.¹¹⁷

2.6.3 Marriage Guardian (*Wali*):

A marriage guardian is a person authorized by law to make a valid contract of marriage of a minor or person of unsound mind. It is one of the constitutive elements of marriage contract although there exist divergent juristic opinion as to whether the approval or

¹¹⁵ Rashid, S. K. *op cit.*, pp. 79-80

¹¹⁶ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 107

¹¹⁷ Ibid

consent of a marriage guardian is of fundamental validity to the marriage or not. This sub-unit has been discussed in detail in the subsequent chapter.

2.6.4 Witnesses (*Shuhud*):

The presence of (at least two) witnesses to the formation of a marriage is a necessary ingredient of a valid marriage under Islamic law. Two respectable witnesses are required in witnessing a marriage and the essence of having witnesses is to attest that a marriage is contracted between the man and the woman. In the absence of witnesses, a husband is forbidden to consummate the marriage, otherwise it becomes void. A woman's marriage guardian does not form part of the witnesses as the Prophet (saw) has said in a famous hadith on the subject: "*there is no marriage except with the permission of guardian and payment of dower and two reliable witnesses*".¹¹⁸

But where the parties are Shiite, no witnesses are required. According to the Hanafi School, it is a requirement of essential validity that marriage proposal and its acceptance must be witnessed by two qualified witnesses; otherwise the marriage would be invalid. To the Maliki School, the presence of witnesses is required only for the sake of publicity.¹¹⁹

2.6.5 The Contracting Parties (*Mahal*):

This refers to the substratum of the marriage contract or the parties intending to get married who are by law, required to be competent and free from any form of legal prohibition that may permanently or temporarily hinder their right to enter into marital relation with one another. The respective grounds rendering persons prohibited to marry

¹¹⁸ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, p. 37; Mahmud, A. B. op cit., p. 12

¹¹⁹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 37-39; Abdur-Rahim, M. A. (1958) op cit., p. 328-329

are due to the close acquaintance between them arising from consanguinity, affinity and fosterage. Persons so prohibited from intermarrying are called *muhrim*.¹²⁰

The legal prohibitions of a permanent nature on the grounds of consanguinity is governed by the provisions of the Holy Qur'an which states: "*Prohibited to you (for marriage) are your mother's, daughters, sisters father's sisters, mother's sisters, brother's daughters, sister's daughters, ...*".¹²¹ This concerns restriction placed on a man not to marry any: (a) female ascendant like his mother or grandmothers how high so-ever (b) female descendants like his daughter and the daughter's offspring how low so-ever (c) one's parent's descendants like his sisters and their offspring how low so-ever (d) one's grandparent's descendants to the first degree like paternal and maternal aunts.¹²²

As regards prohibitions on the ground of affinity, it is governed by the provisions of the Holy Qur'an which states that: "*Prohibited to you ... your wives' mothers; your step daughters under your guardianship, born of your wives to whom you have gone in, no prohibition if you have not gone in; those who have been wives of your sons preceding from your loins ...*"¹²³ This is to the effect that a person is prohibited permanently from marrying his (a) wife's ascendants like her mother or grandmother of both paternal and maternal side how high so-ever whether that marriage is consummated or not (b) his consummated wife's descendants, i.e., the wife's daughters and their offspring how low so-ever. Here, it is noteworthy that the general rule is that the mere marriage contract of a daughter prohibits permanently the marriage of her mother, while it is only the

¹²⁰ Mahmud, A. B. op cit., p. 11

¹²¹ Qur'an 4:23

¹²² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 46-58; Abdur-Rahim, M. A. (1958) *op cit.*, p. 329; El-Imairi, M. T. op cit., pp. 46-47

¹²³ Qur'an 4:23

consummation of marriage of the mother which prohibits her daughter (c) his descendant's wife, i.e., the wife of his son or son's son or the wife of his daughter's son how low so-ever whether the marriage has been consummated or not (d) the wife of the father or grandfather how high so-ever whether paternal or maternal side.¹²⁴

As to permanent prohibitions on grounds of fosterage, the Holy Qur'an provides to the effect that: "*Prohibited to you ... are your foster mothers who gave you suck, foster sisters ...*"¹²⁵ And, generally speaking, persons prohibited by virtue of fosterage are the same with those covered by consanguinity.¹²⁶

Furthermore, there are also certain marriage prohibitions of a temporary nature and these includes marrying a woman that is already married, marrying a woman during *iddah*, joining of two sisters together, (re)marrying a triply divorced woman without observing the special rules and restrictions placed in this regard, marrying more than four wives, marrying a woman who does not believe in a revealed religion (i.e., difference of religion), marrying during *Ihram*, marrying an adulterer/adulteress, marrying a woman with whom *li'an* (mutual imprecation) have been undertaken, etc.¹²⁷

2.7

2.8 CLASSIFICATION OF MARRIAGE IN ISLAMIC LAW

¹²⁴ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 46-58; Abdur-Rahim, M. A. (1958) *op cit.*, p. 329; El-Imairi, M. T. *op cit.*, pp. 46-47

¹²⁵ Qur'an 4:23

¹²⁶ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 46-58; Abdur-Rahim, M. A. (1958) *op cit.*, p. 329; El-Imairi, M. T. *op cit.*, pp. 46-47

¹²⁷ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 58-73; Abdur-Rahim, M. A. (1958) *op cit.*, p. 329; El-Imairi, M. T. *op cit.*, pp. 46-47

A marriage under Islamic law and as per the Sunni perspective, may be valid (*sahih*), void (*batil*) and irregular (*fasid*). But to the Shiite sect, they do not recognize any distinction between regular and void marriages; to them, a marriage may either be valid or void. A valid (*sahih*) marriage is one which conforms in all respect with the legal requirements and without either party being suffering from a particular kind of prohibition due to affinity, consanguinity or fosterage.¹²⁸

A void (*batil*) marriage is one which is unlawful and has no legal results in view of the parties being affected by the rules of blood relationship, affinity or fosterage. So also, a marriage is void if it is contracted with the wife of another person; remarriage with a wife triply divorced without observing the prescribed rules and procedure set for this occasion; etc., such a marriage will be treated as if it was never contracted and thus no legal effects will flow from it.¹²⁹

An irregular (*fasid*) marriage on the other hand, is one which involves a relative or temporal deficiency that may be cured subsequently. It is also a marriage that is valid in one *mathab* (school of thought) and invalid in another *mathab*, examples includes:

- a) A marriage without witnesses;
- b) A marriage with a woman undergoing *iddah*;
- c) A marriage prohibited by reason of difference of religion;
- d) A marriage with two sisters at the same time;

¹²⁸ Rashid, S. K. *op cit.*, pp. 60-61

¹²⁹ Abdur-Rahim, M. A. (1958) *op cit.*, p. 330; Rashid, S. K. *op cit.*, pp. 60-61; Habibi, S. A. M *op cit.*, pp. 30-31

- e) A marriage with a fifth wife by a person already having four wives.¹³⁰

The legal consequence of an irregular marriage is that, although it may be annulled by the courts when the fact is brought to its notice, the marriage is nevertheless capable of giving rise to certain legal effects. For example, the children of an irregular marriage are treated by law as legitimate and are entitled to inherit but there is no right of inheritance between the husband and the wife. Similarly, the wife of an irregular marriage is entitled to her dower if the marriage is consummated and she has to observe *iddah* for three courses. Moreover, an irregular marriage may be regularized by removing the impeding irregularity if it's of a temporary nature.¹³¹

2.9 RIGHTS AND DUTIES OF SPOUSES

A valid marriage contract bestows upon either spouse certain rights and also some corresponding duties as parts of the predicaments of marital union to be discharged within the bound of the sharia. Some of these rights specifically relates to the husband alone whereas some other rights relates to the wife alone but besides, certain other rights mutually relates to them both. These categories of conjugal rights have been briefly outlined below.

2.9.1 Rights of the Wife/Duties of the Husband:

The pivotal rights of a wife which are enjoined as duties on the husband include the following:

- a) Maintenance, in terms of feeding, clothing and accommodation;
- b) The payment of due dower as part of precondition to consummation of marriage;

¹³⁰ *Radd-ul-Mukhtar*, Vol. ii, p. 380; Abdur-Rahim, M. A. (1958) *op cit.*, p. 330; *op cit.*, pp. 60-61; Habibi, S. A. M. (1975) *op cit.*, pp. 30-31

¹³¹ Rashid, S. K. (1979) *op cit.*, pp. 60-6

- c) The right to the enjoyment of sexual intercourse;
- d) Equality of the number of days for each wife if the husband has more than one.

Where the husband contracts a new marriage, he is to spend the first seven days after the marriage with the new wife if she is a virgin while three days for a matron;

- e) Permission to visit her parents, children and nearby relatives and where the need arises, to extent condolence and remorse to her sick relatives;
- f) Honourable treatment whereby no harmful beating, degradation and isolation from the matrimonial home by the husband by virtue of Qur'an 2:231.¹³²

2.8.2 Rights of the Husband/Duties of the Wife:

It is said by one of the well-known Muslim scholars on Islamic Family Law, i.e., Hammudah Abd al-Ati that, "one of the essential criteria of determining the wife's obligations is 'the purpose of marriage'. Whatever serves that purpose or follows from it falls within the range of her duties... jurists hold the purpose of marriage to entail enjoyment, companionship, and gratification."¹³³ Accordingly, among the most pivotal rights of a husband which are enjoined as duties on the wife is obedience within her ability and the limit set by Allah (swt) and this encompasses:

- a) Allowing him sexual intercourse whenever he desires unless she has some lawful excuse such as menstruation, ihram, etc. If a wife fails to obey her husband in this regard, she will be deemed disobedient (*nashizah*) and consequently disentitled to maintenance.

¹³² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 101; El-Imairi, M. T. op cit., pp. 99-100; Abd al-Ati, H. op cit., pp. 146-168; Mahmud, A. B. op cit., pp. 12-14

¹³³ Abd al-Ati, H. op cit., p.168

- b) She must remain within the matrimonial home unless where she has been permitted by the husband to go out or where some just cause compels her go out to satisfy some necessities.
- c) She has to safeguard her chastity and his property by taking care of his wealth and herself. She must not go out unless with his permission. The Holy Prophet (saw) has said: *“the best among women is she that when you looked at her, you feel pleased; if you command her, she obeys; and if you are absence, she preserves her own self and his property”*.
- d) She has to look after his children and nurse the baby in accordance with prevailing custom and the husband’s financial ability.
- e) Right of correcting her abnormal behaviour whenever necessary.¹³⁴

2.8.3 Mutual Rights of Husband and Wife:

Both husband and wife enjoy certain mutual rights against one another. It was stated by the Holy Prophet (saw) that *“surely you have from your wives certain rights and also your wives have from you certain rights.”*¹³⁵ Principally, both husband and wife are mutually entitled to the following rights:

- a) **Sexual Intercourse:** this right is never permitted unless by virtue of marriage and neither spouse is allowed to unilaterally deprive the other spouse to the enjoyment of this right. Its deprivation therefore goes to the root of marital relations and can ground a divorce or judicial separation. The basis of this right may be inferred from the provisions

¹³⁴ Abd al-Ati, H. op cit., pp. 168-182; Mahmud, A. B. op cit., pp. 12-14; El-Imairi, M. T. op cit., pp. 100-107

¹³⁵ Mahmud, A. B. (1981) *Marriage under Islamic Law*, Gaskiya Corporation Ltd., Zaria, pp. 12-13

of several verses of the Holy Qur'an which include chapter 23:1-5, 7:189 and 2:187 respectively.¹³⁶

b) **Kind Treatment between Spouses:** an ideal matrimonial life must be built on the footing of kind and honourable treatment and this is a matter of legal right to the extent that any reprehensible behaviour arising from either spouse is disapproved of, and where it become unbearable, it would also ground a divorce or judicial separation. The basis of this right may be inferred from the clear provisions of some verses of the Holy Qur'an which include chapter 2:228 and 4:19 respectively.¹³⁷

c) **Inheritance:** marriage is one of the grounds of inheritance under Islamic law, and a valid marriage contract confers mutual right of inheritance to both spouses to inherit from each other in case of the death of one of them. This would be the case immediately a marriage contract is concluded even if there is no consummation of the marriage. Thus, none of the spouses can deprive the other from inheritance.¹³⁸

¹³⁶ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 100; El-Imairi, M. T. op cit., pp. 99-100

¹³⁷ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 101; El-Imairi, M. T. op cit., pp. 99-100

¹³⁸ El-Imairi, M. T. op cit., p. 98

CHAPTER THREE

MARRIAGE GUARDIANSHIP (*WILAYAT-UN-NIKAH*) IN ISLAMIC LAW

3.1 INTRODUCTION

Generally, the marriage of a minor boy or girl under the age of puberty is not valid unless it is contracted by a marriage guardian. This authority under Islamic law is termed guardianship for marriage (*wilayat-un-nikah*).¹³⁹ And, a marriage guardian is required to contract not only a minor's marriage but also that of an insane boy or girl of any age. Therefore, in this chapter, the principles of Islamic law relating to guardianship in marriage and the exercise of the power of *ijbar* by *wali mujbir* have been discussed.

3.2 THE CONCEPT OF GUARDINSHIP (*AL-WILAYAH*)

Guardianship (*wilayah*) refers to the legal right conferred on the *wali* (guardian) to exercise certain prerogatives over the affairs of certain persons.¹⁴⁰ The term *wali* (guardian) is derived from the Arabic term "*al-wilayah*". Literally, *wali* means adjacent, helper, friend, relative, caretaker and protector; and technically, it stands for guardian, who is a person authorised under the law to protect the person and property of a minor.¹⁴¹

The concept of guardianship (*wilayah*) denotes generally the right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs, e.g., an infant, an idiot, a lunatic, etc. It also extends to the custody of the person and the power to deal with the property of the ward.¹⁴² It is also a duty imposed by law.¹⁴³ In the words of Hammudah Abd al-Ati,

¹³⁹ Sinha, R. K. (1987) *The Muslim Law*, Central Law Agency, Allahabad, 2nd ed., p. 150

¹⁴⁰ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 82

¹⁴¹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 82; Sinha, R. K. (1987) *op cit.*, p. 142

¹⁴² Abdur-Rahim, M. A. (1958) *op cit.*, p. 344

“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 exists.”¹⁴⁴

The concept of guardianship in Islamic law encompasses three major aspects, i.e., guardianship of persons (which is otherwise known as custody of children [*hadanah*]), guardianship of property and lastly guardianship in marriage.¹⁴⁵ Our concern in this work is on guardianship in marriage, it being the concept under which *ijbar* obtains. Likewise, the concept of guardianship comprises the following kinds of guardians, i.e., natural or *dejure* (legal) guardian, *defacto* guardian, testamentary guardian, and guardian appointed by court.¹⁴⁶ These kinds of guardians are briefly discussed below.

3.2.1 Natural or Legal Guardian:

A natural guardian is also referred to as *dejure* or legal guardian and this is a person who has the legal right to control and supervise the activities of a child. A father is recognized as the natural guardian of his child under all the Schools of Islamic law. The father’s right to act as guardian of the minor is an independent right and is assigned to him under the substantive principles of Islamic law. In the presence of a child’s father, he is the only proper person that the law recognizes as the child’s natural guardian, but in the absence of the father, the father’s executor may also act as legal guardian.

So also, in the absence of the father’s executor, paternal grandfather or paternal grandfather’s executor acts as legal guardian. Thereafter, in the absence of the above mentioned category of persons, none else is recognized as the natural or legal guardian of

¹⁴³ Masud, M. K. (1985) op cit., at p. 218

¹⁴⁴ Hammudah Abd al-Ati, (1977) *Family Structure in Islam*, American Trust Publications, p. 71

¹⁴⁵ Ibid, p. 142

¹⁴⁶ Ibid

a minor. Under Shia law, in the absence of the father, only the grandfather may act as natural guardian; thus, in the presence of paternal grandfather, the father's executor has no right to act as legal guardian of a child.¹⁴⁷

3.2.2 Defacto Guardian:

This is a person who is neither a legal guardian nor a testamentary guardian but has himself assumed the custody and care of a child. According to Tyabji, a *defacto* guardian means an unauthorized person who, as a matter of fact, has custody of the person of a minor or his property.¹⁴⁸ Briefly put, *defacto* guardian is a person having no legal authority for the guardianship but has in fact acts as the guardian of the minor.¹⁴⁹

3.2.3 Testamentary Guardian:

This is a person who is appointed as guardian of a minor under a Will (*wasiyyah*). It is only the child's father or in his absence, paternal grandfather having the right to appoint a testamentary guardian. No special formality is required for the appointment of a testamentary guardian, only that it is required that he must be competent to act as a guardian, i.e., he should be male, adult and sane person. A non-Muslim and a female may also be appointed a testamentary guardian. But under Shia law, a non-Muslim cannot be appointed a testamentary guardian.¹⁵⁰

¹⁴⁷ Ibid, pp. 142-143

¹⁴⁸ Tyabji, Faiz Badruddin, (1940) *Mohammedan Law: The Personal Law of Muslims*, 3rd ed., Bombay, p. 213

¹⁴⁹ Sinha, R. K. (1987) *op cit.*, p. 144

¹⁵⁰ Sinha, R. K. (1987) *op cit.*, p.143

3.2.4 Guardian Appointed by Court:

In the absence of a natural and testamentary guardian, the court is empowered to appoint a guardian for the protection of the minor's person and property or for both.¹⁵¹

3.3 MARRIAGE GUARDINSHIP (*WILAYAT-UN-NIKAH*)

Marriage guardianship as it was described by Hammaudah Abd al-Ati, "is the legal authority invested in a person who is fully qualified and competent to safeguard the interest and rights of another who is incapable of doing so independently. It is the authority of a father or nearest male relative over minors, insane, or inexperienced persons who need protection and guardianship".¹⁵² And as to the role of the marriage guardian, Abd al-Ati further noted that it is "a right conferred on him by law, empowering him to act on his ward's behalf with or without regard for her wishes. It may also be considered as a duty assigned to him by law and by virtue of his responsibility for the wards welfare."¹⁵³

Tyabji defines marriage guardian (*wali*) as follows: "a guardian for marriage is a person authorized by law to make a valid contract for effecting the marriage of a minor or person of unsound mind."¹⁵⁴ Thus, under Islamic law, a marriage guardian is a person who is authorized to contract the marriage of a minor.

There are several juristic views and arguments on the requirement of marriage guardian and/or his consent to the validity of marriage contract in Islamic law. In fact, some divergence existed among Muslim jurists on the requirement of marriage guardian,

¹⁵¹ Ibid

¹⁵² Hammudah Abd al-Ati, (1977) *Family Structure in Islam*, American Trust Publications, p. 70

¹⁵³ Ibid, p. 74

¹⁵⁴ Tyabji, Faiz Badruddin, (1940) *Mohammedan Law: The Personal Law of Muslims*, 3rd ed., Bombay, p. 146

whether it carries the status of a prerequisite essential for the validity of the marriage or not. Such divergence of juristic opinion may be categorized into two, i.e., those who consider guardian's consent essential for marriage (i.e., the Maliki, Shafii and Hanbali Schools) and those who do not consider it essential (the Hanafi School) respectively.¹⁵⁵

Maliki, Shafii and Hanbali Schools consider the permission of a guardian essential for the validity of marriage. To them, a marriage contracted by a woman for herself or for another woman without the requisite consent of marriage guardian is void. It is maintained by these schools that the guardian is required to seek the consent of his ward only if the ward is male, or in the case of female, if she is divorcee.¹⁵⁶ Maliki allows an exception to the general rule by waiving these condition in case of a female of low social status, it being that she can be married without the proper marriage guardian.¹⁵⁷

The Hanafi School do not require the permission of the guardian if the ward is an adult and sane. Under this school, guardian's consent is only essential if the ward is minor or insane. Thus, a woman may contracts her marriage or acts for another woman but the marriage guardian has the right to raise an objection before the courts in case there is non-observance of the principle of *Kafa'a* (compatibility) of the bridegroom with the girl.¹⁵⁸ As an exception, the Hanafi School maintained that a marriage guardian could be allowed to intervene, even in respect of an adult ward, if the marriage is not advantageous to the ward.¹⁵⁹ The Zahiri School on the other hand, regards marriage guardian's consent

¹⁵⁵ El-Imairi, M. T. op cit., pp. 76-77

¹⁵⁶ Al-Jaziri, *Kitab al-Fiqh*, p. 48 cited in Masud, M. K. (1985) op cit., at p. 218

¹⁵⁷ Ibn Hazm, al-Muhalla, p. 455 cited in Masud, M. K. (1985) op cit., at p. 218

¹⁵⁸ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 84; El-Imairi, M. T. op cit., pp. 76-77

¹⁵⁹ Sarakhsi, al-Mabsud, Vol. 10, p. 28 cited in Masud, M. K. (1985) op cit., at p. 221

essential for females whether adult or minor irrespective of whether she is virgin or divorcee.¹⁶⁰

3.4 RATIONALE AND OBJECTIVES OF MARRIAGE GUARDIANSHIP

Generally, a minor is supposed to have no capacity to protect his/her own interest and the law therefore requires that some adult person must safeguard the minor's personal and property rights or interests and to do everything on his/her behalf because of the legal incompetency inhibiting the minor's capacity.¹⁶¹ In expounding the rationale and objectives of marriage guardianship, Abd al-Ati has noted conspicuously that a marriage guardian is primarily interested in preventing any match that may bring dishonour to the family or bride and that in the most considered view, guardianship was endorsed for the attainment of welfare of the ward. That a guardian should consider the wards interest as his own and that when he acts on the matter, he may appear as if he were defending his interests while, in fact, he is defending those of his ward.¹⁶²

It may be noted generally that the central idea behind guardianship is the welfare of the minor. Thus, while the guardian has the right to negotiate and conclude a marriage on his ward's behalf and to give his consent or object to her unwise choice, it is his duty to exercise this right in her best interest and in conformity with her wishes.¹⁶³ Furthermore, the exercise of *ijbar* by certain classes of marriage guardians is a safety measure in the interest of minors and this is because; on account of her immaturity or over-zealousness, a young girl may be proposing to marry a man of bad character or one lacking the proper means of livelihood. To avert awful consequences arising from reckless choice, a *wali*

¹⁶⁰ Ibn Hazm, *al-Muhalla*, p. 457 cited in Masud, M. K. (1985) *op cit.*, at p. 221

¹⁶¹ Sinha, R. K. (1987) *op cit.*, p. 142

¹⁶² Abd al-Ati, H. *op cit.*, pp. 74-75

¹⁶³ *Ibid*, p. 75

mujbir is empowered to oversee the selection process and to eventually propose a minor girl to the most suitable person whom to give her in marriage.¹⁶⁴ Seen in this context, *ijbar* is nothing more but a cautionary role exercised by a guardian in favour of their female wards against incompatibility in the choice of partner for marriage.

Consequently, guardianship for the purposes of marriage is by its objects, principally allowed because of the necessity to secure proper and suitable match between the marrying partners. Such match may not always be available thereby necessitating the parental intervention to guard and guide the selection process and to eventually discern their approval to the union in order to avoid mismatch.¹⁶⁵ For this reasons, guardians entrusted with the power of *ijbar* are best suited to select partners for their wards rather than allowing such delicate decision at the hand of minors who are inexperienced in family matters at their level of childhood.

Besides, to secure their welfare and moral upbringing, the decisions of parents/guardians entrusted with the affairs of minors in determining for them when and whom to marry is the most commendable role that such guardians can exercise in favour of their wards, if at all, parental care and upbringing is of any value to the life of the child in question.

And it must be remembered that the true measurement of a suitable match in marriage is the statement of the Prophet of Allah (pbuh): *“If a person comes to you to propose a marriage and you are pleased with his religion and morals, then marry him. If you fail to do so, great affliction will take place on earth, and corruption will be widespread.”*¹⁶⁶

This is because, a man with a sound and good understanding of his Islamic commitment,

¹⁶⁴ Doi, I. A and Clarke, A. (2008) *op cit.*, p. 207

¹⁶⁵ Abdur-Rahim, M. A. (1958) *op cit.*, p. 331; Hedaya, Vol. iii, p. 173

¹⁶⁶ Reported by *Tirmidhi & Ibn Majah*

with good moral standards will honor his wife and dignify her, and treat her justly with decency even if he does not love her.¹⁶⁷

Moreover, coercive marriage guardianship is not exercisable on all categories of women but only those that lack capacity to rationally conduct themselves. As to for whom marriage guardianship is instituted, Hammudah Abd al-Ati has explained that different positions have been taken by different schools of Islamic law but the general view is that, minors, insane, inexperience and irresponsible persons of either sex must have marriage guardians only that focus was on the woman's need for guardianship rather than that of men for the same. Such needs of guardianship in respect of women have been expounded by Abd al-Ati to be motivated by:

... the fact that men are generally believed to be relatively more experienced than women and tend to marry their juniors, in which case two basic reasons for guardianship, i.e., minority and inexperience, are eliminated. It is the woman who needs a guardian because she is usually said to lack experience in practical affairs and, hence may be intrigue into commitments contrary to her interests. Moreover, if she contracts marriage in her own behalf, she may give the impression of being inconsiderate, presumptuous, and inclined to intermingle with men unnecessarily – actions which would customarily stigmatize her character. For such reasons, the jurists argue, 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.¹⁶⁸

Additionally, different opinions have been expressed by Muslim jurists as to the basis upon which the requirement of marriage guardian is necessary in respect of a woman and

¹⁶⁷ Abdul-Rahman Al-Sheha, *Women In Islam & Refutation of some Common Misconceptions*, Translated by: Abu Salman Deya ud-Deen Eberle Edited by: Abu Ayoub Jerome Boulter Abdurrahman Murad, The Vista, p.94

¹⁶⁸ Hammudah Abd al-Ati, (1977) *Family Structure in Islam*, American Trust Publications, pp. 71-80

the various viewpoints are that it is by virtue of womanhood as such, whereby a marriage contract is invalid unless the woman involved is represented by her guardian; neither can she give herself nor anyone else in marriage. This is as per the view of Maliki School of Islamic law. In another viewpoint, immaturity and/or minority of a woman is the determining factor for the exercise of guardianship over her; in which case, a woman who is mentally sound and has reached the age of puberty may independently negotiate marriage contract and give herself or others in marriage. This is as per the view of Hanafi School of Islamic law. According to some other jurists, virginity is the determining factor and if a woman is virgin, she cannot marry without a guardian.¹⁶⁹ Collectively put together, whether in view of womanhood as such, virginity or immaturity, the preservation of a woman's moral integrity vide the protection of her honour and social status naturally necessitates the Islamic conception of marriage guardianship.

3.5 THE LEGAL AUTHORITIES ON MARRIAGE GUARDIANSHIP

The authorities relied upon by Muslim jurists who consider that a woman cannot represent herself in marriage nor represent other women and that the requirement and/or consent of a guardian are essential for the validity of marriage contract is as follows:

1. *And marry those among you who are single and those who are pious among your slaves and maids ...*¹⁷⁰
2. *Do not marry unbelieving women till they believe ... nor marry the unbelieving men till they believe.*¹⁷¹

¹⁶⁹ Hammudah Abd al-Ati, op cit., p. 73

¹⁷⁰ Qur'an 24:32

¹⁷¹ Qur'an 2:221

The provisions of these two verses of the Holy Qur'an were interpreted by some Muslim jurists as referring to an instruction on guardians to marry off their wards, as the tense of the verb in the two verses addresses the male rather than female as masculine form of imperatives is employed.¹⁷² Additionally, it was reported in a Prophetic hadith to the effect that “*no marriage except with the (permission) of the wali (guardian)*”¹⁷³ It is stated in *Fiqh-ul-Sunnah* from the explanation of *Tirmidhi* on this hadith that it has been acted upon by the *Sahabah* (Companions) of the Prophet (saw), among them: Umar ibn al-Khattab (RA), Ali ibn Abi Talib (RA), Abdullah ibn Abbas (RA), Abu Hurairah (RA), Ibn Umar (RA), Ibn Mas'ud (RA), A'isha (RA) and others. Similarly, among the *Tabi'un* (next generation following the companions), Said ibn al-Musayyib, Hassan al-Basri, Shariyh, Ibrahim al-Nakha'i, Umar ibn Abdul-Azeez and others.¹⁷⁴

Other Qur'anic verses relied upon by Muslim jurists on the requirement of marriage guardianship are the following:

3. *O you who believe! When believing women come to you as emigrants, examine them ... if you ascertain that they are true believers, send them not back to the disbelievers. They are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them ... And there will be no sin to marry these women when you have paid them their due dower.*¹⁷⁵

4. *And whoever of you has not the means to marry free, believing women, let him marry from the believing women from among those (slaves) whom your right*

¹⁷² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 83

¹⁷³ Reported by Ahmad, Abu Dawud, Tirmidhi, Ibn Hibban and Hakim (who certified it as *sahih*)

¹⁷⁴ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 83

¹⁷⁵ Qur'an 60:10

*hands possess, ... marry them with the permission of their own folk (guardians) and give them their Mahr according to what is reasonable ...*¹⁷⁶

5. *And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed to them the Mahr, then pay half of that mahr unless they agree to forgo it or he in whose hands is the marriage tie agrees.*¹⁷⁷

6. *And when you have divorced women and fulfil the term of their prescribed period, do not prevent them from marrying their former husbands if they mutually agree in kindness.*¹⁷⁸

The above quoted verses number five and six are relied upon by the adherents of the Hanafi School while holding the view that these verses refers to the womenfolk being addressed in conjunction with the subject of marriage. It is further maintained by the Hanafi School by way of analogy, that as women are competent to enter into contracts of sale, they are also best entitled to conclude marriage contract by themselves.¹⁷⁹

Similarly, the following Prophetic traditions refer to the requirement of marriage guardian. It has been made perfectly clear by the Messenger of Allah (pbuh) when he said: *“There is no marriage without a guardian.”*¹⁸⁰ And in another version, it is said: *“There is no marriage without a guardian, and the ruler is the guardian for those who have no guardian.”*¹⁸¹ Therefore, if a Muslim woman elopes and marries herself, this marriage is considered unlawful, as the Prophet (pbuh) declared:

¹⁷⁶ Qur’an 4:25

¹⁷⁷ Qur’an 2:237

¹⁷⁸ Qur’an 2:232

¹⁷⁹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 85

¹⁸⁰ Reported by *Abu Da’wood, Tirmidhi & others*

¹⁸¹ Reported by Ahmad and Ibn Majah

Any woman who marries without the consent of her guardian, then her marriage is nullified, then her marriage is nullified, then her marriage is nullified, and if he has consummated the marriage then she must receive a dowry from him for what he has made lawful of her private parts, and if they fall into dispute then the ruler is the guardian for those who have no guardian.¹⁸²

3.6 ORDER OF PRIORITY AMONG PERSONS WHO QUALIFY AS MARRIAGE GUARDIAN

The proper persons who may be appointed guardians for the purposes of marriage, as it is stated in the *Hedaya*, according to a saying of the Prophet (saw), belongs in the first place, to the *Asabah* (agnates) in the order of inheritance; the more remote being excluded by the nearer.¹⁸³ In the absence of *Asabah*, the most nearby uterine relatives (distant kindred) who may inherit from a minor boy or girl has the power of giving him or her in marriage. Thereafter, the Sultan or the ruler is next, and then the judge and a person appointed by him.¹⁸⁴

It is to be noted that in the above mentioned hierarchy, order of priority is applied strictly to the extent that, a nearer guardian excludes the remoter and in the presence of a nearer guardian, the remoter guardian cannot contract a minor's marriage. So also, where a nearer guardian of a minor is alive but the marriage is contracted by a remoter guardian without the approval of the nearer guardian, the marriage is void and not even consummation can validate such a marriage. However, if a marriage has been contracted

¹⁸² Reported by *Ahmad, Abu Da'wood, Tirmidhi & Ibn Majah*

¹⁸³ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 87; al-Marghinani, *Al-Hedaya*, Vol. I, pp. 34-35; See also Rashid, S. K. *op cit.*, p. 65

¹⁸⁴ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 87; Abdur-Rahim, M. A. *op cit.*, pp. 331-332; Rashid, S. K. *op cit.*, 65; Sinha, R. K. (1987) Rashid, S. K. *op cit.*, p.151

by a remoter guardian out of his turn, the marriage may be validated by its subsequent ratification of the proper marriage guardian.¹⁸⁵

The Maliki School recognizes and confines the right of matrimonial guardianship only to the father whose right is expressly recognized by the text of Prophetic tradition.¹⁸⁶ Under the Shafii and Shia schools, no person other than the father and father's father is entitled to act as guardian for marriage; the Shafi'i therefore recognizes the right of the grandfather by giving an extended application to the wordings of the text of the Prophetic tradition. The Hanafi extends it to the father, grandfather and other relatives in order of priority in the same way as that equivalent to the priority applicable to their right to inherit; only that when a minor is given in marriage by a guardian other than the father or the grandfather, he or she can exercise option of puberty (*khiyar al-Bulugh*) to refuse to be bound by the marriage and ask the court to pass a decree annulling the marriage. This option is not applicable where the marriage was contracted by the father or the grandfather in whose favour the law raises a presumption that they must have acted in the best interests of the minor.¹⁸⁷ It may be observed that the Hanafi school in recognizing the right of the grandfather to act as marriage guardian of a minor, they base their view in what in their opinion, is the policy of the law.¹⁸⁸

In cases where the guardian who is primarily competent is residing in some other country or at a far-off place; and if in the circumstances, it is feared that a good marriage may be

¹⁸⁵ Sinha, R. K. (1987) Rashid, S. K. *op cit.*, p. 151-152

¹⁸⁶ Baillie, Neil B. E. (1865) *Digest of Mohammedan Law*, London, p. 47; Rashid, S. K. *op cit.*, p. 66

¹⁸⁷ Abdur-Rahim, M. A. (1958) *op cit.*, p. 331; Hedaya, Vol. iii, p. 175; Baillie, Neil B. E. (1865) *op cit.*, p. 47; *op cit.*, p. 66

¹⁸⁸ Abdur-Rahim, M. A. *op cit.*, p. 332; Hedaya, Vol. iii, p. 175; Syed Khalid Rashid, *op cit.*, p. 66

lost if his approval must be sought or to be awaited for, then the person next competent to act as guardian can give such approval.¹⁸⁹

3.7 CONDITIONS TO BECOME MARRIAGE GUARDIAN (WALI)

As a precautionary measure, a marriage guardian must meet certain moral and personal qualities which are stipulated to insure that in all probability, he will neither neglect his duty nor abuse his right.¹⁹⁰ For a person to be appointed a *wali*, he must satisfy the following conditions, i.e., he must be a male that has reached puberty and is mature; he must be a Muslim; he must be just and not *fasiq* (someone who violates Islamic law); he must not be in a state of *ihram*; he must be a free man (not a slave); he must not have visual impairment (due to old age) which may impair eyesight.¹⁹¹ These conditions have been further elaborated below.

- a) A man – a woman is not granted the power to become a *wali* to other people and she may not marry herself off.¹⁹²
- b) The *wali* must have reached puberty and become mature – *wilayah* of a *mumaiyiz* child is invalid. The *wali* must not be insane or mentally challenged, for example, too stupid (*safih*). The word *Safih*, as interpreted by Imam Al-Shafii, refers to someone who wastes his wealth on things that are forbidden such as gambling, drinking and so forth.
- c) The *wali* must be a Muslim. An infidel may not marry off a Muslim woman because he does not have the authority (*al-Wilayah*) over any Muslim. Allah (s.w.t.) said: “*and never will Allah give the disbelievers over the believers a way*

¹⁸⁹ Rashid, S. K. *op cit.*, p. 66

¹⁹⁰ Hammudah Abd al-Ati, *op cit.*, p. 71; Rashid, S. K. *op cit.*, p. 76

¹⁹¹ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 82-83; Hammudah Abd al-Ati, *op cit.*, p. 71; Rashid, S. K. *op cit.*, p. 76

¹⁹² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 83

[to overcome them]”.¹⁹³ Similarly, authority (*al-Wilayah*) in marriage belongs to *Asabah* class of agnates as in the order of priority in inheritance whereby Muslims and infidels cannot mutually inherit one another’s wealth.

- d) *Wali* must be just – which means that the guardian does not commit great sins, does not continue to commit small sins, and does not commit demoralizing actions such as pissing by the roadsides without repenting. However, when a person truly repents, then he will become eligible to act as a *wali*.
- e) *Wali* must not be in *ihram* – someone who is performing *Hajj* or *Umrah* may not marry off someone else as indicated by the *hadith* of the Prophet (pbuh): “*Who are in Ihram (men and women) cannot marry and marry off another (a woman whether or not in Ihram), and may not propose*”.¹⁹⁴
- f) *Wali* must be a free man, i.e., a slave does not have the authority to marry off anybody because he does not even have the authority upon himself and when he does not have the authority upon himself, surely he does not have the authority on others.¹⁹⁵

Notwithstanding the above mentioned conditions which are instituted in order to secure the exercise of the role of guardianship in the best interest of the ward concerned, negligence and abuse do occur and guardians do make unwise decisions. It is highly unwholesome and thus forbidden to deliberately neglect or abuse these regulations and in circumstances where a guardian acts against the interest of the minor, the law provides

¹⁹³ Surah al-Nisa’, 4:141

¹⁹⁴ Reported by Imam Muslim in *Sahih Muslim*

¹⁹⁵ Hammudah Abd al-Ati, (1977) *op cit.*, p. 71; See also *Wali (Guardian) in Islam*, p. 3, an online article available at http://www.islam.gov.my/sites/default/files/wali_in_islam.pdf accessed on the 24th September 2013

for certain safeguards or remedies against improper exercise of the role of guardianship and these has been discussed later in the next chapter.

3.8 CLASSIFICATION OF MARRIAGE GUARDIANS

Generally, marriage guardians are of two types, i.e., *Wali al-Mujbir* (a guardian who possesses the power of *ijbar*) whose role is termed *Wilayat ijbar* and *Wali Ghair al-Mujbir* or *Wali Ikhtiar* (a guardian who represents a woman at the making of her marriage upon her consent devoid of any compulsion) whose role is termed *Wilayat Ikhtiyariyyah*.¹⁹⁶ The detailed rules and roles of these two classes of marriage guardians have been discussed below.

3.8.1 *Wali al-Mujbir*:

This is a guardian who possesses the power to impose the status of marriage on his ward regardless of his/her consent and his role or power over his ward is termed *Wilayat Ijbar*. A minor's father is unanimously regarded as the guardian possessing the power of *ijbar*. The Hanbali did not extend this power to anyone else but the Shafii extends it only to the grandfather in the absence of the father, while the Maliki consider the executor of the father's Will (*al-wasiyyi*) entitled to represent the father in the exercise of power of *ijbar*. In the absence of executor, the power of *ijbar* belongs to the ruler or to the *Qadi* (judge). The Hanafi allows *ijbar* only in cases of wards that are minors or mentally incapacitated. They extend the power to other agnatic relatives in the same order of priority as is regulated in matters of succession. The *ijbar* of other relatives is revocable at the instance or initiatives of the ward by the exercise of *khiyar-ul-bulugh* on attaining puberty.¹⁹⁷

¹⁹⁶ Masud, M. K. (1985) op cit., at p. 219; El-Imairi, M. T. op cit., pp. 78-79

¹⁹⁷ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 87; Masud, M. K. (1985) op cit., at p. 219; El-Imairi, M. T. op cit., pp. 78-79

Furthermore, the subjects or category of minor persons upon whom the power of *ijbar* is exercisable includes the following:

- a) According to the Maliki School, a virgin girl (*bikhr*) whether a minor or an adult. A girl of unsound mind and a minor divorcee;
- b) According to the Hanafi School, they consider as subject of *ijbar*, a minor whether male or female who is virgin or widow.
- c) According to the Shafii School, they regard all virgin girls whether minor or adult to be subject of *ijbar*;
- d) According to the Hambali School, they consider the category of minors, males or females as the subjects of *ijbar*.¹⁹⁸

Maliki and Shafii Schools do not normally allow *ijbar* in case of a male ward be him a minor or an adult and in their view, it is because, if he is an adult, he possesses the required capacity and if he be minor, he is not in immediate need of marriage.¹⁹⁹

A *Wali Mujbir* is regarded as the perfect *wali* because he has full power to endorse a marriage on behalf of everyone under his care. Although a father may marry off his virgin daughter without her consent, it is *sunnah* for the father to request for her consent. And the father may not act freely using his *ijbar* authority. He has to make sure that his actions are just and fair for the benefits of his daughter. That is why the law has prescribed 3 conditions which allow for the *ijbar* authority of the father to be enforced upon his daughter:

- a) There shall be no apparent dispute between the father and the daughter;

¹⁹⁸ Masud, M. K. (1985) op cit., at p. 219; El-Imairi, M. T. op cit., pp. 78-81

¹⁹⁹ Masud, M. K. (1985) op cit., at p. 219

- b) The groom must be suitable for the daughter;
- c) The prospective husband is capable of paying the dowry (*mahr*).²⁰⁰

3.8.2 *Wali Ghair al-Mujbir* or *Wali Ikhtiyar*:

Wali Ikhtiyar is a *wali* from the *Asabah* guardians related to a woman that can marry her off upon her consent. *Wali Ikhtiyar* includes *Wali Aqrab* (closer) and *Ab'ad* (distant), who are guardians in the absence of a *Wali Mujbir*. Such a *wali* can marry off mature adult women and does not have any authority to force any marriage contract on them but to merely represent them. Thus, a *Wali Ikhtiyar* may only marry off a bride after she has given her consent and such consent may be given in two ways:

- a) For widowed/divorced women, she must pronounce her consent clearly and verbally. Silence alone is not sufficient.
- b) For virgins, the consent is sufficient by virtue of her silence. In a hadith reported by Imam Muslim, the Prophet (pbuh) said: “*It is sunnah for a father to ask permission from a virgin woman, and her silence is her consent*”.²⁰¹

²⁰⁰ *Wali (Guardian) in Islam*, p. 3, an online article available at http://www.islam.gov.my/sites/default/files/wali_in_islam.pdf accessed on the 24th September 2013

²⁰¹ *Ibid*, p. 4

CHAPTER FOUR

THE CONCEPT OF *IJBAR* AND ITS IMPACT ON CHILD MARRIAGE IN ISLAMIC LAW

4.1 INTRODUCTION

Generally, the law prescribes certain age limit before which a person is said to be a minor and that a person who is regarded as minor has no capacity to understand the legal consequences of his/her actions. In view of this, the imperative need of the role of marriage guardianship was instituted by the law. Furthermore, for parents and guardians to properly discharge their role towards minor wards, and to further safeguard the moral and welfare requirement of their wards, and given the sanctity of marriage against illicit sexual indulgence, a coercive power (*ijbar*) is conferred on parents/guardians to either marry off or constraint an otherwise improper proposal of marriage put forward by a minor.

Consequently, this chapter discusses the impacts of *ijbar* on the practice of child marriage under Islamic law. The raging debates on the need to either abolish or curtail the doctrine of *ijbar* have been examined and analysed. Similarly, the Western influence and conspiracy that abhors the practice of Islamic child marriages have been equally highlighted and criticised as imperially motivated rather than being philanthropic or in any way sympathetic to the cause of the Muslim-girl child but to get her plunge into the dexterities of corrupt sexual immorality as is prevalent in the West today.

To properly appreciate the discussion, the Islamic legal basis of child marriage and that of the concept of *ijbar* are first presented in this chapter, followed by an analysis on their intersection in the light of current debates on the subject.

4.2 LEGALITY OF CHILD MARRIAGE IN ISLAMIC LAW

The legitimacy of child marriage is a matter established by the *Sunnah* of the Holy Prophet (saw) as well as the practice of his Companions. It has been reported from the Prophet (saw) that he married A'ishah (RA) when she was a minor girl of 6 years and that she resumes the matrimonial home at 9 years. On the authority of this hadith, Muslim scholars argue that it is a proof on the legality of child marriage, male or female through their parents. To al-Sarakhsi, this legality is established against the view by some scholars that it is not legal to marry off minors, male or female until they reach puberty and to buttress its legality, al-Sarakhsi points out that:

- a) Child marriage is entered into while the minor is young but the obligations arising from the marriage is shouldered upon puberty;
- b) If not for the benefit of minors, guardianship is not allowed and that no guardianship by anyone is exercised over a minor upon attaining puberty talk less of contracting him/her in marriage;
- c) That by virtue of the provisions of Qur'an 65:4 which refers to the *iddah* of young women who sees no menses upon divorce, it has been explicit that their *iddah* is in view of their marriage and this is an evidence indicating child marriage;
- d) That by virtue of the provisions of Qur'an 4:6 which refers to the requisite test to be applied on minor orphans at maturity stage before their property could be surrendered to them, child marriage is explicit in this verse under the clause

“and try orphans as regards their intelligence until they reach the age of marriage ...”²⁰²

The legality of child marriage in Islamic law is also traceable from the practice of Companions of the Holy Prophet (saw) and it has been stated by al-Sarakhsi in *al-Mabsud* that:

- a) Qudamah ibn Madh’un had married the daughter of Zubair (RA) on the day of her birth;
- b) Ibn Umar (RA) marries off two of his young daughters from Urwa ibn Az-Zubair (RA);
- c) Urwa ibn Az-Zubair (RA) married off the daughter of his brother to the son of his brother while they are young;
- d) A certain man offered his young daughter to Abdullah ibn al-Hassan and that Ali (RA) approves of it;
- e) The wife of ibn Mas’ud (RA) marries off her two young daughters to the sons of Musayyib ibn Nukhbah and it was approved by Abdullah (RA).²⁰³

4.3 NATURE OF CHILD MARRIAGE IN ISLAMIC LAW

The nature of child marriage within the framework of Islamic law is not as it is unscrupulously depicted by the West nowadays as being “force marriage”, “paedophilia”, “child abuse”, “harmful traditional practice” or the like. Nor as it is known and practiced in other customary systems. In describing child marriage within the bounds of Islamic law, Hammudah Abd al-Ati has this to say:

²⁰² al-Sarakhsi, *Al-Mabsud*, Vol. 4, pp. 212-213

²⁰³ Ibid

Marriage in minority would seem to imply a betrothal or some formal agreement, deferring final consummation to later date. This type of child 'marriage' is probably best explained by the desire to draw families together and to facilitate social integration. Given the low sex ratio and racial plurality of Muslim society, the need for social integration and the high value of sexual purity and virginity, it may become understandable why Islam set no age limits on marriage. Preliminary arrangements may have been made at an early age, but consummation usually took place when the parties were fit for marital congress, which depended, among other things, on their physical conditions. However, the lawfulness of such marriages does not necessarily mean that they were predominant. Nor were they peculiar to any society, region, or generation.²⁰⁴

From the above quoted exposition, it is glaringly clear that in Islam, unlike in other systems, customary or otherwise, the practice of child marriage encompass the following basic features which, in the considered view of the writer, can be candidly (re)asserted as reinforcing the spirit of Islamic law, that is to say, child marriage:

- a) Simply imply a betrothal or some formal arrangement as part of mate the process of mate selection or choice of partner which can be done on the very day a child is born and where this is the case, it in neither way harms or deprecates the interests of the minor concerned;
- b) consummation of the marriage as parts of the incidences of marriage is deferred to a later date, when the minor attains sexual maturity upon reaching puberty whereby the false claim or perceived implications of child birth as relied on by the critics of the practice of child marriage is rendered nugatory for to date, for no forensic evidence to establish unfitness of marital cohabitation at the onset of puberty;

²⁰⁴ Hammudah Abd al-Ati, op cit., p. 76

- c) The preservation of sexual purity and virginity is among the most pressing moral aspiration behind the practice of child marriage within the bounds of Islamic law. And this is further backed by the severity behind the prohibition of sexual promiscuity and the high reverence bestowed on progeny and legitimacy thereon; whereby cohabitation without marriage and/or the immoralities committed under the guise of boy-friend and girl-friend as the social norm sanctioned by the West nowadays is unknown to the Islamic tradition by any token;
- d) It is worthwhile that Islam set no age limits on marriage, therefore, the idea of fixing marriageable age or of delaying marriage until a later age is quite unknown but contradictory to the dictates of the sharia which sees puberty as the ideal stage under which human physiological development is attained allowing psychological feasibility of marriage; in which case, natural individual differences is accommodated rather than pegging a particular age limit for all categories of persons irrespective of established biological traits or the exclusion of all other tangible signs of puberty;
- e) Besides, its legality is not synonymous with its practice and that even modern critical oriental scholars like J.N.D. Anderson²⁰⁵ have confirmed the practice of child marriage to be unknown in some Muslim communities

²⁰⁵ Anderson, J.N.D. (1970) *Islamic Law in Africa*, London, p. 204

Furthermore, the law prescribes that all marriage arrangements must be made in the best interest of the minors involved and that it is unlawful to do anything disadvantageous to them. To guard against possible misjudgment, certain specific requirements have been made and these have been additionally outlined by Hammudah Abd al-Ati as follows:

- a) First, marriage in minority is invalid without the consent and participation of the guardian and this is but what obtains in other religious and legal systems of ancient and modern times;
- b) Islam does not entrust this responsibility to any parent or guardian *per se*, but to those who, in addition to parenthood, must have certain qualifications sufficient under normal circumstances to ensure a good sense of judgment and conscientiousness;
- c) Islam has, according to many jurists, given to minors the so-called “option of majority”. A minor who has reached the age of puberty is free either to uphold or annul a marriage contract that was concluded on his or her behalf while in minority.²⁰⁶

Certainly, all these precautionary rules goes to secure the best interest of the child in affording him/her the latitude to enjoy parental care, whereby a wards sexual gratification and socialization is legitimacy met through marriage and the earnest regard paid to their welfare in order to avert a disgraceful situation similar or of the kind that the child is plunge in the West today. Anyone who is familiar with the social realities prevalent in the West would regret the high sexual immoralities that are predominant even among

²⁰⁶ Hammudah Abd al-Ati, op cit., p. 76

adolescent and teenagers of relatively pre-pubescent stage that the sharia viewed as the criteria of adulthood for the purposes of marriage.

It has been shown by A. H. Al-Kahtany²⁰⁷ that in the United States (US), in the year 1990 alone, about 67% of teenage births (excluding abortions) were to unmarried mothers and that what is more disastrous is that in the majority of teenage births, the mothers are left alone to carry the financial and emotional responsibilities of raising the newly born babies. The males just abandon them both, and probably look for other easy preys.

Similarly, the *Macmillan Visual Almanac* (1995) reported that 70% of American boys had had sexual intercourse before the age of 18, while 56% of the girls had lost their virginity by that age. This is because; men and women mix and mingle freely with one-another with no reasonable restrictions in such a society where these kinds of relations between men and women are prevalent. Men and women could lock themselves alone in houses, offices or any other private locations; just as the former American President Clinton did with Monica in the Oval office with the excuse that they were involved in serious work for the good of the nation. Western and western-like societies, have for long time, had blindly demolished moral principles to accommodate false values and principles deceived by the mirage of modernization and liberalism which pushed men and women into dark tunnels of adultery and hypocrisy.²⁰⁸

While the commonality of sexual freelance among teenagers is viewed without any social disapproval in the Western world, much perhaps where contraceptives is employed, premarital sex under whatever pretext is woefully condemned by Islamic law. Hence, the

²⁰⁷ Abdallah H. Al-Kahtany, *Women's Rights: A Historical Perspective*, pp. 36-37

²⁰⁸ Ibid, p. 38

Islamic ordainment of child marriage is morally justified notwithstanding its contemporary Western intense dislike and this viewpoint is further elucidated hereunder.

4.4 THE CONCEPT OF *IJBAR*

The term *ijbar* (compulsion) is taken from the Arabic terms *al-Wilayat al-Ijbariyyah* (compulsory guardianship) and *al-Wali al-Mujbir* (compulsory guardian). *Mujbir* is literally the one who helps someone to be back on his feet and who forces or compels one to do something. Technically, *al-Wilayat al-Ijbariyyah* has been defined as “enforcing one’s will on the other whether he agrees or disagrees.”²⁰⁹ Consequently, the concept of *ijbar* refers to the power of the marriage guardian to contract marriage on behalf of his ward without his/her consent. It is the legal authority that gives the guardian absolute power to dictate over his ward, when and whom to marry without his/her permission.²¹⁰ In that, a marriage guardian has the right to confer the status of marriage on minors against or without their consent.²¹¹

Ijbar is established against those with defective or incomplete legal capacity be him/her a minor or an insane. That is to say, a *wali mujbir* is conferred the right to enter into marriage contract on behalf of his ward without bearing in mind the wishes of the ward. Such marriage contract becomes binding on the minor without taking into account his/her consent. The law provides for this kind of guardianship in order to secure the best interest of the ward, taking into consideration the ward’s incomplete legal capacity to exercise

²⁰⁹ Masud, M. K. (1985) *The Sources of the Maliki Doctrine of Ijbar*, *Islamic Studies [A Journal of the Islamic Research Institute, Islamic University, Islamabad, Pakistan]*, Vol. 24. No. 2, pp. 215-253 at p. 217

²¹⁰ Masud, M. K. (1985) *op cit.*, at p. 215

²¹¹ Sinha, R. K. (1987) *op cit.*, pp.150-151

rational judgment over his/her own affairs. This is the reason why the management of his/her own affairs is bestowed upon his/her legal guardian.²¹²

So, *ijbar* may be seen as a power of superintendence exercised by guardians over the choice of partner by a minor girl whereby her choice is subject to the overriding power of compulsion (*ijbar*) granted to her father to determine the fitness of whom to marry.²¹³

This power of *ijbar* has been defined by the jurists as the right of the guardian, mainly the father, to marry his ward to somebody without his/her consent.²¹⁴

The concept of *ijbar* also includes the power of constraint (*adhhl*) by the guardian to withhold his consent. But a *wali* is not allowed unfettered discretion to object to the desire expressed by his ward to get married, i.e., he cannot constrain his female ward from getting married especially when the suitor meets the requisite compatibility (*kafa'a*) and the dower is equivalent to that of her equal (*mahr al-mithl*). If the guardian constrains his ward from getting married, she is at liberty to present her case to the ruler/*Qadi* who would get her married. On the other hand, where the constrain is exercised in view of lawful justification, e.g., the suitor is incompatible, or the dower is lesser than that of her equal, or for the presence of a better suitor than the one she likes, the exercise of constrain in circumstances of this kind cannot consequently disentitle a guardian of his role or power of *jabr*.²¹⁵

The basis or rationale that necessitates the exercise of *Ijbar* on a particular person as it has been earlier stated is him/her being affected by restricted or incomplete legal

²¹² Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 87

²¹³ Doi, I. A and Clarke, A. (2008) *op cit.*, p. 207

²¹⁴ Masud, M. K. (1985) *op cit.*, at p. 218

²¹⁵ Sabiq S. (nd) *Fiqh-ul-Sunnah*, Al-Fath, Cairo, Vol. 2, pp. 90; Masud, M. K. (1985) *op cit.*, at p. 218

capacity. So also, insanity is unanimously considered incapacity and hence a ground for *Ijbar*. Different criteria's as to the ground for the exercise of *Ijbar* on minors have been advanced by the jurists. According to the Hanafi and Hanbali Schools, minority alone is the ground for *Ijbar*. Shafii School regard virginity or marital inexperience even of adults as justification for *Ijbar*. Maliki School regards both minority and virginity as grounds. According to them, a married woman remains under the *Ijbar* of her father until after the first year of her marriage and her stay with her husband. Likewise, the guardian can intervene and constrain a marriage on the grounds of social incompatibility (*kafa'a*) of the spouses and also if the dower paid is less than the customary dower.²¹⁶

4.5 CESSATION AND LIMITATIONS ON THE POWER OF *IJBAR*

As it has been earlier stated, parents and guardians are not allowed unfettered discretion in the exercise of *ijbar* over their wards. It is a limitation that guardians for marriage cannot be appointed by Will.²¹⁷ Likewise, the authority or power of *ijbar* exercisable by a guardian to give his ward in marriage ceases or terminates in the following situations:

- a) When the ward, male or female, attains the age of majority, i.e., the authority or power of a guardian to give his ward in marriage ceases when the ward attains the age of majority.²¹⁸ Under the Maliki and Shafii Schools, the right of *ijbar* in the case of a female child continues till she is married.²¹⁹ The Malki consider *ijbar* terminated when after due deliberations, the father declares his daughter mature

²¹⁶ Ibid

²¹⁷ Rashid, S. K. *op cit.*, p. 66

²¹⁸ Rashid, S. K. *op cit.*, p. 66

²¹⁹ Sinha, R. K. (1987) The Muslim Law, Central Law Agency, Allahabad, 2nd ed., p.152

enough to take care of her own interests. The Hanafi and Hanbali consider *ijbar* terminated when the ward attains puberty.²²⁰

- b) The right of *ijbar* also terminates upon the guardian's loss of sanity.
- c) It also terminates upon the guardian's loss of any qualification required by law.
- d) It also terminates upon the guardian's disappearance for a longer period to a distant place.
- e) It also terminates upon the guardian's improper exercise of *ijbar* without legal justification.
- f) It also terminates upon the minor's conclusion of an advantageous marriage in the absence of the guardian without him objecting in either way.
- g) It also terminates upon the cessation or loss of the ground or justification that renders the ward subject to *ijbar*.
- h) It also terminates upon the emancipation of the female ward from *ijbar* by the guardian where she is allowed to exercise her choice.²²¹

4.6 REMEDIES AND SAFEGUARD AGAINST IMPROPER EXERCISE OF THE POWER OF *IJBAR*

Several safeguards that act as remedies are provided for under the sharia to protect a minor from an improper or wrongful exercise of the power of *ijbar* by parents/guardians. The minor or one of the relatives could apply to the court for intervention relying on anyone or more of the following safeguards, i.e., *Khiyar-ul-Bulugh* (option of puberty), *Kafa'ah* (compatibility), etc.

²²⁰ Masud, M. K. (1985) op cit., at p. 218

²²¹ Masud, M. K. (1985) op cit., at pp. 219-220

4.6.1 *Khiyar-ul-Bulugh* (Option of Puberty):

When a minor's marriage is entered into whether male or female, upon attaining the age of puberty, such a child has the right to ratify or repudiate the marriage by exercising what is called *Khiyar-ul-Bulugh* (option of puberty). In Islamic law, an adult husband is considered to have an absolute legal right to the dissolution of his marriage, hence it is the wife who stands in need of help for the dissolution of marriage and the doctrine of option of puberty comes to her aid. This option of puberty is one of the safeguards which Islamic law provides against an undesirable child marriage.

The legal basis of the doctrine of option of puberty is traceable to certain Prophetic traditions. It was narrated by Ibn Abbas (RA) that a virgin girl came to the Prophet (peace be upon him) and said that her father had given her in marriage which was not to her liking. The Messenger of Allah (peace be upon him) then gave her option.²²² So also, Abu Dawud reported that the father of Khantha gave her in marriage while she was not a virgin. She did not like the match and so she came to the Prophet (peace be upon him) who annulled her marriage.²²³

The basic idea underlying the doctrine of option of puberty is to protect a minor from an unscrupulous exercise of authority by his/her marriage guardian. The right has been accorded to minors to dissolve a marriage on attaining majority where the guardian showed want of affection and discretion by contracting the minor in an undesirable marriage.²²⁴ In respect of females, the option of puberty is lost if she does not exercise it

²²² Wali al-Din al-Khatib, *Mishkat al-Masabih*, Delhi, 1932, p. 271 cited in Ahmed, K. N. (1978), *The Muslim Law of Divorce*, Kitab Bhavan, New Delhi, India p. 138

²²³ Abu awud, Sunan Abu Dawud, Vol. I, pp. 285-286

²²⁴ Ahmed, K. N. *The Muslim Law of Divorce*, Kitab Bhavan, New Delhi, India (1978), pp. 137-138

immediately after attaining puberty, or on being informed of marriage, if she was not aware of it. In case of a male child, the right continues until he has ratified the marriage either expressly or impliedly, such as by cohabitation or payment of dower.²²⁵

There is a distinction made between marriages contracted for a minor by his or her father and paternal grandfather on the one hand and those contracted by any other marriage guardian. Thus, a marriage contracted for a minor by a father or paternal grandfather is generally considered binding on the minor, both under the Sunni and Shia law. However, the Maliki confines this rule to the father alone and does not extend it to the grandfather. These distinction as to the marriage contracted for a minor by father and grandfather on the one hand and by other classes of marriage guardians is based on the presumption that a father or grandfather cannot, on account of his natural love and affection for the minor, act against the minor's interest by contracting for him/her a marriage that may not be desirable. But if it is established that he had ignored the interests of the minor or that the marriage is to the minor's manifest disadvantage, then the minor is entitled to exercise option of puberty.²²⁶

Under the Hanafi School, a minor can on attainment of puberty, dissolve a marriage as a matter of right, if it is contracted for her by a marriage guardian other than the father or grandfather. Even then, such a minor's marriage cannot be cancelled by the minor on attaining puberty, unless it is proved that:

²²⁵ Mulla, Dinshah Fardunji (1955) *Principles of Mohammedan Law*, 14th ed. by M. Hidayatullah and Arshad Hidayatullah, N. M. Pripathi Private Ltd., Bombay, p. 243; *op cit.*, p. 66

²²⁶ Ibn Abidin, *Al-Radd al-Mukhtar*, Cairo, 1318 A. H., Vol. II, p. 312 cited in Ahmed, K. N. (1978), *op cit.*, p. 140

- a) The father or grandfather has ignored the interests of the minor or has acted fraudulently or negligently and the marriage is to the manifest disadvantage of the minor, e.g., when a girl has been married to a lunatic or the husband is suffering from some serious disease or have a grave physical deformity;
- b) An improper dower has been fixed, i.e., if the father or grandfather gives the boy or the girl in marriage for a dower which is highly excessive in the case of the boy or grossly inadequate in the case of the girl;
- c) Where the other partner is not compatible or equal in social status to the minor, i.e., if the husband's worldly position is such that the change from the father's house to that of the bridegroom would be one attended by material discomfort to her;
- d) If the father or grandfather marries his minor boy to a girl belonging to a very low family status such as the daughter of a slave, then the marriage shall be binding on the boy according to the opinion of Abu Hanifa. Abu Yusuf and Muhammad ibn Hassan al-Shaybani held that the boy shall be entitled to exercise his option of puberty on attaining majority;
- e) When the father or grandfather is known to have a bad or depraved character, and is notorious for his greed or lack of worldly discretion;
- f) If the father or grandfather is drunk at the time of the marriage to such an extent as not to understand what was going on there.²²⁷

According to the Maliki, Hanbali and Shafii Schools, in the most generally accepted view, Imam Malik has laid down that it is only the father of a minor girl who can give her

²²⁷ Ibn Abidin, *op cit.*, Vol. II, pp. 313-314 cited in Ahmed, K. N. (1978), *op cit.*, p. 139; Rashid, S. K. *op cit.*, p. 67

in marriage and that no one else can exercise that power. Imam Ahmad ibn Hanbal agrees with Maliki in the matter of option of puberty. To Imam Shafii, the power to give a minor in marriage can be exercised by the father as well as by the paternal grandfather. Both the Imams hold that the marriage shall be binding on the minor and cannot be dissolved by the exercise of option of puberty.²²⁸

According to the Shia law, a minor's marriage if contracted by anyone other than the father or father's father, is totally ineffective until it is ratified by the minor on attaining puberty.²²⁹ Thus, the Shi'ite law is practically the same as the Sunni law discussed above.

Furthermore, a marriage contracted by the minor himself is voidable at his option on his attaining the age of puberty and it would be immaterial whether his guardian had approved the marriage or not, provided that marriages approved by the father or agnatic grand-father are not voidable. The option lasts till the minor comes to know that he has such a right and a reasonable time thereafter has elapsed. The reasonability of time will depend upon the subjective satisfaction of the court.²³⁰

4.6.2 *Kafa'ah* (Equality/Compatibility) of Spouses:

This refers to the compatibility in status between couples intending to get married. It is one of the safeguards instituted to ensure healthy companionship that may lead to happy married life between the spouses. It involves consideration of certain factors like religious background in terms of Islam, family background (*nasab*), profession, freedom

²²⁸ Al-Marghinani, *al-Hedaya*, Vol. II, p. 296; Ahmed, K. N. *op cit.*, p. 142

²²⁹ Rashid, S. K. *op cit.*, p. 67

²³⁰ *Ibid*, p. 66

(from slavery), honesty, means of livelihood, potency,²³¹ etc. In *al-Hedaya*, it is stated that marriage must be contracted among equals “because cohabitation, society and friendship cannot be completely enjoyed excepting by persons who are each other’s equal as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore, that regard be had to equality with respect to the husband, that is, the husband should be the equal of the wife.”²³²

Accordingly, the Hanafi School hold that equality between the two parties is a necessary condition in marriage and that an ill-assorted union in this regard is liable to be set aside by a decree of the judge. In view of that, it is stated in *Radd-ul-Mukhtar*, the test of equality applies to the husband and not the wife, for a husband can raise her to his own rank, however high.²³³

The power of objecting absolutely to the incompatibility of the spouses rest with the agnates (*asabah*) of the woman and an unreasonable delay by the guardian in instituting court proceedings will not ordinarily deprive him of his right. But if the woman has already born a child to her husband, then the guardian has no right to have the marriage cancelled because doing so may damage the interests of the child.²³⁴ However, the marriage between unequal partners remains valid until annulled by the order of the court,

²³¹ This is according to *Fatawa-e-Hamidia* as cited by Syed Khalid Rashid (1979) Muslim Law, Eastern Book Company, Lucknow, p. 65

²³² Burhanuddin al-Marghinani, *Al-Hedaya*, translated into English from Persian rendering by Charles Hamilton, Kitab Bhavan, New Delhi ed. (1963), pp. 34-35

²³³ Rashid, S. K. *op cit.*, p. 64

²³⁴ *Ibid.*, p. 65

because it is only the court that has power of cancelling marriages on the ground of inequality.²³⁵

Conversely, the doctrine of *Kafa'a* is unknown to Shia law and in their ideology; they confined issues of equality (*kafa'a*) to be only with respect to the Islam of the husband and his ability to support the wife. Thus, if a Shia woman marries a non-Muslim; her relations may take legal steps in the courts for the annulment of the marriage.²³⁶

4.6.3 Mother's Custody of Minor Wife:

Under all the schools of Islamic law, the general rule is that a mother is entitled to the custody (*hadanah*) of her child up to certain age. And, this rule is based on the presumption that on account of her peculiar relationship with the child, she is obviously the best person to give that natural love and affection which a child requires during its infancy including its dependence for feeding. Thus, where a girl is married but has not attained puberty, her custody rests with her mother as against the girl's husband.²³⁷ This dispels the western fear and/or conjecture that give the impression of immediate sexual initiation of a child bride in instances of child marriage to the regard of the fact that the child's custody remains with her parents till evidence of her puberty is confirmed.

²³⁵ Rashid, S. K. *op cit.*, p. 65

²³⁶ *Ibid*, p. 65

²³⁷ Sinha, R. K. (1987) *op cit.*, p.150; Mulla, D. M. (1955) *op cit.*, p. 372

4.7 IMPACT OF IJBAR ON MARRIAGEABLE AGE

The idea of any fixed age, minimum or maximum under which a person, male or female, may be considered marriageable is unknown to Islamic law. For the purposes of marriage, “age” therefore doesn’t serve as legal criteria of determining capacity to marry. Thus, the western fear in this regard, as J. N. D. Anderson has revealed,²³⁸ is that, if the classical Islamic doctrine of *ijbar* is allowed to be practiced by Muslims in the contemporary setting, the outcome would be rampant instances of child marriages in the Muslim world view of the absence of any notion of “marriageable age”.

Nevertheless, it is understood that as various systems of law fix a particular age on the attainment of which the mental capacity of a child is supposed to have developed to such an extent as to give rise to the presumption that he/she can then arrive at a proper and reasonable decision on any matter,²³⁹ it is against this background that the various stages of development of childhood on the basis of “age” as discussed by Muslim jurists under Islamic law are conversed below. This would help give a highlight on the lack of fixed marriageable age policy of the sharia on the one hand, and the rationality and scientific relevancy of the Islamic criteria of puberty as the mark of adulthood as against that of other legal systems.

4.7.1 AGE OF TAIMIZ (UNDERSTANDING)

Muslim jurists have offered a distinction between the age of *taimiz* (understanding) and that of *bulugh* (puberty). As to *taimiz*, it is meant the age when a child can look after himself, i.e., can take his/her food, attend to his/her toilet, dress himself or herself, and do

²³⁸ Anderson, J.N.D. (1970) *Islamic Law in Africa*, London, P. 204

²³⁹ Ahmed, K. N. *op cit.*, p. 912

such other acts without the help of anyone else. It is considered that on attaining this age, the child must be trained for future life. This age or stage of the child is at best relevant for the purposes of custody (*hadanah*) and before the attainment of this age, the mother is considered to be the fittest person to take care of the child.²⁴⁰

But after the attainment of this age, it is felt that the father is more suitable of the parents to prepare a boy for his future life and a mother to train a girl for her future life. Therefore, the mother is entitled to the custody of the children only till they attain the age of understanding but after reaching that age, a boy must be given in the custody of the father and a girl must remain in the custody of her mother till she is fit to get married, when she must be given in the custody of the father. The father is under an obligation to defray the expenses of his daughter's marriage and is in a better position to arrange for her marriage and to look after her protection. The father is therefore entitled to the custody of a girl when she attains puberty. The requisite age on the attainment of which a child may be considered to have reached understanding (*taimiz*) is 7 years.²⁴¹

4.7.2 AGE OF PUBERTY OR MAJORITY (*BULUGH*):

Under Islamic law, the minority of a male or female child terminates when he or she attains puberty. This stage of childhood under Islamic law is described by the term "*bulugh*" which is puberty or majority, and a minor becomes major when he/she attains puberty. A boy or a girl can under the provisions of Islamic law enter into binding contracts on reaching this stage. And, a child is considered to attain puberty when he/she becomes a fit subject for marriage. The puberty of a boy is generally established by his

²⁴⁰ Ahmed, K. N. (1978), *op cit.*, p. 914

²⁴¹ Ibid

becoming subject to nocturnal emission of semen while the puberty of a girl is established by the commencement of menstruation.²⁴²

However, Muslim jurists have differed on the age of puberty. Some jurists have fixed this age at 12 years for a boy and 9 years for a girl. To the Hanafi School, according to a report, Abu Hanifa has fixed the age of puberty at 18 years for a boy and 17 years for a girl. Abu Yusuf and Muhammad ibn Hassan al-Shaybani have laid down that a boy or a girl attains puberty on the completion of 15 years and according to a report, Abu Hanifa also agreed with this view. The Hanafi School do not attach any importance to the growth of pubic hair.²⁴³ In the most prevalent view among the Hanafi and the Shias, puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.²⁴⁴ Thus, any person who has attained puberty is entitled to act in all matters affecting his or her status.

To the Shafii School, similar view is held. Imam Shafii himself holds that puberty shall be presumed when a boy gets nocturnal emission of semen or gets pubic hair or attains an age of 15 years. A girl shall be considered to have attained majority when she gets menstruation or attains the age of 15 years.²⁴⁵

To the Maliki School, Imam Malik has stated that a child attains his majority or puberty when a boy gets nocturnal emission of semen or gets pubic hair and for a girl when she gets menstrual discharge or hair grown in the pubic region. As regards age, there are two

²⁴² Ahmed, K. N. *op cit.*, p. 912

²⁴³ Ibn Qudamah, al-Mughni, Cairo, Vol. IV, pp. 459-460; al-Marghinani, al-Hidayah, Vol. III, p. 358; Ahmed, K. N. (1978), *op cit.*, p. 913

²⁴⁴ Mulla, D. F. (1955) *op cit.*, p. 282; al-Marghinani, *Al-Hedaya*, *op cit.*, p. 529; Baillie, Neil B. E. (1865) *op cit.*, p. 4

²⁴⁵ Ibn Qudamah, al-Mughni, Cairo, Vol. IV, p. 459; Ahmed, K. N. (1978), *op cit.*, p. 913

reports attributed to him. According to one report, he holds a boy or a girl to attain puberty on attaining an age of 15 years which according to the other report, he fixed the age at 18 years.²⁴⁶

According to the Hanbali School, nocturnal emission of semen is a sign of puberty in a boy and that another sign is the growth of pubic hair. As regards age, a boy or a girl shall be presumed to become major on attaining 15 years. Furthermore, a girl shall be deemed to become a major when she gets menstruation.²⁴⁷

According to Shia law, a child is considered to have attained majority on reaching puberty and in the absence of earlier signs of puberty, it is considered that a boy attains majority on the completion of 15 years and a girl on the completion of 9 years.²⁴⁸

The above juristic view that fixes the age of majority to 15 years seemed to have been influenced by the following Prophetic tradition:

Ibn Umar reported, "I offered myself to the Prophet (peace be upon him) in the year of Uhud while I was a boy of 14 years. He turned me back. Afterwards, I appeared before him in the year of the battle of Trench while I was a boy of 15 years. Then he gave me permission to participate in the battle."²⁴⁹

4.7.3 A CRITIQUE ON THE MODERN NOTION OF "MARRIAGEABLE AGE"

It may be observed that from the various juristic views and the Prophetic tradition considered above, there appears a generally accepted view that a child attains puberty or majority on the completion of fifteen years subject to the condition that signs of puberty

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Ahmed, K. N. (1978), *op cit.*, p. 915

²⁴⁹ Wali al-Din al-Katib, *Mishkat al-Masabih*, Vol. I, p. 292

have not appeared earlier. That is to say, priority is accorded under Islamic law, to occurrence of signs of puberty as the applicable test rather than the attainment of any determined age. It is only in the absence of evidence to the contrary that the completion of 15 years as a presumption of law would be given effect to. Thus, a boy or a girl can actually attain puberty before completing the age of 15 years once requisite signs of puberty have appeared.²⁵⁰ By any token, this position of the sharia differs widely and is opposed to the standard of international and some national legislation that pegs marriageable at 18 years.

It may be further observed that the Islamic criteria of adulthood and the proper stage for marriage, as expatiated by classical Muslim jurists, is the attainment of the stage of puberty (*bulugh*) and that this period is the *litmus* test that determines mental and physiological development of a child rendering him/her capable of discharging legal responsibilities including the feasibility of marriage. Thus, any standard ascribed to Islamic law whereby “age” alone is used to determine the legal responsibility of a person including a fixed marriageable age is of modern origin and as well an imitation of what obtains in some secular legal systems, particularly those of the civil and common law traditions of the Judeo-Christian West.

Accordingly, under Islamic law, reaching a particular “age limit” has no bearing on legal capacity to marry or of any practical assistance towards the proper understanding the mental and physiological development that would allow the discharge of marital responsibilities as is advocated by feminists. Further still, the currently yeaned minimum

²⁵⁰ Ahmed, K. N. (1978), *op cit.*, p. 914

age for marriage, as per the standard of international law, pegs at 18 years,²⁵¹ is in stark opposition to the spirit of Islamic law.

Not only that, this standard is in our analysis, a deliberate attempt to encroach the practice of Islamic child marriage; for, it is largely in the Muslim world where the legality of child marriage is still reflective in practice that the West fears more that absence of fixed and higher marriageable age and as well, that any exercise of the power of *ijbar*, would defy the satisfaction of imperial motives of population control in such countries. These imperial motives of the West and the devices employed to achieve it are further elucidated below in our examination of the contemporary debates of the proponents and opponents of Islamic child marriage.

4.8 IMPACT OF *IJBAR* ON MINOR'S CONSENT IN MARRIAGE

Does the exercise of *ijbar* negate the requirement of free consent of parties in marriage?

As a general rule, every Muslim who is of sound mind and who has attained puberty may enter into a contract of marriage. But because of the requirement of free consent of spouses while entering into marriage contract, and in view of the incomplete legal capacity of minors, the law has reserved certain principles and procedures applicable to certain group of persons with incomplete legal competence. In respect of marriage, the legal capacity of minor's and lunatics is wanting and their marriage contract may therefore be concluded by their guardians. Minors who have not attained puberty may be validly contracted in marriage by their respective guardians who represent their interests

²⁵¹ See for example, Article 2 of the 1964 *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage*; Article 1 of the *Child Rights Convention*, 1989; Article 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women*; *Protocol to the African Charter on Human and People's Rights on the Rights and Welfare of the Child*; *The Child Rights Act 2003*, etc.,

and acts as their agents, thereby discerning the requisite consent on behalf of the minor.²⁵²

The consent of both spouses to the validity of a marriage is a fundamental issue and according to the teachings of the Holy Qur'an and the *Sunnah* of the Holy Prophet (saw), no form of undue influence would be exerted on any one as to deprive him of his free will or consent while entering into the contract of marriage. The Holy Qur'an provides: "*You are prohibited to inherit women against their will ...*"²⁵³ and this provision has been interpreted by Muslim jurists to imply that, in respect of marriage, the permission of both the parties are required as women cannot be obliged into the bond of marriage through inheritance against their will. It is therefore essential that the man and the woman must both agree to marry one-another.

The Prophet of Allah (pbuh) was reported to have said: "*An Aayyim (a divorcee or a widow) must not be wedded unless she is asked, and gives her approval. And a virgin must not be wedded unless she is consulted. It was asked: O messenger of Allah, How is her permission? He said: If she remains silent.*"²⁵⁴ From the provisions of this hadith, it is clear that even in respect of minors, no element of force can be applied in marrying them off and their consent or approval has to be obtained, otherwise they are at option to seek the nullification of such marriage.

Accordingly, it is reported in another hadith to the effect that a certain lady was forced by her father to marry against her wishes and she went to the Prophet (saw) and he

²⁵² Mulla, D. F. (1955) *op cit.*, p. 282

²⁵³ Qur'an 4:19

²⁵⁴ Reported by *Bukhari & others*

invalidated the marriage.”²⁵⁵ In another narration, it was reported that a daughter was forced by her father to get married and when the daughter approached the Prophet (saw), the Prophet said to her that she can either continue, or if she wish, she can invalidate the marriage.²⁵⁶ This means, the consent of both the male and the female is required for there to be a valid marriage contract.

However, the question arises as to whether in view of their lack of complete legal capacity, must minors decide when and whom to marry by themselves? Similarly, are minors to discern their consent and to carry on with the conclusion of their marriage contract by themselves or through their legal guardians? The Muslim jurists have various opinions on the issue.

Under the Hanafi School, even without the accession of a guardian, an adult male or female of sound mind, whether he/she is virgin or *thayyiba*²⁵⁷ may engage in the contract of marriage by virtue of his/her own consent without the intervention of his/her guardian to represent him/her. The point here is that among the Hanafis, they emphasize on the consent of the parties to the marriage independent of the role or influence of either the father or any other relative.

On the other hand, the Maliki and the Shafii Schools agrees with the Hanafis so far as boys and a *thayyiba* who have attained majority are concerned, i.e., their free consent must be obtained from them as they possess the requisite competence to discern such

²⁵⁵ Sahih Bukhari, Volume No. 7, Ch. No. 43, Hadith No. 69

²⁵⁶ Hadith in *Musnad* Imam Ibn Hambal, Hadith No. 2469,

²⁵⁷ *Thayyiba*: refers to a girl that has had sexual relation with a man

consent. But to the Maliki jurists, a maiden girl even if she has attained majority, she cannot marry without the consent of the guardian.²⁵⁸

However, where for one reason or the other, the requisite consent of the parties to the marriage have been obtained by force or fraud, the marriage is invalid unless it is ratified and not even consummation against the will of the woman will validate the marriage.²⁵⁹

4.9 AN ANALYSIS ON CONTEMPORARY ARGUMENTS FOR AND AGAINST *IJBAR VIS-À-VIS* THE PRACTICE OF CHILD MARRIAGE IN ISLAMIC LAW

There appears to be two dominant perspectives to the debate on the concept of *ijbar* and the practice of child marriage in Islamic law, i.e., those group of scholars (herein termed proponents of the doctrine) who on the one hand, see it as a distinct feature of Islamic family law thereby arguing it as protecting the best interest of the child as per the dictates of Islamic law; and those group of scholars who are sternly opposed to the doctrine and its practice (herein termed opponents of the doctrine). Below is an examination of the major highlights of both the proponents and opponents of the concept of *ijbar* and the practice of child marriage in Islamic law.

4.9.1 ARGUMENTS OF THE PROPPONENTS OF *IJBAR* AND/OR CHILD MARRIAGE IN ISLAMIC LAW

In the words of Syed Khalid Rashid on child marriage while discussing the option of puberty (*khiyar-ul-bulugh*) as part of the rights of the child in Islamic law, and also in a bid to offer a critique against the unsubstantiated assertions of J.N.D. Anderson and Carroll Lucy on child marriages vis-à-vis the exercise of *ijbar*, S. K. Rashid states that under Islamic law, child marriage is possible and that a Muslim minor married during

²⁵⁸ Abdur-Rahim, M. A. (1958) *op cit.*, pp. 330-331

²⁵⁹ Mulla, D. F. (1955) *op cit.*, p. 283

minority by a guardian, is given a right, on attaining the age of puberty, to accept or reject such a marriage.²⁶⁰ He further put forward some of the main reasons behind continued acceptability of early marriages in eastern and third world countries. In his view, which this writer also concurs, it is not the fact of their recognition under various personal laws but some entirely other sociological factors and considerations which he summarized as follows:

Islam prohibits every kind of sexual experience. Parents, therefore, prefer early marriages to save their children from the dangers of sinful life. Then, if young ladies do not marry what else should they look for in life? In the countries where actual age of marriage is considerably high, it is not so by virtue of any law but because of numerous opportunities available to young persons in education, vocational training and employment. Those whose marriages are sought to be statutorily delayed have to be given alternatives as interesting, if not more, as early years of married life. Thus to make early marriages a cognizable offence, as some reformist plead, would be nothing but cruelty.²⁶¹

Further still, in objecting to any legislative influence on the practice of child marriage more particularly reform of the traditional role of marriage guardians and the imposition of minimum age of marriage, S. K. Rashid had succinctly argue that any legislative effort to impose a minimum age for marriage may not be very useful, because if a law runs counter to the ideals and concepts of a society, it is bound to fail and to say that such social legislation may at least help to mould public opinion, may also not be correct.

To buttress the above assertion, he cited the legislative experience in India whereby a 59 years old enactment (i.e., *The Child Marriage restraint Act 1929* which is now 85 years old) could do nothing by way of moulding public opinion against child marriages in

²⁶⁰ Rashid, S. K. Certain Aspects of Children's Rights in Islamic Law, *Journal of Islamic and Comparative Law*, Vols. 15-17, pp. 10-11

²⁶¹ Rashid, S. K. Certain Aspects of Children's Rights in Islamic Law, *Journal of Islamic and Comparative Law*, Vols. 15-17, pp. 10-12

India. Besides, it is observed that 34 years after the enactment of the Indian *Special Marriage Act of 1954* (now 60 years old), an overwhelming number of marriages still takes place under the various personal laws (like Hindu and Islamic laws), all of which have full recognition for parent's role and none of which regards a minor's marriage as invalid.²⁶² It is also observed by Mahmood Tahir that similar situations prevail in Uganda, Nigeria and other countries.²⁶³ S. K. Rashid finally remarked that:

Accusations of child marriage and other 'social evils' among Muslims in Nigeria are made without being supported by any empirical study. Child marriage, though not prohibited by shari'ah, is regulated by means of many legal provisions, so as to ensure the welfare of the child. There could be isolated instances of violations of these rules, but such exceptions should not be used generally to impeach the whole system.²⁶⁴

In his arguments while justifying child marriage, Hammudah Abd al-Ati has this to say:²⁶⁵

Abdul-Rahman Al-Sheha,²⁶⁶ in his refutation of some of the most common misconceptions relating to the power of guardianship in the marriage contract, he has while dismissing allegations of elements of force in Muslim marriages, argued that in Islamic jurisprudence, one requirement for a sound marriage is the total agreement of the woman concerned and that if a woman is coerced to accept an undesired marriage, she is entitled to present her case before a Muslim judge to seek annulment. He cited an incident whereby a woman by the name of al-Khansa bint Khadam, who had been

²⁶² Ibid, p. 12

²⁶³ Mahmood, Tahir (1980) Marriage Age in India and Abroad: A Comparative Conspectus, *Journal of the Indian Law Institute*, Vol. 22, pp. 38-80 at p. 79

²⁶⁴ Rashid, S. K. op cit., p. 13

²⁶⁵ Hammudah Abd al-Ati, (1977) *op cit.*, pp. 76-77

²⁶⁶ Abdul-Rahman Al-Sheha, *Women In Islam & Refutation of some Common Misconceptions*, Translated by: Abu Salman Deya ud-Deen Eberle Edited by: Abu Ayoub Jerome Boulter Abdurrahman Murad, The Vista, pp. 91-94

previously married (and was now divorced or widowed), came complaining to the Messenger of Allah (pbuh) that her father had forced her to marry a person she despised. He disapproved and invalidated it.²⁶⁷ Furthermore, Al-Sheha has reinstated the position that:

Another requirement is that she does not give herself in marriage to anyone without guardianship. Her father, or in the case he is not alive, her grandfather, paternal uncle, brother or even her mature son, or the ruler of the State, must act as her guardian in this affair to assure her rights are protected and to sign the marriage contract along with her signature. His role is to make sure that the groom is sincere and of standard, that she has a proper dowry, and that two witnesses testify to the contract which she willfully accepts. All these measures are to protect her rights and the sanctity of marriage.²⁶⁸

Additionally, in buttressing marriage guardianship in respect of women, Al-Sheha has argued that:

Since the woman remains in a position of natural weakness, Islamic jurisprudence lays down principles and laws to protect her interests and welfare and preserve her rights. The father, the mother and other concerned relatives, if need be, help select the right and most suitable husband for her, since all seek her happiness and none wish her to be victim of a failed marriage. The goal of marriage is to establish an everlasting relationship between a male and a female and a loving and beneficial home for the children, not mere gratification of certain desires. Since women are, in general, more emotional than men and more easily affected and tempted with appearances rather than the deeper realities, Islamic jurisprudence gives the right to the guardian to refuse and reject proposals if the suitor is not deemed a sound and sincere match. Male guardianship in this case is only natural given their role of authority and responsibility. Moreover, it cannot be denied that men, being of the same gender, have a better ability to perceive qualities of other men in certain areas, and are more capable of finding those characteristics of a man that suit his daughter or the woman under his responsibility of guardianship. Of course he seeks counsel of the wife and other concerned females in the process of selection of the bridegroom. If an appropriate man proposed for marriage and the guardian refused for no valid reason, then the guardianship can be contested in the court of law.²⁶⁹

²⁶⁷ Reported by *Bukhari*

²⁶⁸ Abdul-Rahman Al-Sheha, op cit., p. 92

²⁶⁹ Abdul-Rahman Al-Sheha, op cit., p. 93

The Nigerian legal scholar Dr. Bala Babaji, in his critique against the Child Rights Act [CRA], 2003 as being largely in conflict with the cultural and religious background of the Muslims in Nigeria, he has identified the CRA as prohibiting child marriage with threat of punitive sanctions for its violations and pegging marriageable age at 18 years.²⁷⁰ Against this stance of the CRA, it has been argued by the author that such innovation may not find the support of majority of the Nigerian Muslims.²⁷¹ Furthermore, it was highlighted by the author that the CRA contravenes the position of Islamic law with regard to the limitation of marriageable age. That, neither in the Holy Qur'an nor in the Hadith of the Holy Prophet was any person below the age of 18 years disqualified from marrying.²⁷² Thus, in his analysis of the issue, he further made it clear that:

What is important to note is that, Islam allows child marriage and or betrothal at whatever age because, it prescribed as a condition that final consummation must be delayed until the parties are ready for marital relations, and this condition is determined usually by puberty. Secondly, Islam has, according to many jurists, given minors and or children the option of majority, which means that, a minor or child who has reached the age of puberty is free to uphold or annul such a marriage contract. Taken together, one can say that, Muslims would like a reconsideration of this provision of the Act for it to be successful.²⁷³

In furtherance to the view that Muslims would like a reconsideration of the provisions of the CRA on child marriage for it to be successful, it may be argued that its success is not supposed to be the business of Muslims in Nigeria and that rather seeking a way a balance the provisions of the CRA with that of Islamic law in Nigeria, it deserve an

²⁷⁰ See sections 21-23, Child Rights Act 2003

²⁷¹ Babaji, B. (2005) Harmonizing the Child Rights Act 2003 with Cultural and Religious Values in Nigeria: A Muslim Perspective, *Journal of Islamic and Comparative Law*, Vol. 24, p. 19

²⁷² Ibid, pp. 30-31

²⁷³ Ibid, pp. 31-32

outright rejection albeit it be observed in breach at all costs and by all means for its fundamental encroachment on the personal laws of Muslims in Nigeria.

4.9.2 ARGUMENTS OF THE OPPONENTS OF *IJBAR* AND/OR CHILD MARRIAGE IN ISLAMIC LAW

The concept of *Ijbar* has been subject of continuous controversy and criticisms ranging from divergence of opinion by certain classical Muslim jurists down to its modern day hypothetical disparagement by critics of the sharia under the guise of child's rights protection.²⁷⁴ To do away with its practice, the modern secular opponents of the doctrine therefore continue to advocate reforms to be introduced in the Islamic laws of marriage. Therefore, in this chapter, this unit of the work seeks to examine the various criticisms and mechanisms levelled against the practice of child marriage arising out of the exercise of power of *ijbar*.

Oriental scholars that are experts on Islamic affairs such as J.N.D. Anderson, no doubt, champions the path to modern criticism or resistance to the Islamic concept of *ijbar*, setting forth precedent to present feminist and child rights advocates who starkly condemn child marriage, thereby seeking an outright abolition of the concept of *ijbar* as being constructive to the practice of child marriage. Thus, the first line of argument maintained by the opponents of *ijbar* is to argue that it leads to many child marriages, therefore, in their view, to curtail child marriage among Muslims; the starting point should be an attack on the concept of *ijbar* wherever such is the practice in the Muslim world. Secondly, another line of argument and/or approach against the practice of child marriage vis-à-vis the exercise of the power of *ijbar* by guardians is a device which

²⁷⁴ Masud, M. K. (1985) op cit., p. 215

revolves around setting a fixed but higher minimum age for marriage in the sense that persons would only become eligible for marriage at the peak of their youthfulness. Thirdly, child marriage is condemned on the pretext of education and health associated hazards of which VVF and HIV/AIDS are the commonly cited implications of child marriage. However, these arguments and approaches of the opponents of *ijbar* have been analyzed below.

In his study of Islamic law in Africa in 1954, J.N.D. Anderson expressed his fears that Maliki father's right of *ijbar* (compulsion) would lead to many child marriages. But as S. K. Rashid had argued in his criticism of a later edition to the above study as at 1970, J.N.D. Anderson's²⁷⁵ empirical surveys on the subject with reference to Northern Nigeria failed to substantiate his hypothesis regarding his fear that *ijbar* would lead to many child marriages. This is because, Anderson himself found that child marriage in Northern Nigeria is uncommon though not unknown.²⁷⁶

Following the footsteps of Anderson and while calling for the drastic curtailment of the power of *ijbar*, an English author, Carroll Lucy, has remarkably over exaggerated the implications of *ijbar* on child marriage with reference to Northern Nigeria, she remarks thus:

This assumption (that the guardian will act in the best interest of the ward), as the Nigerian situation proves, cannot always be relied upon ... Muslims (in Nigeria) must address themselves to the actual situations confronting the female members of their community ... A minimal age of marriage protecting a girl from the hazards of early pregnancy, coupled with provisions for the avoidance of marriages contracted during

²⁷⁵ Anderson, J.N.D. (1970) *Islamic Law in Africa*, London, P. 204

²⁷⁶ Rashid, S. K. Certain Aspects of Children's Rights in Islamic Law, *Journal of Islamic and Comparative Law*, Vols. 15-17, p. 11

minority, and drastic curtailment of the Maliki/Shafi'i father's right of *ijbar* over his minor daughter would appear to be urgently needed.²⁷⁷

Certainly, one may concur with the critique offered by Syed Khalid Rashid against the above unfounded remarks of Carroll Lucy in the sense that although the assertion sounds genuine, it is however not fortified with any empirical data to show that child marriages are widely prevalent among Muslims of Nigeria.²⁷⁸ Secondly, that experience shows otherwise and this has been documented even by the study on the subject under the hand of the oriental scholar J.N.D. Anderson as highlighted above.

Another approach by the opponents of *ijbar* and child marriage is efforts towards the social dislodgment of the practice of child marriage vis-à-vis the disparagement of the application of the concept of *ijbar* among Muslims particularly in Nigeria under the guise of girl-child education and this approach is also on the move. Some Muslim writers, academics, religious and political leaders are being used to campaign for this social change and the struggle is being fought under the banner of reforming Islamic family law to accommodate modernity. To cite an example, Noibi, D.O.S. in his book,²⁷⁹ has dedicated a chapter with the title “*Early Marriage, Education and Social Responsibilities – The Islamic Point of View*”. He started his discussion with an identification of what he called ‘the problem’ whereby he stated thus:

The widespread of too early marriage among Muslims in some parts of Nigeria as in some other parts of the world has created some problems for the Muslims. The practice has had some tremendous adverse effects on the education of Muslim women and consequently on their social

²⁷⁷ Carroll Lucy, (1987) *Marriage-Guardianship and minor's Marriage at Islamic Law*, *Islamic and Comparative Law Quarterly*, Vol. 7, pp. 292-293

²⁷⁸ Rashid, S. K. *Certain Aspects of Children's Rights in Islamic Law*, *Journal of Islamic and Comparative Law*, Vols. 15-17, pp. 10-12

²⁷⁹ Noibi, D.O.S. (1988) *Islamic Perspectives (A Comprehensive Message)*, Shebiotimo Publications, Ijebu-Ode, Lagos –Nigeria

status and their ability to carry out their social responsibilities. It is common to hear of or read about the withdrawal of teenage girls from schools into matrimonial homes. Quite often, we are told of the serious consequences of early marriage on the health of the young girls involved. Such a problem is source of concern for all Muslims.²⁸⁰

It was further stressed by the above author that part of the role of women within the matrimonial home is the duty of upbringing children which is a difficult task the proper accomplishment of which requires education and training. And that to be able to carry out certain social responsibilities, Muslim women must be educated and that obviously, some of these responsibilities require high-level education. Citing some hadith without their references,²⁸¹ he concludes that:

The Prophets injunctions that Muslims must seek knowledge ‘from the cradle to the grave’ also applies obviously to Muslim women just as it does to male Muslims. Therefore, it is contrary to the spirit and letter of that injunction to withdraw a girl from school and marry her out at an early age, thus terminating her formal education ... that it is contrary to the Sunnah to terminate a young girl’s education merely because she must get married at an early age.²⁸²

It may be observed that the above statement of D.O.S. Noibi is very much misconceived and above all, motivated by Western conspiracy against the practice of child marriage by Muslims. This is because, as we shall see later, a call for the abolition of child marriage is

²⁸⁰ Ibid, p. 42

²⁸¹ The Hadith quoted by the Noibi, D.O.S. op cit., at pp. 42-45 without proper referencing is the reported statements of the Prophet (saw) to the effect that:

- a) “*Acquisition of knowledge is obligatory on every Muslim, male or female*”;
- b) “*The woman is the ruler over the home of her husband and she is answerable for the conduct of her duties*”;
- c) A report that the wife of the Prophet (saw) has said: “How good the women of Ansar, they would not shy away from acquiring knowledge about religious matters”;
- d) That Muslim women of the time of the Prophet (saw) once went up to him and said: “*You are always surrounded by men (teaching them and preaching to them). So please appoint a day for us and the Prophet was happy and granted their request.*”

²⁸² Noibi, D.O.S. op cit., at p. 45

one of the devices to curtail population in third world countries. In stark opposition to the above exposition of D.O.S. Noibi, the following points may be critically observed:

1. First of all, under the shari'ah, marriage and education has no direct correlation and neither marriage nor education is a prerequisite to the attainment of one-another. Consequently, any attempt to justify abolition of child marriage on the pretext of acquiring modern secular education using the legal injunctions of sharia is unjustifiable; because, in the overall analysis, both marriage and education are devotional acts (*ibadah*) and that each serve certain ultimate objectives in such a manner that none can defeat but complement the other at any material time.
2. Secondly, while he seeks to justify abandonment of child marriage in the name of modern secular education using the standard of the sharia, the author willfully disregards that even from the hadith he cited, none of the earlier Muslim women were stated in the various hadith to be embracing education in a state of spinsterhood. In fact, A'isha (RA) whose statement he quoted was very well married in the youngest age of 6 years, but nevertheless, she is reckoned as one of the most knowledgeable women that are pride to Islam. This establishes the fallacy of those who seeks to condemn Islamic child marriage on the pretext of education. The writer believes that at least, there must be certain conspiracy behind this approach and the simple explanation to it is the Western imperial desire to curtail population growth in third world countries. And the logic is simple, as all efforts towards having the acceptance of contraceptives at the level that would provide for what the West is longing for, (i.e., safer sexual freelance

among youths) proves abortive especially among Muslims in various nations, then, there ought to be a higher minimum age for marriage that would allow little active fertility period as at the time of marriage. And, the best way to achieve this, is prescribing the modern secular education whereby the child is forced to undergo the current global policy of the UN in terms of universal basic education of which the minimum age that it may terminate is somewhere around 16-18 years. This tactically allows for the 18 years minimum age for marriage that they consider the ideal to be accepted globally. That is to say, child marriage is entered into at the most active fertility stage of the child whereby the occurrence of several births would naturally be the result. But, by the time marriageable age is raised higher (possibly the now 18 years accepted by the West) and when attention of the child is diverted to acquiring higher education, there would be massive reduction in sexual fertility among the youth which may eventually result in lower birth rate in the society.

3. Thirdly, modern secular education would not by any token, be weighed against the requisite welfare of minors as the Islamic focal point upon which child marriage is contemplated. It has earlier been stated in this work, that parts of the primary objectives of marriage is to secure the protection of chastity and morality besides such other objectives of sustaining mental peace, mutual love and affection as well as the preservation and continuity of human race. It has also been earlier stated that some Muslim jurists conceive the legality of marriage as partaking the nature of obligatory ruling (*wajib*) on the pretext of their analysis on the role of marriage as the means of attaining sexual purity. That is to say, in

circumstances where Muslim parents comes to the understanding that the welfare of their child, male or female, demands marriage as the only means to secure his/her sexual morality against the evils of *zina* (adultery and fornication), then the value of education is rendered nugatory where by failing to meet the necessity of marriage, pre-marital sexual indulgence would occur.

4. By and large, the modern secular education cannot override the moral pursuit of marriage in Islam and that by its very nature, the western education nowadays advocated for is the kind that over hauls moral uprightness in Muslim lands. It inculcate in students, both children and adult, males and females, exposure to all sorts of immoralities whereby the teaching of sex education, admixture of males and females against the Islamic principle of segregation of sexes, nudity of all kinds in school campuses, more particularly depriving the female of her right to wear the Islamic hijab, and a host of more other evils associated with modern education systems, gradually deprives Muslim children of ideal Islamic moral and social etiquette to the extent that they are rendered halfway Judeo-Christian in likings. If this type of education is the one advocated for, and if western education naturally means to Muslims loss of Islamic values, then, certainly not only withdrawal of children from school for the purposes of marriage would be upheld, but total rejection of the entire concept of western education is the best answer that Muslims must choose to go by. Therefore, in the considered view of this writer, no measure of effort however intelligent it might be can successfully use the standard of the sharia to justify the abolition of child marriage on the pretext of modern secular education.

Furthermore, Maryam Uwais,²⁸³ while writing on the compatibility of the Child Rights Act [CRA] with Islamic legal principles, she has touched on child marriage whereby an analysis on her remarks is as follows. In her approach, she is opposed to the practice of Islamic child marriage and consequently supportive of its abolition under the pretext of education and health while actively seeking to justify the pegging of minimum marriageable age using the standard of the sharia. First of all, an analysis of her ideologies on the subject indicates that contrary to what she termed “assumed incompatibility” of CRA with Sharia and Islamic principles and also while disagreeing to her conclusion or stand on the compatibility of sharia with modern human rights norms, it may be stressed that the sharia-based criticisms leveled against the provisions of the CRA are quite real, tangible and derogatory to the socio-religious pursuit of Muslims in Nigeria and these opposition of sharia-minded Muslims are far from being flimsy in substance nor does it simply revolves around the so-called conspiracy theory as she retorts.²⁸⁴ Secondly, it may be maintained that to turn a blind eye over blemish content of the CRA while pressing for its acceptance and/or enforcement among Muslim population in Nigeria is the craziest human rights advocacy directed towards social disruption of the

²⁸³ Maryam Uwais, *Compatibility of the Child Rights Act with Islamic Legal Principles*, An Online Article Available at <http://telegraphng.com/2013/07/compatibility-of-the-child-rights-act-with-islamic-legal-principles/> accessed on the 4th September, 2013

²⁸⁴ In the words of Universalists human rights advocates, they see any relativistic critique on human rights as flimsy and motivated by conspiracy theory. In that, it is not surprising to hear of Maryam Uwais saying:

Contemporary Islamic jurists and scholars in our jurisdictions need to adopt and accommodate a complementary approach to achieve the noble objective of enhancing human dignity, irrespective of flimsy distractions and allegations that human rights norms are a conspiracy against religious values. Muslims must begin to view and understand international human rights norms as endemic in and complementary to Islamic principles (and vice versa).

Nigerian society, more particularly disruption of Islamic family values among the Muslims of Nigeria. In her exposition on pegging the marriageable age, she states thus:

The most contentious issue arising from the contents of the 2003 Child Rights Act is the feasibility, or otherwise, of pegging the marriageable age for the female gender by the government. This appears to offend the culture that prevails in many communities of Northern Nigeria under which young girls are married off at ages between 9 and 16 years. Upon a careful study of the position in Islamic Law, however, it is clear that this culture is one of the many inconsistencies that abound. There is certainly no categorical statement under the Sharia that a female must be married off even after the attainment of puberty, and the emphasis on the pursuit of education seems to be more pronounced, than marriage (which becomes imperative only in the event that the person is incapable of remaining chaste).

The following points are noteworthy from the above quotation, that is to say:

- a) As Maryam Uwais as tagged it, it is acceptable that the issue of legal prohibition of child marriage is among the most encroaching aspect of the implications of CRA on the practice of Islamic family law in Nigeria. To allow such a position, no doubt, the future of Islamic family law and values is doomed and the ascendancy of Western sexual freelance among youths would prevail as a norm; because, the youths who are still considered to be children, would never get married in a state of childhood until the prescribed marriageable age is attained but in the meantime, it is open to the child who has attained sexual maturity to resort to the option of pre-marital sexual indulgence to satisfy his lustful desire.
- b) Again, defection of child marriage on the pretext of education is advocated. But as it has been earlier stated in this work and contrary to what Maryam Uwais has assumed, in Islam, education (and in particular, girl-child education) never seem to be more pronounced than marriage.

- c) Marriage does not and is not reckoned by the sharia to be “imperative only in the event that the person is incapable of remaining chaste” as Maryam Uwais has presented it, but that chastity is the ultimate end result of marriage and that getting married in Islam in the least analysis, is that it is a devotional act (*ibadah*) besides the natural human surge for it.

Similarly, in grossly presenting the feminist agenda against child marriage, Maryam Uwais has abhorrently thrown the fears associated with child marriage in such a tone that would scare a conscious mind. She stated this:

Any honest observer would be fully conscious of the injury done to the girl-child’s future when she is removed from school at a tender age for the sole purpose of being given away in marriage. Not only is she mentally unprepared to take on the onerous duties that attach to caring for a home and husband, she has no knowledge of family planning and is under pressure, almost immediately from family and friends, to become pregnant. Such child brides are prone to the VVF disease, not only because of the relatively immature size of their pelvis, but also because of the lack of adequate nutrition and basic healthcare at the actual time of delivery. She is placed in a situation where she can exercise no options; and virtually no life.²⁸⁵

From the above quotation, it is manifestly clear and it as well lends credence to our earlier analysis that some of the worries conceived by the West and their allies in third world countries are population control, including but not limited to employing the device of abolition of child marriage. Maryam Uwais has acknowledged properly their feminist agenda of the role of knowledge of family planning among the youth whereby as she said, absence of such knowledge coupled with the desire by child brides to procreate, are among the dangers they identified with child marriage. This belief of the feminists

²⁸⁵ Ibid

depicts their conspiracy that they never meant or care for the well-being of the girl-child but the satisfaction of the imperialistic motives of birth control.

Further still, their worry about child brides being prone to the VVF disease is unacceptable when viewed from the standard of the sharia against what obtains in other customary systems. The modern day VVF has no direct correlation with child marriage *per se* especially within the framework of Islamic law because; under Islamic law as it has been earlier stated in this work, child marriage is not synonymous with early sexual initiation or pregnancy of the type that defeats the Islamic criteria of adulthood (*bulugh*). Besides, medical evidence has establish plausibility with respect to the common causes of VVF to which even in the words of Maryam Uwais, she allude that child brides contact VVF “not only because of the relatively immature size of their pelvis, but also because of the lack of adequate nutrition and basic healthcare at the actual time of delivery”²⁸⁶.

In the face of malnutrition and lack of basic healthcare, which are gross social evils that pervade the Nigerian society, it is hard to believe solely that VVF is the natural consequence of child marriage. In fact, diseases that are far more fatal than the acclaimed VVF are in existence and indeed affect the girl-child but focus was directed only on such diseases that would shock human conscience in such a manner as to secure social change against child marriage.

Likewise, in her remarks while justifying pegging marriageable age of the CRA using the standard of the sharia, Maryam Uwais conceives that:

²⁸⁶ Ibid

Generally, the importance of family and the protection of the institution of marriage are well-established under Islamic Law. There exists abounding evidence in Islamic history, of the practical demonstration by the Prophet and the early Caliphs, that it is the State's duty to protect and support the family and especially its more vulnerable members. Since it is the State, as the ultimate guardian of all, that is responsible for protecting and promoting children's rights, surely the time has arrived for the State Governments to determine a particular age as the age of responsibility, especially in view of the tragedy of the VVF and unfortunate implications of numerous emerging child mothers in our various jurisdictions, as a developing society. Our scholars should be the first to recognize that this is permissible, even under the Sharia, as existing social conditions do merit the government pegging a minimum age for marriage. Moreover, because the Qur'an itself does not specifically prescribe any specific age, or even the onset of puberty, for the host of rights it conceives as belonging to the child, it is difficult to understand how pegging the minimum marriageable age of eighteen (by which age it could be safely concluded that the second important requirement of mental maturity in Islam would have been fulfilled) would offend the Sharia or the spirit of Islam.

It may very well be brought to her notice that the legislative role assumed by the modern secular states is quite distinct with the Islamic concept of state (the *khilafah*) and it could not be surrendered even for the sake of argument that contemporary nation states in the Muslim world are typical of the Islamic concept of state whereby the will of Allah is acclaimed but merely reminiscent of the Judeo-Christian concept of statehood whereby positivists approach to legislation is the norm. Besides, unlike the other countries cited as an example,²⁸⁷ these countries proclaimed themselves as Islamic states but in Nigeria, we

²⁸⁷ In the words of Maryam Uwais, she whimsically entertained the view that: "indeed, were the fixing of a minimum marriageable age against the precepts of the Sharia, many Sharia-practicing countries would not have dared to do so in their own jurisdictions. You would find that in Egypt, as in Malaysia, for instance, the minimum marriageable age for a female has been fixed at eighteen for boys, and sixteen for girls; while in Syria, it is eighteen for the male, and seventeen for the female. Morocco has fixed eighteen for male, and fifteen for female. Yemen makes the legal minimum age for marriage for both female and male, 16, while the Philippines pegs this minimum age at 20, again with no gender distinction. Bangladesh, Pakistan, Indonesia and Tunisia also make the minimum age for boys and girls between sixteen and twenty one. It is therefore clearly not un-Islamic for a government to fix a minimum marriageable age in the public interest, even under the Sharia".

are made to believe that it is a secular state, and how would a secular state emulate a theocratic state? Additionally, Nigeria is a multi-religious and as well having plural legal environment, at least as it affects personal laws to which every individual must, at a matter of right, be permitted to adhere to his own personal law. And if human right is tenable, no measure of derogation would be allowed to stand on the way of religious freedom in the practice of family matters.

Moreover, in all the countries cited, western influence either through colonialism or some sort of allies would not be discountenanced with and by no token would the western-minded reforms introduced in given country in the Muslim world to stampede the spirit of Islam would be worthy of emulation in so far as and to the extent that such reforms are squarely modern without any element of spiritual backing of the sharia but rather spiritual derogation of the manifest Islamic purposes (*maqasid*) of legislations.

While seeking to justify the compatibility of the pegging of minimum marriageable age with the tenets of the sharia, Maryam Uwais further call in aid the approaches of modern Muslim scholars on the subject, and her exposition on the issue is that:

Besides, the attitude of contemporary Islamic jurists to ‘innovations’ such as these is that nothing should stand in the way of their adoption if they are useful to human society, prevent harm, encourage good and do not conflict with fundamental principles or direct commands in the Qur’an or the Hadith. On this particular issue, no categorical age has been stated; and puberty, (which would include mental and physical maturity), is made the benchmark for marriage. With examples of the instances of the Aisha’s age, as well as Fatima’s, of marriage, surely it is clear that a country or a jurisdiction could determine what age should be best for its own girl-child, given its peculiar circumstances. Indeed, it is examples such as these that have paved the way for pegging the minimum age for marriage in other Islamic jurisdictions around the world, to ensure the empowerment and enhancement of the girl-child,

and thus, safeguarding and protecting the family unit in their various countries.²⁸⁸

It is noteworthy that she failed to name the modern scholars she is referring to in order to avail her readers of whom they are in terms of their knowledgeable and religiousness (God-fearing) but if it is her feminist colleagues of the kind of Ayesha Imam, Jamila Nasir, JAM Audi, M. T. Ladan, B. A. Haruna, and such other internationally acclaimed feminists of the kind of A. A. An-Na'im, Shaheen Sardar Ali, Javaid Rehman, Mir-Hosseni Ziba, Haifa A. Jawad, etc., it is hard to believe that their *ijtihad* endeavors is motivated by Islamic spirit but nothing less than being used as agents to satisfy western imperialism. This is because, the Islamic harm principle together with that of public interest is at the very essence behind the Islamic concept of child marriage and that the same principle cannot be hijacked either way to accommodate western interest in defiance of its established legality.

It is well-known that the Islamic child marriage vis-à-vis the exercise of the power of *ijbar* is philosophically meant to avert public immorality of the kind prevalent in the West today where marriageable age is obtained. To call for such a standard is indeed calling for licentious sexuality among Muslim youths in Nigeria, and that it is sheer illusion to attempt to bridge the manifest conflict between the secular provisions of the CRA with clear-cut Islamic injunctions that are opposed to same.

The best way, in the considered view of this writer, is that Nigeria should maintain plurality in personal laws and that no attempt whatsoever should be made to impose such secular and atheistic conceptions inherent in the provisions of the CRA on all citizens to

²⁸⁸ Ibid

the disregard of the diverse religio-cultural background of the nation. If social cohesion of the Nigerian society is to be maintained, the CRA should remain open to those feminist who see rationality in it and that adherent of customary and religious practices shall be accorded sufficient latitude to have their fundamental freedoms preserved as citizens of Nigeria.

4.9.3 CROSS ANALYSIS ON THE PROPONENT'S AND OPPONENT'S VIEWS ON CHILD MARRIAGE VIS-À-VIS THE CONCEPT OF *IJBAR*

First of all, wherever Islamic relativism is employed, an analysis on the subject of child marriage vis-à-vis the concept of *ijbar* would manifestly indicate western conspiracy behind abolition of child marriages in third world countries, especially in the Muslim world with particular reference to Northern Nigeria. It is belied by this writer as the above analysis shows, that the move and aggressive influence of the western world under the auspices of the UN to have child marriage abolished is simply to check population growth in third world countries, it being a threat to western imperialism.

To do so, they have to hide under the banner of the so-called “harmful traditional practices” that impede the protection of the rights of women; namely, child marriage, female genital mutilation, child labour, etc., etc. Similarly, in furtherance of these illicit objectives, as it was earlier discussed in this work, the Western world had to device compulsory education for the youth, with special interest on girl-child education tactically rising the female’s marriageable age.

In contradistinction to western orientalism, it is submitted that marriage in its Islamic law conception is by its objectives, one of the means of Muslim’s population growth and it is the policy of Islam that marriage signify diversification of the *ummah* to which several

hadith earlier considered in this work under significance of marriage lends credence to this position. Moreover, it is the youth that are encouraged to marry and procreate and that is objective or policy of the sharia is never meant to doom the future of anyone but to brighten it nor is any forensic evidence available that by solely entering into marriage, a child bride's future is halted. This is merely the assumption of the feminists who tend to build the future of children on safer sexual freelance and the avoidance of marital responsibility in the name of education.

Consequently, the sum total of the analysis presented above on the moral justification of Islamic child marriage and the exercise of *ijbar* where necessary as presented by the so-called conservative Muslims on the one hand, and the various approaches and techniques employed by the opponents of Islamic child marriage, it becomes manifest that it is one of the conspiracies of the West to expose the Muslim child to immoralities and early but safe sexual initiation whereas in Islamic law, morality and sexual preservation can only be attained through marriage. It is also factual that sexual maturity is attained earlier than the Nigerian CRA's prescribed marriageable age of 18 years, the implication being that the child while prohibited from marrying is thereby compelled to resort to premarital sex for the attainment of his/her sexual needs upon attaining puberty below 18 years.

Similarly, it is understood that it is no business of the law under the CRA, i.e., it frowns not on consensual sex by engaged by the child below 18 years, whereas, Islamic law sees any form of sexual corruption outside wedlock as serious immorality. Therefore, the quest for the abolition of Islamic child marriage is but a technical device to delay marriageable age to a later period when active fertility period had declined. Moreover, it is a device to expose Muslim children to the vices of sexual immorality vide compulsory

girl-child education whereby the child remain under the mental care and superintendence of social policy dictation of the West that he/she may gradually become sensitized on contraceptive use and family planning devices.

4.10 REFORMS IN THE MUSLIM WORLD AGAINST THE DOCTRINE OF IJBAR AND/OR CHILD MARRIAGE

Recent reforms have been introduced in the Muslim world on the subject of child marriage vis-à-vis the concept of *ijbar* and the most pertinent question here is, does such reforms meets the spirit (*maqsid*) of the sharia? Or are they motivated by Western secular motives? It is understood that, in the Muslim world, to bypass the operation of the doctrine of *ijbar*, some Muslim countries through the efforts of modernist scholars that have studied in the West and becomes influenced or diluted with Western philosophies in their thinking, have called for and champions the banning of child marriage while other Muslim countries have restricted the marriage of minors by fixing minimum marriageable age.

Such modern marriageable ages ranges from 17 to 20 years for males and from 12 to 18 years for females which are relaxable in some exceptional circumstances. The role of marriage guardian has also been restricted generally to one of protecting the interest of the ward whereby consent of the guardian is essential only in cases where the parties have restricted capacity.²⁸⁹

In Morocco, guardianship with the right of compulsion (*wilayat-ul-ijbar*) is expressly prohibited under Article 12(4) which declares that “The guardian, even if he is the father, shall not compel his daughter who has reached puberty, even if she is a virgin, to marry

²⁸⁹ Masud, M. K. (1985) op cit., at p. 220

without her permission and consent unless temptation is feared, in which case the judge shall have the right to compel her to marry in order that she may be under the protection of an equal husband who will take care of her.”²⁹⁰

In Algeria, Articles 12 and 13 of the Algerian law provides to the effect that a guardian has no right to stop his ward from marrying if she so wishes, and if it is in her interests. If he does withhold permission, then the couple may apply to the judge, who may grant permission if he considers it wise in the circumstances. But a father may stop his virgin daughter from marrying if he considers the marriage not to be in her best interests. However, no guardian, whether father or otherwise, can compel his ward to marry, nor can he get her to marry against her consent.²⁹¹

In Iraq, Article 9 of the Iraqi law provides that “No kin or stranger may compel any person, whether male or female, to marry against his/her consent. A marriage contract under compulsion is void if no consummation has occurred. Similarly, no kin or stranger may prevent the marriage of anyone who has the legal capacity for marriage under the law.”²⁹²

In Lebanon, until the *Family Rights Act* came into force, guardianship with the right of compulsion (*wilayat-ul-ijbar*) was practiced by the Lebanese Sunnis observing the Hanafi law. This new Act prohibits the marriage of the minor in all but a few exceptional cases, and confines the exercise of the right of compulsion to marriage of the insane, whether

²⁹⁰ Royal Decrees Nos. 343/57/1 and 379/157 promulgating the Personal Status Law; See also Jamal J. A. Nasir, (2009) *The Status of Women under Islamic Law and Modern Islamic Legislation*, Volume 1, Brill’s Arab and Islamic Laws Series, pp. 49-52

²⁹¹ The Family Law No. 84–11, of 9/6/1984. See also Jamal J. A. Nasir, op cit., pp. 49-52

²⁹² The Personal Status Law No. 188/1959 as amended by Act No. 11/1963 and Act No. 21/1978. See also Jamal J. A. Nasir, op cit., pp. 49-52

male or female, provided that such a marriage is considered necessary for their welfare, and is permitted by the Shari'ah judge. The Lebanese Ja'faris (of the Shi'ah school) however, have retained the right of compulsion, meaning that the guardian may compel the minor ward to marry without the ward's consent. In such a case however, the ward would then have the right, upon reaching maturity, to choose between continuing in the marriage, or applying for its annulment if he or she feels the marriage to be disadvantageous. The Ja'fari doctrine makes no distinction between male and female minors, who both need the consent of the guardian and of the judge to their marriage. On the other hand, if the father (or the grandfather in the absence of a father) refuses to give consent, no matter on what grounds, neither any other relative nor the judge may grant permission in their stead. Should a minor be given in marriage by a judge, then the minor, male or female, has the right to decide the future of that marriage on reaching the age of majority.²⁹³

In countries like Syria,²⁹⁴ Jordan²⁹⁵ and Morocco,²⁹⁶ all forms of compulsion to marry are excluded but whilst the guardian retains his right to object to the marriage of his ward, the judge can overrule that objection if it is in the interests of the ward. Thus, the judge has the last word.

²⁹³ Al-HILLI, Shaikh Abdul Kareem Rida, *Al-Ahkaam al-Jaafariyya fil Ahwall-ish-Shakhsiyya*, Baghdad Muthanna Library, Cairo, (1947), p. 10 cited in Jamal J. A. Nasir, op cit., pp. 49-52

²⁹⁴ See The Civil Code, Decree No. 84/1949 and Decree No. 59/1953 on the Personal Status Law amended by Law No. 34/1975. See also Jamal J. A. Nasir, op cit., pp. 49-52

²⁹⁵ See The Civil Code, Provisional Law No. 43/1976 and The Personal Status Law, Provisional Law No. 61/1976. See also Jamal J. A. Nasir, op cit., pp. 49-52

²⁹⁶ Royal Decrees Nos. 343/57/1 and 379/157 promulgating the Personal Status Law. See also Jamal J. A. Nasir, op cit., pp. 49-52

Motivated by Western impact, the attempts to introduce legal changes in this area of personal law were not welcome in all societies. Upon being introduced in Sudan that women are independent to marry whom they wished provided the husband is socially compatible and the dower was proper, it has in fact resulted in wrongs on a large scale among some Sudanic tribes to the extent that the Sudan government was forced to withdraw this change and to issue a new Circular²⁹⁷ allowing the requirement of marriage guardianship to continue.²⁹⁸

4.11 AN ANALYSIS ON JUDICIAL ATTITUDE TOWARDS THE CONCEPT OF *IJBAR* VIS-À-VIS THE PRACTICE OF CHILD MARRIAGE IN [NORTHERN] NIGERIA

Availability of reported case law from the lower courts especially from the Sharia/Area Courts is among the problems faced by legal practitioners interested in the analysis of judicial attitudes of the courts towards a particular legal problem. Thus, few decided cases are illustrative of the judicial attitude towards the concept of *ijbar* vis-à-vis the practice of child marriage in [Northern] Nigeria.

In *Alhaji Isa Bida v. Baiwa*,²⁹⁹ the then North-Western State Shari'a Court of Appeal, Sokoto, held that where a father permits or allows his daughter the option to choose or bring a suitor by herself that would amount to cessation of the right of *ijbar* inherent in the father. Thus, the court dismissed the father's claim of *ijbar* on his virgin daughter (Baiwa) on the ground that she has been emancipated from the operation of the doctrine of *ijbar* by virtue of the freedom of choice accorded to her.

²⁹⁷ No. 35 of 1933

²⁹⁸ Masud, M. K. (1985) op cit., at p. 221

²⁹⁹ Sharia Law Report, (1980) Vol. 1, p. 38

In *Karimatu Yakubu Paiko & Another v. Alhaji Yakubu Paiko and Another*,³⁰⁰ this case concerns the question of *ijbar* and it was an appeal to the Court of Appeal from the Niger State Shari'a Court of Appeal. One of the issues which the appellate court was asked to decide was whether a father could lose his powers of *ijbar* over his virgin daughter to marry her off to whomsoever he wishes with or without her consent by releasing her. While relying on the earlier decision in *Alhaji Isa Bida v. Baiwa* as precedent, the Court of Appeal held that the father could lose and forfeit the right of *ijbar* where he puts the daughter to choose between options. Jurisprudentially, this attitude of the Court of Appeal in relying on an earlier decision in reaching its own decision have been criticized by Professor A. H. Yadudu³⁰¹ and Professor M. T. Ladan³⁰² as a practice unknown to administration of justice under the Sharia.

³⁰⁰ (1985) Unreported, Court of Appeal, Kaduna, Suit No. CA/K/805/85

³⁰¹ Yadudu, A.H., Colonization and the Transformation of Islamic Law in Nigeria, *Journal of Legal Pluralism and Unofficial Law*, (1992) vol. 35, pp.131-134

³⁰² Ladan, M.T. *Introduction to Jurisprudence Classical and Islamic*, Malthouse Press Ltd., (2006), pp.202-295

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

Child marriage under Islamic law is a marriage arranged by the matrimonial guardian (*wali*) especially where the child concerned, male or female, is a minor or does not have full legal capacity for some reason. But, where a marriage has been arranged by a guardian and that such marriage fails to meet the requirements of the law, the sharia grants to the child, upon attaining puberty, the right to rescind the marriage.

As it was earlier discussed in the preceding chapters of this work, the Islamic institution of marriage guardianship (*wilayat-un-nikah*) including where the power of *ijbar* is exercised, is to protect the interest of women and that it is the rights of daughters, whether a virgin or otherwise, to accept or reject any marriage proposal upon free will. To ensure the best protection of the interest of minors, marriage guardianship is given to the nearest responsible male relative of the woman, or, in case she has no responsible male relatives, the Muslim Judge assumes the role of guardianship. And the ultimate objective of assigning the father or grandfather, ruler or governor to become a woman's legal guardian is to assure that all things are in order and that no prejudice is perpetrated against her interest and this reinforces the sacredness of the marriage contract and the sanctity of her rights in Islam.

5.2 Observations

From the foregoing discussion, the following observations are noted:

- 5.2.1** It is observed that, even though *ijbar* literally mean coercion, its exercise by parents and guardians in imposing marriage on their ward where practiced as per the dictates of Islamic injunctions does not deprive minors of their right to express their consent to proposal for marriage. In fact, Islamic law gives due regard to the consent of minor daughter in marriage and that the rationale behind the concept of *ijbar* is to avert the awful consequences of irrational decision of a girl in the process of mate selection arising out of inexperience and inability to make sound decision but, in a situation where the girl rejects her parent's choice of husband, it has become unlawful for her parents to contract the marriage.
- 5.2.2** It is also observed that, the practice of child marriage is not an empty legal norm in Islamic law; it is rather motivated by the sacred value of protecting the welfare of minors while securing their best interest in terms of chastity and moral uprightness against the backdrop of premarital sexual immorality.
- 5.2.3** It is further observed that, the idea of setting a fixed marriageable age is unknown to Islamic law and that the modern reform on Islamic family law whereby the concept of *ijbar* vis-à-vis the feasibility of the practice of child marriage becomes abortive, is nothing more but a western conspiracy designed to curtail population growth but that such a move have to be shrouded with sympathetic feminism that emphasizes on education and health concerns as a device to tactically delay early marriage. But upon proper analysis, as this study has shown, feminism jurisprudence has nothing tangible to offer to the future of young Muslim girls

other than to distract them from proper Islamic moral upbringing that allows only the satisfaction of sexual urge through marriage irrespective of the currently 18 years minimum age sanctioned by the UN and get them plunged into the dexterities of sexual immoralities while employing contraceptives that allows for the realization of western interests of population control.

5.2.4 While it is indiscreet that some parents or guardians misuse the power of *ijbar* due to certain un-Islamic customs and tradition and selfish interest, that shortcomings and abuse of the doctrine cannot be taken as its ideal position under Islamic law nor must the awful consequences of wrong exercise of *ijbar* be misrepresented as its natural impact on the future of minors.

5.2.5 It is observed that, unlike western critics of child marriage who entertains fear and concern as to lack of mental and psychological fitness to bear the burden of motherhood or parental responsibility, from the foregoing discussion, it is discernible that the Islamic criteria of adulthood is puberty and as far as the Islamic tradition is concerned, no any burden whatsoever is obliged on anyone beyond his capability and that by virtue of marriage, unless he/she attains mental and physiological fitness at the onset of puberty which marks the feasibility of discharging the rights and obligations arising out of marriage, no unbearable nor detrimental burden is placed on the girl child in such unsympathetic manner as the critics of the sharia tend to show.

5.2.6 And that, the ascription of early marriage as the cause of Vesico Virginal Fistula [VVF] though it may not be disregarded at all, but it is highly plausible as it is also attributable to other causes such as malnutrition, poor health and sanitary

conditions and lack of access to and timely maternal health services. By no token has any forensic evidence established early marriage as the sole cause of VVF to warrant a prohibition of child marriage on that ground. Besides, the critics of child marriage always blatantly misrepresent early sexual ignition with early marriage of which the Islamic conception of child marriage is neither synonymous to early sexual ignition of the type medically abhorred nor early marriage of the type detested by the Western world. This is because, the criteria adopted by the West on childhood differs with that of Islamic law; it being that while to the West, age of 18 years is the test of adulthood and the determinant of marriageable age; Islamic law recognizes puberty in view of actual physiological development of the child as the determining factor in arriving at adulthood including for the purposes of marriage.

5.3 Recommendations

Following the above stated observations, it is recommended that:

- 5.3.1** In the considered view of the writer, it is recommended that if the right to culture and freedom of religion is ever true as it was advocated by national and international laws, all citizens and in particular, Muslims in Nigeria must be allowed the sufficient freedom to apply their personal law; in which case, to practice child marriage where the need and moral exigencies as per the teachings of Islam requires so.
- 5.3.2** It is further recommended that, to avert the awful and disgraceful situation of sexual immoralities, including among teenage boys and girls of the kind prevalent in the Western world today, the Islamic requirement of marriage guardianship, in

particular, the exercise of the power of *ijbar* must be retained and further institutionalized in the Muslim majority States in Northern Nigeria. Doing so is imperative in order that Muslim children that are sexually active albeit below the Western standard of 18 years marriageable age, and when susceptible to premarital sexual indulgence, their parents/guardians would be obliged by law to enforce the status of marriage on them so as to adequately cater for their sexual needs within wedlock and to salvage the society from the evils of adultery and fornication.

5.3.3 It is also recommended that Nigerian Muslims should discountenance the reform directed towards the abolition or restriction of the concept of *ijbar* and the practice of child marriage in other countries in the Muslim world, it being un-Islamic and motivated by Western conspiracy. Instead, the current state of the matter as regards non-codification of Islamic laws should be maintained and further stressed so as to counter the introduction of western elements into the body of Islamic laws and practices in Northern Nigeria.

5.3.4 It is further recommended that, Nigerian Muslims should continue to oppose the move for the abolition of child marriage under the *Child Rights Act* as an attempt to encroach upon the practice of Islamic personal law in Nigeria as well as an aggressive imposition of secular family values which is even against the dictates of human rights. Albeit, Muslims should honour the provisions of the CRA in breach rather than in observance.

5.3.5 It is also recommended that parents and guardians should take into consideration the consent of their minor daughters on matters concerning their choice of

husband provided the choice goes in line with Islamic injunction. Parents should also raise their children in an Islamic way in order to give them proper Islamic moral background so that they can harmoniously come to an agreement between themselves on the issue of choice of partner for marriage.

5.3.6 The sharia courts in Nigeria should apply liberal attitude in their consideration of cases of improper exercise of *ijbar* thereby allowing minors the option to opt out of irksome marriages contracted during minority as per the doctrine of *khiyar-ul-bulugh*.

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