

A Study of Doctrine of Legal Capacity of Woman in Islamic Family Law

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Ph.D Islamic Studies**

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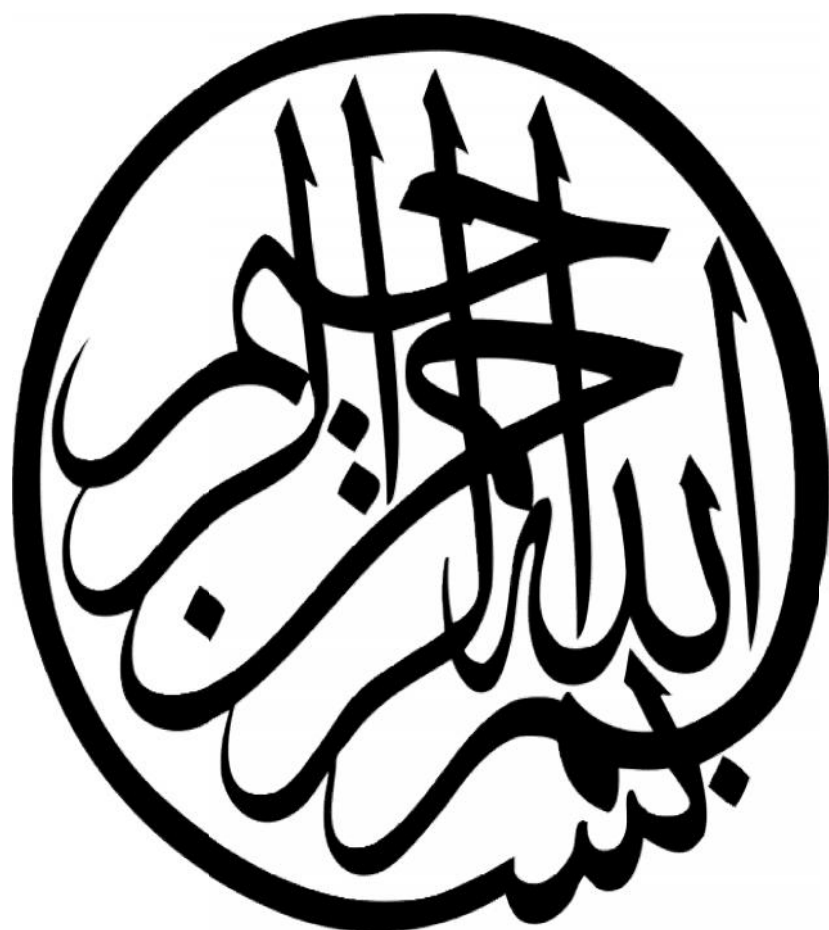
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**FACULTY OF SOCIAL SCIENCES
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**A Study of Doctrine of Legal Capacity of Woman in
Islamic Family Law**

By

Farhana Mehmood

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Aadam

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ABSTRACT

The present research endeavors to explore the legal capacity doctrine in Islamic law particularly in the context of woman's position as the subject of Islamic Family Law. The aim of the research is to determine the true nature of legal capacity of woman defined in Islamic family law. It is provided that Allah almighty has made woman a subject of law equally as man on the basis of humanity based on the doctrine of *dhimmah*. However, owing to presentation by Muslim jurists of female subject especially in Islamic family law resulted in deficit capacity of woman. After discussing the status of woman and family law in Qur'an and *adith* the research explains the doctrine of Legal Capacity especially effects of impediments on woman's legal capacity. The research after answering the basic question concentrates on legal capacity of woman in Islamic family law mainly in marriage contract and dissolution of marriage. While exploring the nature and significance of woman's legal capacity in marriage in Islamic law the research focuses *inter alia* on the consent of woman in marriage contract along with the true role of guardian in that contract, woman's capacity to get dower and maintenance, issues relating to justice in polygamy and various restriction in marital relation upon woman. While exploring the legal capacity of woman regarding dissolution of marriage the research mainly considers the divorce by husband, *al-khul* by wife, delegated divorce and the issues relating to waiting period (*iddah*). After exploring all the relevant issues that explains the true nature of the legal capacity of woman in Islamic family law the research finally concludes that ultimate goal of marital relations as provided by the teachings of Quran and Sunnah can be achieved by considering the capacity of woman absolute in marital relations as Islam has granted to the Muslim woman.

TRANSLITERATION TABLE

Arabic has some sounds that do not actually exist in English. Thus, in order to enable the non-Arabic speaker produce the Arabic word in a way that is closest to the Arabic origin, we have to provide a transliteration table that shows the sounds in Arabic. Here is a list of both Arabic consonants and vowels.

= B	= Z	= f
= t	= s	= q
= th	= sh	= k
= j	=	= l
=	=	= m
= kh	=	= n
= d	=	= h
= dh	= ’	= w
= r	= gh	= y

Short: a = ; i = ; u =

Long: = ; = ; =

Diphthong = aw ; = a

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INTRODUCTION

I. Introduction of the Topic

The primary source of Islamic Law, *Shar'iah*, is the Qur' n, the word of Allah Almighty. Another primary source, which the Muslims believe, is the *ديث* defined in the words of Messenger of Allah (). Every right and duty, privilege and obligation enjoins upon the Muslims is derived from and in accordance to the Qur' n and *ديث* of the Prophet ().¹ Unlike secular law, Islamic Law is not only religious and spiritual guideline to the people but it also defines civil laws to its subjects. One of the major legal developments introduced by the Qur' n and narrations of the Prophet is to award separate legal identity to woman as being the subject of the *Shar'iah*. Under Islamic Law, Muslim man and woman both are at the same time becomes the subject of the law at equal grounds because of the humanity.

The *Shar'iah* gives a legal paradigm that guides the lives of Muslims universally. Legal matters where legal capacity of the subject is discussed, the *Shar'iah* determine what a person may legally do. Muslim woman has independent legal capacity to own and trade all forms of property, therefore their legal capacity to secure contractual and other entitlements is unique to the world and the *Shar'iah* has distinction as maker of an advanced legal culture. However, legal scholars emphasised their ideas of marital woman's legal incapacity in the laws of marriage and divorce. In discussions on women's rights and legal autonomy, Muslim women are no longer considered privileged of a superior legal capacity in this regard. Instead, in the paradigm of a women's rights framework, Muslim women are frequently cast as the oppressed class of Muslim society.²

¹*Shariah: The Islamic Law*. Abdur Rahman I Doi. (London: Ta Ha Publishers 1987). pp. 21-22

²*Marriage and Slavery in Early Islam*. Kecia Ali. (USA: Harvard University Press 2012), p. 38

The disagreement of these competing claims examines to a study of Islamic law with the aim of understanding how the law defines women and how the jurists determine what women may legally do. These questions guide the present study with a deeper understanding of the woman. The *Shar'iah* examines woman as legal subject of Islamic law and how woman is discussed in Islamic legal books. The study compares contemporary approaches of woman's legal capacity to classical approaches noting firstly how Muslim woman discussed in *Shar'iah* and secondly the affects of these two approaches on woman's struggles for equality at present.

II. Background of the Research

Numerous scholars while conducting research on woman rights in Shariah did not focus upon the doctrines that provide basis of these woman rights in Islamic Law. Such as doctrine of legal capacity that is one of those doctrines. Hence my current research intends to deeply analyse the rights of Muslim woman as a person while considering the scope of the doctrine of legal capacity in Islamic Law. First the present research discusses the general understanding of the legal capacity of both man and woman and then proceeds specifically towards the legal capacity of Muslim woman in the family law of Islam. Muslim jurists have difference of opinion regarding the application of law on 'subject' in the Islamic literature and are particularly important in the context of legal capacity of woman since the Qur' n and dith literature does not create gender discrimination which changed the capacity of woman in application of law.

Two aspects of marital relations of Muslim woman in Family Law of Islam are discussed. Firstly the study is made regarding the nature of legal capacity of Muslim woman in *Shar'iah* as deficit and incomplete subject of the *Shar'iah* based on gender. Secondly, it applies to the Muslim family laws which were developed mostly during second and third century hijra and

therefore prejudiced by socio-political values and school of laws of the prevailing times. During emergence of the classical legal schools and literature, Muslim jurists interpreted Islamic law with this approach.

Argumentations are on the following issues:

- i. Muslim woman has deficit legal capacity in legal doctrine of Jurisprudence due to lack in reasoning and 'lack in religion'.
- ii. Muslim woman has no complete legal capacity to enter into marriage contract by herself.
- iii. Male Guardian is mandatory for legal matters of woman. The question arises on the authority of *Wali* (guardian) which applies to all women whether married or not according to strict interpretations. Islamic law insists on male guardianship as a condition to marriage contract. Male guardian has a power to impose a marriage on a woman without her knowledge or consent. In Muslim society, forced marriages in the name of arranged marriages by male guardians of family are frequently held. Legal authority of male guardian in Islam is to safeguard rights and interests of minors, including that of virgin Muslim woman for her protection and guardianship.
- iv. There is no age for woman for marriage in *Shar'iah*; a minor girl has no option but to continue her marriage due to lack of "reason and deficit legal capacity". Most jurists agree that a woman must reach puberty but option to dissolve contract is the authority of guardian. Marriage age of female is still under discussion in Muslim-majority countries.
- v. Polygamy is legally allowed to husband to marry up to four wives, but a woman has no capacity to even restrict man up to one.

vi. Husband can divorce (*talaq*) his wife without taking of wife's consent, and her presence is not required and a woman cannot be released (taking khul') without her husband's consent, although she takes it through offering him in compensation or return of dower³.

The dissonance of these competing claims brought a study of Islamic law with the aim of understanding how the Islamic law defines women and how the muslim jurists determine what women may legally do. These questions guide the present research. In the scope of a deeper understanding of the woman in Islamic law is to examine the female a legal subject of Islamic law. The study compares contemporary assessments of women's legal capacity to classical approaches noting firstly how 'woman' and femaleness feature in the law and secondly the effects of these two approaches on women's struggles for equality at present.

The present research is an attempt to explore one particular aspect of Muslim woman as legal subject, i.e. *ahliyyah* (legal capacity), and to distinguish from the way legal capacity (*ahliyyah*) is constructed in Islamic jurisprudence. Legal capacity is following in human being from the "stage of birth which makes him eligible for the acquisition of all kinds of rights and obligations"⁴. More specifically, the research investigates to understand the woman as subject of Islamic law and analyse legal capacity given to the woman in the matters of family laws. Knowing the women legal subject in these terms will understand the question why is the woman may be equal spiritually but unequal physically, as Muslim feminist reformers suggest.⁵

³*Marriage on Trial. A Study of Islamic Family Law.* Ziba Mir-Hosseini. (New York: I.B. Tauris) 1997. P. 38-45

⁴*Islamic Jurisprudence.* Imran Ahsan Khan. (Islamabad: Islamic Research Institute, 2009). P. 110.

⁵*Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* Shaheen Ali (Boston: Kluwer Law International, 2001) p. 47.

III. Theoretical Framework

This study begins with discussion on Muslim woman as a subject of the Islamic law. According to the principles of Islamic jurisprudence, all individuals addressed by the law have legal capacity, i.e. *ahliyyah*⁶. Woman as legal subject of classical Islamic law is an adult, rational and a free Muslim. The female infant or minor and major female are both distinguished as different types of subjects by virtue of differential forms of legal capacity available to each stage. Upon the principle that accrued from the text that in legal practice, gender is not a distinguishing legally as characteristic of law's subject. Implicitly, however, in the classical legal text social norms come to work as natural conditions that are attached to male and female bodies. Therefore, it comes to conclude that it is incorrect to assume the absence of a distinctive category of female results in the absence of distinctive legal subjectivity for women. Accordingly, the study of *ahliyyah* focuses on how the law formulates distinct legal capacities for Muslim man and woman. Because these distinctions are not uniform or consistent, it leads towards attention to their origins. The contrasting presentations of legal capacity in Nyazee's contemporary text inspire this inquiry into the definition of woman as subject (*mukallif*) of Islamic law. It is amongst the few English language texts of Islamic legal theory.

IV. Significance of the Study

The research is an attempt to define Muslim woman's legal capacity regarding her marital issues in Islamic Family Law. It will objectively evaluate true nature of legal capacity of woman in Islamic Family Law that might have curtailed owing to social, cultural and political norms and may have resulted to make today's Muslim woman vulnerable. Accordingly, the research is also examining Muslim Juristic views regarding interpretation of divine

⁶*Nur Al-Anwar*. ibn Ab Sa d ibn Ubayd All h J wan (Delhi: Kutub Khanah Rashidiyah, 1960).

injunctions and the explaining their views. The study of the absence and presence of distinctions between woman and man gives insight into some of the major determinants in constituting woman as legal subject. From this conclusion the woman legal subject distinguished by Islamic family law including marriage and its dissolution. These findings are evaluated in the light of the critical study of women's capacity in Islamic family law.

The research is an effort to evaluate and to remove prevailing misconceptions which may be attributed to personal preferences and ignorance from teaching of *Shar'iah* regarding Muslim woman's legal capacity regarding marital issues by responding to invalid and bias criticism by objectively clarifying the teachings of Qur' n, hadith of the Prophet and muslim juristic opinions regarding the matter. The research is intended to discuss women's legal capacity in the light of general concept of woman's legal capacity in *Shar'iah*. The legal capacity of Muslim women in Family Law is a significant issue amongst the Muslim jurists discussing woman's rights in Islamic Law. The research evaluates a general perspective of woman's legal capacity doctrine in Islamic family law that includes *inter alia* marriage contract and divorce to remove misconceptions regarding *Shar'iah* rulings in Islamic family law. Accordingly, the present research proves to be a significant contribution to the current knowledge as it has highlighted the views of Muslim jurists regarding interpretation of divine injunctions firstly, to identify and clarify misunderstandings regarding woman complete legal capacity in the light of *Shar'iah* and secondly, to enhance understanding of Muslim women regarding their marital rights available under *Shar'iah* so that they can fully understand their full capacity as subject of law and where required to assist legislature in this regard.

V. Problem Statement

The personal preferences and ignorance from principles of legal capacity doctrine and injunctions of *Shar'iah* have created misconception and a biased criticism on Muslim Woman's legal capacity in marital relation in Family Law of Islam.

VI. Objectives of the Study

Muslim woman is significant as legal subject and individually addressed in the legal texts of Islamic legal literature, classical and contemporary. To develop the understanding of female subject in Islamic Law and how woman is defined in legal works is the core work of this study. The research examines how the juristic literature explains the woman addressed by the Islamic law. The research has tried to capture the complexity of Muslim woman's capacity by assessing complete or deficit legal capacity in the light of Islamic family law discussed by the jurists and finally has tried to create an understanding of how the woman as subject of Islamic law is constituted by *Shar'iah*. The prime objectives of the research are mentioned below.

1. To define and examine the distinctive feature of legal capacity of women in Islamic law *Shar'iah*.
2. To explore legal capacity of married Muslim woman in Islamic family law.
3. To highlight the views of Muslim jurists regarding interpretation of divine injunctions.
4. To identify and clarify misunderstandings regarding woman complete legal capacity in the light of *Shar'iah*.
5. To enhance understanding of Muslim women regarding their marital rights available under *Shar'iah* so that they can fully understand their full capacity as subject of Islamic law and where required to assist legislature in this regard.

VII. Research Questions

The following questions are explored in the present research.

1. How the doctrine of legal capacity of a Muslim woman is defined in the Text and Islamic jurisprudence?
2. Why jurists formulate ‘deficit’ capacity for the woman as subject of *Shar’iah* in some aspects?
3. What are approaches of classical and contemporary jurists regarding legal capacity of woman in a marriage contract and dissolution of marriage contract?
4. How misunderstandings and related criticism can be evaluated and clarified through true understanding of teachings of *Shar’iah*?
5. In the light of the obtained findings what recommendations can be made regarding *Shar’iah* principles that may further assist to improve present laws prevailing in Muslim Countries?

VIII. Research Methodology

In the present research while adopting the interpretivist epistemology or theory of knowledge⁷ and considering the problem statement, the nature of the research objectives and questions and to obtain deep insights pertaining to the capacity of Muslim women in *Shar’iah* and specifically in Islamic Family Law a qualitative approach is considered both appropriate and desirable. The research firstly, describes in a lucid way secondly, analyzes in an in-depth manner and finally, critically evaluates the distinctive legal capacity of Muslim woman in Islamic Family Law as provided in the Islamic legal texts primary as well as secondary in their textual rather than applied forms. Therefore, the present research is descriptive, analytical and critical in its nature. This study is based on the primary and secondary sources

⁷See Social Research Methods. Bryman A. (Oxford UK 2004., 2nd ed) p. 11

with regard to the woman's legal capacity in Islamic Law. Primary sources include Al-Qur' n, dith literature, the magnificent works of classical jurist of Sunni schools of thought discussing legal capacity (*Ahliyyah*) in Islamic Jurisprudence and interpretations of the contemporary researcher and jurists on this issue. Secondary sources include the relevant published material such as books existing Islamic laws, journals; web-based reliable information, unpublished materials such as thesis focusing on woman marital rights in Islamic Family Law.

IX. Choice of Legal Texts

The study is shaped by two sets of literature. First type of literature includes legal classical literature that is originated in the field of Islamic law. The other contemporary literature emerges from the critical study of Islamic law and is limited to the studies of legal rights of Muslim women and the Muslim Law. The research methodology is to evaluate the first classical literature in terms of concerns raised as legal capacity of woman and the second concern of deficit capacity of woman as constitute of the Muslim female legal subject in contemporary literature. The selection of legal texts in this study is guided by the magnificent classical works on anafi, Al-Sh fi' , Maliki, Hanbali jurists of school of law and independent juristic views of Islamic Law. The chronological origins of doctrine of legal capacity, classical legal text of *Hedayah*⁸ is consulted *and* for contemporary text including Imran Ahsan Khan Nyazee's *Outlines of Islamic Jurisprudence*⁹. Imran Ahsan Nyazee defines legal capacity in Islamic jurisprudence in comprehensive manner but it is found that his writings include a summary of 'women's legal capacity' where women are categorised as unique legal subjects with imperfect legal capacities.

⁸*Al-Hedayyah*. Ali ibn Abu Bakr al-Marghinani.. Ed Ashur Hafiz and M Tamir.(Cairo: Dar us Salam 2000).

⁹ *Outlines of Islamic Jurisprudence*, Imran Ahsan Khan Nyazee. (Islamabad: Advanced Legal Studies Institute, 2005).

X. Delimitations

The doctrine of legal capacity of woman is significant amongst jurists in Islamic law. The present study is an attempt to define interpretations of jurists of Hanafi, Maliki, Al-Shafi'i and Hanabli School of thought presenting classical theory or modern interpretation of legal capacity defining legal capacity of Muslim woman as complete or deficit legal capacity in family law and evaluate the criticism in this regard. The area of this research does not comprise of legal doctrines of other fiqhi sects and school of thought neither it discusses the legal capacity of women in contemporary Muslim Laws in Muslim states.

XI. Chapters Outline

After this introduction, the coming chapter one introduces the status of Woman in Qur'an and A Hadith of the Messenger of Allah (). Chapter two begins with the study of doctrine of legal capacity, significance and meaning of doctrine of legal capacity, its types and effects which make complete legal capacity to imperfect legal capacity. It defines the parameters of *ahliyyah* (legal capacity) through the *bulugh* (puberty) and the '*aql, rushd* (intellect) and their relevance to the female legal subject but not affected by her reproductive biology as impediment. Chapter three discusses the legal capacity of woman in marriage contract as partner of the contract, role of marriage guardian, conditions of the contract, witness and dower. Chapter four critically evaluates the legal capacity of women in Islamic law regarding his marriage obligations as wife. Chapter five discusses the Legal capacity of woman to dissolve marriage contract and the legal obligations on woman in case of separation. Finally the conclusion is drawn which concludes the study by debate on Islamic Law from which it argues the equal protection of the woman as legal subject.

XII. Conclusion

The present research has concluded that the woman has not been explicitly distinguished as legal subject in the classical law but problem is seeing such explicit distinctions in contemporary legal texts. The reason is classical doctrine on *ahliyyah* lacks a specific legal category 'woman' and does not address woman's legal capacity as a distinct form of legal capacity, however, modern legal discussion creates these categories or argues that they are insignificant. The research analyses and finds more correctly ascribed to a legal work that envisions equality between Muslim man and woman when in fact the doctrine of legal capacity does make significant distinctions, which derogate the legal capacities of woman. It is concluded that the legal capacity in classical works with regard to marriage and divorce recognizing this doctrine may bring jurists to new evaluations of the classical legal paradigm and new tools for collective work towards equality in front of the present family law.

CHAPTER: 1

DEFINING WOMAN IN FAMILY LAW IN THE VIEW OF THE QUR'ĀN AND ADITH LITERATURE

1.1 Introduction

Islam considered family as basis of Islamic society and marriage is a vital part of lives of Muslim man and woman therefore it is viewed as a 'sacred union'. The Qur' n and adith of the Prophet () grant status and dignity to Muslim man and woman in equal measure. Muslim man and woman enjoy equal spiritual, social, economic and political status under Islamic teachings. Unit of the family is based on husband and wife who create a 'firm contract'¹⁰ of marriage under the commands of Allah Almighty. Marriage provides spiritual, physical, emotional and psychological gratification to man and woman in a valid and legal way. *Shar'iah* has granted both husband and wife certain rights and obligation for the attainment of objectives, which *Shar'iah* defines for the family. Objective of the marriage generates companionship between husband and wife based on affection, benevolence, mutual confidence and consolation for each other and brings them together to live with affection and tranquility¹¹. This relationship in the result of marriage gives spiritual and legal basis to build a family because it is a firm pledge. Both partners of the contract have certain rights and duties, which are required to abide by *Shar'iah* principles and in marriage, both enjoy equal right to contract a marriage or to dissolve it.¹²

This chapter explores position of Muslim woman as discussed in the Qur' n and adith literature and interpretations of Muslim scholars. Islam has granted the gender equality as well

¹⁰ Allah swt uses the word, "...a solemn covenant... غَلِيظًا مِّيثَاقًا" in the Qur' n. Surah al-Nis 4:21

¹¹ Surah Ar-Rum 20:31

¹² 'Rights of Women in Islam. Asghar Ali Engineer (Lahore: Vanguard Books) 1996. P. 42.

as enormous diversity to the Muslim man and woman in the roles they play on the basis of distinctiveness e.g. age, social class, knowledge and proficiency. It is rational to explain that the differences between man and woman in Islam are differences, which imply the complementary roles of both sexes in different aspects of life. This research provides a dynamic understanding of position of woman in Islam based on the original sources i.e. the Qur' n and adith literature. The interpretation of verses and adith aims to discuss Muslim woman's position in these primary sources of *Shar'iah*. The Qur' nic translation and commentary is taken from Abdulla Yusuf Ali. Authentic *Tafsir* (commentaries) of Qur' nic verses are taken from the most original source of Qur' nic commentaries. adith are cited from authentic adith literature.

1.2 Nature and Significance of Family in Islam

In Arabic the word “سرة” - is used for family means ‘unity, closeness and tight knot’¹³. In this restrictive sense including spouses and siblings. – this word includes the extended family-uncles, aunts, grandparents أهل – A lot of times it used in place of wife when said by the husband. it actually means he is going to see his wife and – This word means ‘the people of’ but is more formal. It also means the house of¹⁴.The word refers to a group of people connected together through close ties that keep them together and maintain their unity”.¹⁵ Islam gives significant important to the family and give principles to its functions for the prosperous community which give rise and produces effective persons. Islamic family institute provides an effective social security for Muslim society. Allah Almighty says:

¹³*Al-Mawrid*. (A Modern English-Arabic-Dictionary) Munir Ba'aibaki. (Beirut: Dar-e-Ilm lil Malayen) 2003. P. 336

¹⁴*Al-Munjad* (Arabic Urdu Dictionary).(trans. Saad Hassan Khan Yousafi), (AA SA FA) (Karachi :Dar al Ishaat publishers) 1994 P. 55

¹⁵*Misbah aulLughaat*. Abul Fadl Maulana 'AbdulHafeez Bilyawi. (Arabic-Urdu Dictionary) (Karachi:Dar ul Ishaat Publishers) 1997.

يَتَأْتِيَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا
وَنِسَاءً ۗ^{٦٦}

“O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (Like seeds) countless men and women”

Maulana Abul Ala' Maududi explains this verse: “the subsequent laws and regulations about human rights, specially about the smooth running of the family life is discussed. On one hand, the people have been urged to fear Allah so as to escape His displeasure; on the other, they have been reminded that all human beings have sprung from one and the same parents and are thus closely related to one another. ‘...He created you of a single soul’¹⁷ the interpretations of this verse exegetical explicated the phrase of *nafswahida* as referring to Adam by al- abar , al-M tur d , al-Zamakhshar , al- abars, al-Qur ub , Ibn Kath r, and Mawd d among these exegetes.¹⁸ In this regard followers of Ibn ‘Arab ’s interpretnafswahidamentioned in the verse as denoting to Adam. ‘Abduh and al-Mar gh however, argues that interpreting the term as Adam is taken not from the verse but assuming that the predecessor of the human race is Adam. For establishment of family as institute, marriage is significant in Islam. In a human society, the individuals cannot survive and effective without family. Family is the institute in which natural and valid relation emerges e.g. parents, children and siblings. In addition to these relations, it also inculcates intense sense of affection, care and cooperation in members of the family. The satisfaction of the emotions can be attained through marriage institution under Islamic principles. The only valid association between mature Muslim man and woman can establish through the marriage contract, which develops institution of family.

¹⁶Surah al-Nis 4:1

¹⁷*Tafheem al Quran*. Maulana Abul Ala Maududi. Vol. 6. P. 56

¹⁸al- abar , *J mi‘ al-Bay n*VI (Cairo: D rHijr , 2001), 339–340.

The Islamic concept of the family is “a group that emerges from the union of man and woman through a valid marriage contract and the children that are born from it. Husband and wife are co-partners in a family upon which a home is established”.¹⁹

1.2.1 Purpose of marriage in Islam

Islam considered marriage as the basis of development of human beings in a valid and legal way. The most significant objective of marriage is procreation and attainment of gratification, but along with its apparent objectives in a broader sense of development of human society having children brought up to establish Allah’s commandments and *Shar’iah* on earth. The goal is to produce righteous children who will be obedient to Allah swt and who will be a source of reward for their parents²⁰. The messengers of Allah observe marriage therefore *Shar’iah* disliked to Abandon this practice without a valid reason. Allah Almighty says:

وَلَقَدْ أَرْسَلْنَا رُسُلًا مِّن قَبْلِكَ وَجَعَلْنَا لَهُمُ أَزْوَاجًا وَذُرِّيَّةً²¹

“we did send apostles before thee, and appointed for them wives and children”.

Marriage is a form of ‘worship’ by obeying Allah commandments and follows the path of His messenger. Messenger of Allah has emphasized on conduct of marriage in numbers of a hadith. And consider it as his *Sunnah*. Messenger of Allah said:

«أَنْتُمْ الَّذِينَ فُلْتُمْ كَذَا وَكَذَا، أَمَا وَاللَّهِ إِيَّيَ لَأُحْسِنَنَّكُمْ لِلَّهِ وَأَتَقَاتُكُمْ لَهُ، لَكِنِّي أَصُومُ رَغَبًا عَنِ سُنَّتِي فَلَيْسَ مِنِّي»²²

“By Allah, I am most fearful of Allah and most conscious of Him. However, I fast and break my fast, pray and sleep and marry women. Whoever turns away from my way of life is not from me.”

¹⁹*Tadabbur-i-Qur’an*. Mawlana Amin Ahsan Islahi. (Lahore: Faran Foundation, 1994), vol. 2. p 271

²⁰ Surah al-Ta r m 66:6

²¹ Surah Ar Rad13:38

²²*Al-Jamia Sahih lil Bukhari*, Muhammad Ibn Ismail Bukhari, (trans.Muhsin Khan) (KSA:Islamic University, 1973) Volume VI, Book of Marriage 67: dith 1.

Islam is the religion which understands the nature of man therefore it gives its teachings which fulfill the basic nature of man. Like drinking and eating which is the innate in man, procreation is the nature of man. Some religions regard celibacy exalted spiritually than conjugal life. Islam rejects such practices against the human nature and condemns celibacy.

The Qur' n condemns those people and says:

وَرَهْبَانِيَّةً ابْتَدَعُوهَا مَا كَتَبْنَاهَا عَلَيْهِمْ إِلَّا ابْتِغَاءَ رِضْوَانِ اللَّهِ فَمَا رَعَوْهَا حَقَّ رِعَايَتِهَا ^ط₂₃

“but the monasticism which They invented for themselves, we did not prescribe for them: (We commanded) only the seeking for the good pleasure of Allah. but that They did not foster As They should have done.”

Monasticism is not allowed according to the teachings of Islam.. As the Qur'an and h dith literature guides the muslims to spend their lives according to the nature of nature. That is why Messenger of Allah forbade being celibate and encouraged Muslim man and woman to marry. It is narrated that:

«رَدَّ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَلَى عُثْمَانَ بْنِ مَظْعُونِ النَّبِيلِ، وَلَوْ أُذِنَ لَهُ لَأَخْطَبْنَا»²⁴

“The Messenger of Allah forbade Usman bin Mazun to be celibate. If he had given him permission, we would have gotten ourselves constricted.”

The purpose of marriage is that Muslim man and woman can live under a legal and valid relation where they can provide company to one another, procreate children and follows by the commandments of Allah in peace and tranquility.

Messenger of Allah emphasize this function of marriage in his saying:

²³ Surah al- ad d 57:27

²⁴ *Sahih Muslim*. Imam Abdul Hussain Muslim ibn al-Hajjaj. Trans. Nasiruddin al-Khattab. Riyad: DarusSallam Publishers 2007. Vol 4, p. 15. The Book of Marriage: 16. Chapter1 :*Marriage is Recommended for One Who Desires it.* dith: 3405

«يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصْرِ، وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ
فَائِهِ لَهُ وَجَاءٌ»²⁵.

“O young men whoever among you can afford it, let him get married, for it is more effective in lowering the gaze and guarding one’s chastity. And whoever cannot afford it should fast, for it will be a shield for him”

Marriage facilitates to protect a person from doing illegitimate things according to religion.

Marriage serves as a means to encourage chastity through legitimate emotional gratification as

defined by Messenger of Allah in his saying:

«مَنْ رَزَقَهُ اللَّهُ امْرَأَةً صَالِحَةً، فَقَدْ أَعَانَهُ عَلَى شَطْرِ دِينِهِ، فَلْيَتَّقِ اللَّهَ فِي الشَّطْرِ الثَّانِي»²⁶

“Whomever Allah Almighty has blessed with righteous wife, He has helped him with half of his religion, so let him fear Allah with regard to the other half.”

Ab Zahra defines significant objective of marriage in Islam that the objective of marriage is not merely a sexual gratification in a legitimate way, however it is important but it is not the sole object of marriage. He argues that the Qur’ n tells about marriage in terms of lifelong companionship, mutual love, sympathy, tranquility and peace of mind. Thus its emphasis is on the more abstract dimension of marriage i.e. companionship, tranquility and peace and not only the sexual aspect .

1.2.2 Marriage is to build legal relations between man and woman

The family in Islam is a unit in which man and woman unite to share life together according to the rules and principles set by *Shari’ah*. Marriage in Islam is the only possible legitimate method to unite husband and wife in valid relation and preservation of the human race. The goal of *Shar’iah* for preservation of human race and chastity is achieved through marriage.

²⁵*Sahih Muslim*. Imam Muslim. The Book of Marriage: 16 Chapter1: Marriage is recommended for one who desires it. dith: 3398.

²⁶*Al-Mustadrak ala Al- a î ayn*. Abû Abdullâh Mu ammad ibn Abdullâh Al- âkim. (Lebanon: Dar al-Kutub al-‘Ilmiyya. 1990.) Vol:2, p:176

وَالْمُحْصَنَاتُ مِنَ الْمُؤْمِنَاتِ وَالْمُحْصَنَاتُ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ مِن قَبْلِكُمْ إِذَا آتَيْتُمُوهُنَّ أُجُورَهُنَّ
مُحْصِنِينَ غَيْرِ مُسْلِفِينَ وَلَا مُتَّخِذِي أَخْدَانٍ²⁷

“(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 their due Mahr, desiring chastity not committing illegal sexual intercourse, nor taking them as girl-friends”.

Muslim jurist Ab Zahra defines the legality of marriage as:

“Marriage is a legal relationship established by an agreement between man and woman entitled them to live together. Marriage is a contract prescribed by the legislator, and it denotes the lawful entitlement of each of the parties thereto to enjoy the other in a lawful manner”²⁸. Among the most impressive verses in the Qur’ n about marriage is the following

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً...²⁹

“and among His Signs is this, that He created for you mates from among yourselves, that ye may dwell In tranquility with them, and He has put love and Mercy between your (hearts)... ”

The contact between man and woman is natural. Allah Almighty has created in this world everything including human being in pairs. As MaulanaAmeenIhsanIslahi elaborated in detail that sexual aspiration as one of the characteristic of humans can distract them and human beings either men or women may step forward to satisfy it by unauthorized ways. Marriage fulfills the sexual desire of a man and woman in a most suitable manner. Family as a consequence of marriage is a sacred institution as it is established and continued under the holy command of Allah Almighty. A pair of man and woman as a husband and wife after

²⁷ Surah al-M ida 5:5

²⁸ Al-Ahw l al-Shakhsiyyah. Muhammad Abu Zahra.(Cairo:1955). pp17-18.

²⁹ Surah al-R m 30:21, see also Surah Y s n 36:36

marriage is created to complete one another and further in larger context to complete humanity.³⁰

1.2.3 Satisfaction of mutual conjugal desire and gratification

According to *Shari'ah* married couple are united as husband and wife in the presence of witness seeking Allah's blessings to increase mutual love and compassion and agreeing to care for each other in every moment of life this is the fundamental principle of marriage in Islam. "Marriage is recognized in Islam as a basic step towards peace, progress and development of a Muslim society. No proper and appropriate family is conceived without marriage between male and female and no peaceful and stable human society is possible without peaceful and stable families".³¹ Promotion of affection and gratification is a complementary manner illustrated by the Qur' n.

هُوَ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَجَعَلَ مِنْهَا زَوْجَهَا لِيَسْكُنَ إِلَيْهَا³²

"it is He who created you from a single person, and made His mate of like nature, In order that He might dwell with Her (in love)"

The above verse refers to the universal origins of the creation of human beings and lay emphases on the human beings are in pairs. it is essential to understand the meanings of the terms *nafs* and *zawj* to know the way in which humans were created, the purpose of the terms *nafs* and *zawj*, and correspondingly of phrases 'نَفْسٍ وَاحِدَةٍ', is interpreted and understood

through careful explanation. Maulana Azad interpreted this verse and stated that the divine

³⁰*Tazkiyah-i-Nafs*. Amin Islahi. (Faisalabad: Malak Sons, n.d.), vol. I. p. 221

³¹*Family Law in Islam, theory and application*. Muhammad Tahir Mansoori. (Islamabad: *Shar'iah Academy*) 2006. pp. 2-3

³² Surah al-A r f 7:189

wisdom created all human beings from one being and interpreted '*nafsw ida*' one living being as father, its implication was that all men and women have originated from one living being therefore enjoy the equal status in life. The Qur' n is silent to the assertion made that Syeda Hawa was created from the rib of Syedna Adam and therefore is inferior in status.³³

Marriage helps to manage natural desires and make it in the right direction. It functions as a shield against committing illegitimate relations, which are forbidden according to *Shari'ah*. Marital relationship results in peace and comfort of souls as it brings affection and compassion between the spouses. Understanding between the husband and wife is considered as means to fulfill their emotional longings. In other meanings this intimate relationship that exists between the spouses is vital for fulfilling the natural longings that supports the individuals to concentrate upon performing their divine duties effectively.

1.2.4 Procreation and up-bringing of children according to Islamic teaching

The primary objective of *Shari'ah* is procreation and protection of human race. The parents who give their children affection, provisions, and brought up with religious instructions look after children in Islamic family structure. In case the parents are not alive, *Shar'iah*, make this responsibility to next of kin with in child's family to take care of Muslim child with optimum care. The guardian become responsible for the provision of child's welfare and protection of his interests, but if there is no next of kin, care for the child becomes a joint responsibility of the Muslim community. According to Islamic culture, parents's responsibility and compassion towards their children is their important religious as well as social responsibility.³⁴

³³*Tarjuman al-Quran*. Maulana Abdul Kalam Azad. (Dehli: 1980) vol II p. 422.

³⁴*Family structure in Islam*. Abdal-Ati.

وَالَّذِينَ ءَامَنُوا وَاتَّبَعَتْهُمْ ذُرِّيَّتُهُمْ بِإِيمَانٍ أَلْحَقْنَا بِهِمْ ذُرِّيَّتَهُمْ وَمَا أَلَتْنَاهُمْ مِّنْ عَمَلِهِمْ مِّنْ شَيْءٍ ۗ كُلُّ امْرِئٍ بِمَا كَسَبَ رَهِينٌ³⁵

“and those who believe and whose families follow them In Faith, - to them shall we join their families: nor shall we deprive them (of the fruit) of aught of their works.”

The importance of the family in Islam bring forth from its significant role that shapes both man and woman as husband and wife and create values amongst them which nourished by gratification, encouragement, and mutual understanding³⁶. Human nature is attracted towards the rank or lineage for the selection of the spouse. Therefore one of the companion inquired about these options whether it is acceptable under *Shari'ah* or not. The underline principle has defined by the Prophet in the following dith:

37 « »

“Marry women who are loving and very prolific, for I shall outnumber the peoples by you”

Muslim children both boy or girl is treated equal in upbringing according to Islamic teachings and parents will be rewarded for their upbringing. Children's upbringing in Islamic way is mother's responsibility as mentioned by Prophet Muhammad in the following adith:

«أَلَا كَلُّكُمْ رَاعٍ وَكَلُّكُمْ مَسْئُولٌ عَنْ رَعِيَّتِهِ، فَالْإِمَامُ الَّذِي عَلَى النَّاسِ رَاعٍ وَهُوَ مَسْئُولٌ عَنْ رَعِيَّتِهِ، وَالرَّجُلُ رَاعٍ عَلَى أَهْلِ بَيْتِهِ، وَهُوَ مَسْئُولٌ عَنْ رَعِيَّتِهِ، وَالْمَرْأَةُ رَاعِيَةٌ عَلَى أَهْلِ بَيْتِ زَوْجِهَا، وَوَلَدِهِ وَهِيَ مَسْئُولَةٌ عَنْهُمْ، وَعَبْدُ الرَّجُلِ رَاعٍ عَلَى مَالِ سَيِّدِهِ وَهُوَ مَسْئُولٌ عَنْهُ، أَلَا فَكُلُّكُمْ رَاعٍ وَكَلُّكُمْ مَسْئُولٌ عَنْ رَعِيَّتِهِ»³⁸

“Take care! Each of you is a shepherd and each of you shall be asked concerning his flock. A leader is a shepherd of his people, and he shall be asked concerning his flock; and a man is a shepherd of the people of his house, and he shall be asked concerning his flock; and a woman is a shepherd of the house of her husband and over their children, and she shall be asked concerning them.”

³⁵ Surah At-Toor 52:21

³⁶ Surah al-Furq n 25:74

³⁷ Sunan Abi Dawud. Book of marriage (Kitab un Nikkah). Chapter: The Prohibition Of Marrying Women Who Do Not Give Birth dith 2045

³⁸ Jami Sahih li al-Bukhari. Book of Ahkam . dith 6719.

Marriage ensures social and moral stability to Muslim man and woman and Islam defines a way of living for both the spouses, as Islam consider marriage as basis of family. Imam Ghazali explains the responsibilities of husband in the following way:

“This is the responsibility of a husband to uphold inproviding their wives' rights, to tolerate their manners, or to endure harm from them. Improving one's manners with women and upholding their rights are easier than seeking lawful gain. There is also important in this regard because he (the husband) is a shepherd and is responsible for his flock. The Prophet said, ‘It is sin (*ithm*) enough for a man to destroy those for whom he provides.’”³⁹

It emphasizes the significant role of husband under the injuctions of the Qur’ n and dith of the Prophet . Marriage is not merely the procreation and increase human beings as produced by legal conjugational bond but it also emphasize its sacred character as evident from the above teachings. it emphsises the significant role of both man and woman in the social structure of life.

1.3 Significant status of Woman in the Qur’ n and dith Literature

1.3.1 Creation of Man and Woman from ‘one soul’

Islam grants Muslim woman’s dignity and esteem. Islam is significantly defines human beings capacity to carry Allah’s commandants, and woman equally capable to observe responsibilities and obligations of the commandments. Islam respects the woman and her nature of creation is equal to the man. Establishing this fact, the Qur’ n says:

*خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ ثُمَّ جَعَلَ مِنْهَا زَوْجَهَا*⁴⁰

“He created you (all) from a single person: then created, of like nature, His mate”

³⁹*The Revival of the Religious Sciences*. Imam Abu Hamid al-Ghazali. Book on the Etiquette of Marriage. (translate by Madelain Farah. P. 167.

⁴⁰ Surah al-Zumar 39:6

The concept of *zawjis* used for both male and female genders, but *nafs* is a semantically masculine. This concept, with its meaning is used for a couple or pair. However, since opposing things can also be in couples or pairs it does not necessitate resemblance. the concept *zawj* denotes pair but does not always mean being similar or the same. the concept of *zawjis* used in the Qur' n for couples of animals, plants and every other being along with human beings. In the verse “and of everything We have created pairs⁴¹”.Ab Hurairah narrated from Messenger of Allah () who said:

«مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ، فَإِذَا شَهِدَ أَمْرًا فَلْيَتَكَلَّمْ بِخَيْرٍ أَوْ لِيَسْكُتْ، وَاسْتَوِصْ
أَعْوَجَ شَيْءٍ فِي الضَّلَعِ أَعْلَاهُ، إِنْ ذَهَبَتْ تُقِيمُهُ كَسَرَتْهُ، وَإِنْ تَرَكْتَهُ لَمْ يَزَلْ أَعْوَجَ، اسْتَوِصُوا بِالنِّسَاءِ خَيْرًا»⁴²

“whoever believes in Allah and the Last Day, if he witness something let he speak good or else keep silent. Deal kindly with women, for woman was created from a rib and the most crooked portion of the rib is its upper part; if you try to straighten it, it will break, and if you leave it, it will remain crooked, so treat the women in the best way”.

MaulanaAb lAlaMaududi explained that at initial stage first human being was created who further spread the human race on earth. Therefore, human race is related and should honour the obligations regarding this relationship. Qur' n provided that Adam the first man was a single soul who as a father spread the whole human race on earth. The knowledge as to how Eve was created is not certain but arguable. Generally, it is stated that Eve was created from the rib of Adam and the Bible provides the same. In Bible, Talmud further adds to it that it was the thirteenth rib of Adam. However, the Qur' n is quiet in this regard and the sayings of the Prophet generally cited in support have different interpretations. Therefore, the rational approach seems to leave it undefined as practiced in the Qur' n instead of wasting precious time to ascertain the details.⁴³

⁴¹ Surah Dh riy t 51: 49

⁴²*Sahih Muslim*. Imam Muslim ibn al-Hajjaj. The Book of Breastfeeding: 17 Chapter17: Advice with regard to women. dith: 3644.

⁴³*Tafheem al Quran*. Maulana Abul Ala Maududi. Vol 2: p. 26.

وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَنِينَ وَحَفَدَةً ۗ

“and Allah has made for you mates (and companions) of your nature, and made for you, out of them, sons and daughters and grandchildren, and for you sustenance of the best...”

Woman makes up half of human society and they are responsible for the nurturing, guidance and reformation of the subsequent generation of man and woman. It is woman who imbues principles and faith into the souls of the nation. Muhammad Asad, too, states that “*nafs* means soul, spirit, intellect, living being, animate being, human being, person, identity (personal identity), humanity, essence of life and the first principle”⁴⁵. Prophet Muhammad () ordered his Companions to treat their wives in best way and endure the mistakes of their wives, clarifying the nature of the woman, in to which Allah Almighty created her.

1.3.2 Woman is the pair and of similar nature as of Man

Allah Almighty in His perfect wisdom has created all creatures in pairs. Man and woman is created from the single soul therefore there nature is same as creature. There is a biological difference is to create a balance and harmony in this world as everything is in pair and everyone is assigned with a specific job to be done in this world. Therefore, Qur’ n explains that man and woman has been created of the same species; as it is said:

فَاظْرُرِ السَّمَوَاتِ وَالْأَرْضِ ۗ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَمِنَ الْأَنْعَامِ أَزْوَاجًا يَذُرُّكُمْ فِيهِ ۗ

“(He is) the Creator of the heavens and the earth: He has made for you pairs from among yourselves, and pairs among cattle: by This means does He multiply you”

Islam raised position of woman spiritually by declaring man and woman complemented each other by a means of mutual affection. Ibn Kathir expounds the verse that “Allah's perfect mercy has made the spouses from own kind, and created love and kindness between them. For

⁴⁴ Surah An-Nahl 16:72

⁴⁵ Muhammad Asad, *The Message of Qur'an* (Gibraltar: Dar al-Andalus, 1980), 155.

⁴⁶ Surah al-Sh r 42:11, See also Surah al-Dh riy t 51:49

a man stays with a woman because he loves her, or because he feels compassion towards her if they have a child together, or because she needs him to take care of her”.⁴⁷

يَتَأْتِيهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ
أَتْقَىٰكُمْ⁴⁸

“O mankind! we created you from a single (pair) of a male and a female, and made you into nations and Tribes, that ye may know Each other (Not that ye may despise (each other)).”

Starting with the notion of *nafs*, even though this word in language is feminine, it covers the both masculinity and femininity in its general usage. Its wordy meaning it provides the similar of something and the object itself and in religious meaning; it means a soul, spirit or essence.⁴⁹ Basically, *nafs* is the entity that creates a human being in fact a human being in the world is consists of its soul as well as body. This sense of *nafs* is only used for human beings and indicates to the common roots of human beings and establishes the very basic spirit of humankind..⁵⁰

هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ⁵¹

“They are your garments and ye are their garments.”

This point has been beautifully explained by Imam Al-Ghazali. He explains that one of the advantages of marriage is that by having intimacy with wife because of general conversation eases one’s heart, which in results increases one’s desire to worship the Allah almighty. The heart contracts through consistency in the worship and the ease required through marriage. The dominant objective of marriage includes spending time with woman to relish, to have children and to fulfill the desire of taking care of and upbringing the children. However,

⁴⁷ Tafseer Ibn Kathir Abu al-Fida' 'Imad Ad-Din Isma'il bin 'Umar bin Kathir. vol. 5. p. 406

⁴⁸ Surah al-Hujraat 49:13

⁴⁹ al-Mufrad if ghar b al-Qur' nR ghib al-I fah n ,(Cairo: Maktabat al-Anjl al-Mi riyya, 1970),

⁵⁰ Tafs r al-Man r (Cairo: D r al-Man r, 1947), p. 326.

⁵¹ Surah al-Baqara 2:187

objective can be different for varied individuals considering the particular circumstances of the people, which must be brought into consideration.⁵² In Islam it is considered that the object of marriage isto create a home filled with peace and comfort for both the huband as well as wife. The marital relation assists husband and wife to live with one another while supporting and cooperating to mänge the internal household affairs.As it would bring the tranquility and time in their lives significantly required to fulfill the commandments of Allah. The Prophet has advised the believersto select the spouse who would assist them to obtain the blessings of Allah. The Prophet said that:

«الدُّنْيَا مَتَاعٌ، وَخَيْرُ مَتَاعِ الدُّنْيَا الْمَرْأَةُ الصَّالِحَةُ»⁵³

“The world is provision and the best provision in the world is a righteous woman.”

1.3.3 Respect to the Muslim woman’s honor and dignity

Divine commandment in Islam about the association between Muslim man and woman in community, *Shar’iah* has assigned a position of dignity and esteem to Muslim woman. Such eneficent regulation is essential for peace and moral progress of the society⁵⁴.

وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَحَفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا⁵⁵

“and say to the believing women that They should lower their gaze and guard their modesty; that They should not display their beauty and ornaments except what (must ordinarily) appear.”

For the safwguard of the chestety of Muslim woman, men in muslim society are advise to lower their gaze and give respect to the women in the society. Allama Shabbir Usmani explains that according to verse of the Qur’an, both men, women are including in the meaning

⁵²*The Revival of the Religious Sciences*. Imam Abu Hamid al-Ghazali. Book on the Etiquette of Marriage. (translate by Madelain Farah.. p. 172.

⁵³*Sahih Muslim*. Imam Muslim ibn al-Hajjaj. dith:1467

⁵⁴*Women In Islam*. Zafar ullah Khan. (UK: Islamic Foundation) 2008 p. 35

⁵⁵ Surah al-N r 24:31

of bani aadam, and therefore they both are equally honorable without any special distinction or gender discrimination.⁵⁶ Muslim women must also guard their modesty in a society.

1.3.3.1 Significance of protection and upbringing of female child

Before the advent of Islam, there was a cruel practice of killing of female child after her birth. The Qur' n condemns the cruel practice of female unwelcoming attitude and infanticide of some parents upon hearing the news of the birth of a baby girl. Instead Islam bound the parents to support and show kindness and justice to their daughters as their special duty. Criticizing the attitudes of such parents who reject their female children, the Qur' n says:

وَإِذَا بُشِّرَ أَحَدُهُم بِالْأُنثَىٰ ظَلَّ وَجْهُهُ مُسْوَدًّا وَهُوَ كَظِيمٌ⁵⁷

“when news is brought to one of them, of (the birth of) a female (child), His face darkens, and He is filled with inward grief with Shame”

The Qur' n forbade the culture of female infanticide despite of its social acceptance and considered it a crime like any other murder. Girls are given respected

وَإِذَا الْمَوْءُودَةُ سُئِلَتْ بِأَيِّ ذَنْبٍ قُتِلَتْ ...⁵⁸

“when the female (infant), buried alive, is questioned -.for what crime she was killed”

Prophet Muhammad gave good tidings to those who up bring their daughters and sisters according to their means. Abi Said Al-Khuzri narrated that the Messenger of Allah said:

«مَنْ كَانَ لَهُ ثَلَاثُ بَنَاتٍ أَوْ ثَلَاثُ أَخَوَاتٍ أَوْ ابْنَتَانِ أَوْ أُخْتَانِ فَأَحْسَنَ صُحْبَتَهُنَّ وَاتَّقَى اللَّهَ فِيهِنَّ فَلَهُ الْجَنَّةُ».⁵⁹

“whoever has three daughters, or three sisters, or two daughters or two sisters and he keeps good company with them then Paradise is for him.”

⁵⁶ The Noble Qur' n (*Tafseer-e-'Usmani*). 'Allama Shabbir Ahmad Usmani (Karachi: Dar-ul-Isha'at) 2003.vol 1. P. 335.

⁵⁷ Surah An-Nahl 16:58-59

⁵⁸ Surah al-Taqweer 81:8-9

⁵⁹ *J mi' At-Tirmidh* . Imam at-Tirmidhi. Chapter:13 What has been related about spending on daughters and sisters. dith: 1916. .

1.3.3.2 Mother has high rank according to Islamic teachings

The kind treatment with woman is one of the most significant features of Islamic teachings especially Islam grants a high position to mothers. The Qur' n emphasize the great struggle the mother goes through for her child and the responsibility to respect ones parents. Islam commands kindness, respect and obedience to parents especially emphasize to rights of the mother.

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهْنًا عَلَىٰ وَهْنٍ وَفَصَّلَتْهُ فِي عَامَيْنِ أَنِ اشْكُرْ لِي وَلِوَالِدَيْكَ⁶⁰

“we have enjoined on man kindness to His parents: In pain did His mother bear him, and In pain did she give Him birth. the carrying of the (child) to His weaning is (A period of) thirty months...”

Muhammad Al-Sh fi‘ enlightens this verse and he transcribes this is as it is ordained that amongst the two parents mother enjoys more right than father. Keeping in view the general rule, respect should be given to both parents however; mother goes through the pain of giving birth to a child and sufferings she goes through in the upbringing of a child. Contrary to this, if the father is capable enough to afford these services of upbringing his child he would not have to suffer like a mother does. This is the ultimate reason our prophet () has granted more rights to a mother than anyone else.⁶¹

“A man came to Allah's Messenger () and said, ‘O Allah’s Messenger ()! Who is more entitled to be treated with the best companionship by me?’ He () said, ‘Your mother’. The man said, ‘Who is next?’ He said, ‘Your mother’. The man said, ‘Who is next?’ He () said, ‘Your mother’. The man asked, ‘Who is next?’ He () said, ‘Your father’.”⁶²

⁶⁰ Surah Ahqaf 46:15 See also Surah Luqman 31:14

⁶¹ *Maarif ul Quran*. Mufti Muhammad Shafi. Vol. 7, p. 796

⁶² *Sahih al-Bukhari*. Book Al-Adab Chapter 2 dith 5971. See index serial number 56

1.3.4 Muslim man and woman - Equality in spiritual etatus

Allah swt gave equal spiritual status to both Muslim man and woman. It is mandatory on all Muslim men and women to seek the pleasure and forgiveness from Allah by obeying the commandments given by Allah almighty.

إِنَّ الْمُسْلِمِينَ وَالْمُسْلِمَاتِ وَالْمُؤْمِنِينَ وَالْمُؤْمِنَاتِ وَالْقَانِتِينَ وَالْقَانِتَاتِ وَالصَّادِقِينَ وَالصَّادِقَاتِ وَالصَّابِرِينَ وَالصَّابِرَاتِ وَالْخَشِيعِينَ وَالْخَشِيعَاتِ وَالْمُتَصَدِّقِينَ وَالْمُتَصَدِّقَاتِ وَالصَّيِّمِينَ وَالصَّيِّمَاتِ وَالْحَافِظِينَ فُرُوجَهُمْ وَالْحَافِظَاتِ وَالذَّاكِرِينَ اللَّهَ كَثِيرًا وَالذَّاكِرَاتِ أَعَدَّ اللَّهُ لَهُمْ مَغْفِرَةً وَأَجْرًا عَظِيمًا⁶³

“for Muslim men and women,- for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give In charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much In Allah.s praise,- for them has Allah prepared forgiveness and great reward”.

Muslim Man and woman is spiritually similar one to another and are equally beneficiary of favours and blessings of Allah Almighty. As Qur’ n establishes:

فَأَسْتَجَابَ لَهُمْ رَبُّهُمْ أَنِّي لَا أُضِيعُ عَمَلَ عَمَلٍ مِّنْكُمْ مِّنْ ذَكَرٍ أَوْ أُنْثَىٰ بَعْضُكُمْ مِّنْ بَعْضٍ⁶⁴

“and their Lord hath accepted of them, and answered them: Never will I suffer to be lost the work of any of you, be He male or female: ye are members, one of another:”.

These commandments show that qualities and characteristics of Muslim woman are of real worth in the sight of Allah Almighty. The basic values of Islam which has been compressed into believing woman who will be rewarded same as man and is no distinction between believing man and woman in spiritual sphere of Islam. There is no spiritual difference between woman and man in Islam.

⁶³ Surah al-A z b 33:35

⁶⁴ Surah 1 Imr n 3:195

1.3.5 Diverse roles of Muslim man and woman in social life

Allah Almighty has a divine scheme which established His complete wisdom. Man is created from a single soul but their social functions are not identical. In this view this diversity occurs due to respective capacities. This is indicated in the Qur' n as is said:

قَالَ رَبُّنَا الَّذِي أَعْطَى كُلَّ شَيْءٍ خَلْقَهُ ثُمَّ هَدَى⁶⁵

“He said: Our Lord is He who gave to Each (created) thing its form and nature, and further, gave (it) Guidance”

Base on the nature of Male and female, their social roles has a diversity of its functions.

فَطَرَتِ اللَّهُ الَّتِي فَطَرَ النَّاسَ عَلَيْهَا لَا تَبْدِيلَ لِخَلْقِ اللَّهِ⁶⁶

“...(establish) Allah’s handiwork according to the pattern on which He has made mankind: no change (let there be) In the work (wrought) by Allah..”

It is not a question of superior and inferior based on gender, but due to natural capacity with Allah almighty the Creator has assigned to each individual. Therefore, to run the affairs of martial world both man and woman is assigned their job according to the faculties and capacities they possessed.

1.3.5.1 Muslim man and woman are supportive to eachother (Awliya)

The Qur' n established support and assistance of Muslim man to Muslim woman by saying:

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ⁶⁷

“the believers, men and women, are protectors one of another: They enjoin what is just, and forbid what is Evil..”

Allah Almighty mentions the praiseworthy qualities of the believing man and woman. They assist and help one another by sincere support as is narrated in the hadith:

⁶⁵ Surah h 20:50

⁶⁶ Surah al-R m 30:30

⁶⁷ Surah al-Tawba 9:71

“The prophet said: The believer in relation to another believer is like the parts of a building - they mutually support one another, and he demonstrated that by entwining his fingers. The metaphor of the believers in their mutual love and mercy is like a single body. When one part of it suffers, the rest of the body prays for it with fever and sleeplessness”.⁶⁸

Therefore Muslim woman nurtures her family to obey the commandments of Allah and restrain from His wrath. As pious woman is the blessing of Allah for Muslim community. Abdullah ibn Amr narrated from Allah's Messenger () who said:

«الدُّنْيَا مَتَاعٌ، وَخَيْرُ مَتَاعِ الدُّنْيَا الْمَرْأَةُ الصَّالِحَةُ».

“The whole world is a provision, and the best object of benefit of the world is the pious woman”.⁶⁹

Woman in Islamic culture is referred as a ‘*Mohsina*’⁷⁰ means ‘a fortress against evil’. A pious believing woman keeps herself and her family especially husband and children on path prescribe by *Shar’iah* and prevent from harm of this world and hereafter⁷¹.

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا قُوًا أَنفُسِكُمْ وَأَهْلِيكُمْ نَارًا⁷²

“O ye who believe! save yourselves and your families from a Fire”

Therefore if some mistake occurs from her, Islam advices man to be kind with the woman and prohibits him not to get aside her or punish her. Allah almighty advises the believer to protect his family from wrath of Allah by guiding them to follow the path of *Shari’ah*. As pious woman is the blessing of Allah swt for Muslim ummah. Allah's Messenger () commended to believing muslim husband not to hate or give harm he should pleased with another to create a justice in the attitudes as believers are supportive to each other and they tolerate others faults to unite the relationship.

⁶⁸Sahih al Bukhari. Book :Good Manners (Al-Adab) dith 6011

⁶⁹Sahih Muslim. Book of Breastfeeding: Chapter 17: dith: 3465.

⁷⁰ Surah An-Nisa 4: 25 and Surah Maida 5:5

⁷¹Women’s rights in Islam. Umer Farooq. <http://www.msit.no/WomensRightsinIslam.pdf>

⁷² Surah al-Ta r m 66:6

1.3.5.2 Muslim man (Wali) is protector of interest of woman

Islam appointed Muslim man as guardians for woman to safe guard her interests:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ⁷³

“men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because They support them from their means..”

A family is required to have a custodian to protect the interests of the family. Maulana Amin Islahi’s assertion is in favour of distinctive roles of human. In his view, “man possesses those qualities which are required for the custodianship of family. However, it does not mean that man is superior to woman in all walks of life. There are certain areas where women are ahead of men. Man cannot take care of the children as can a woman”⁷⁴. For the generosity on the orphans especially on the girls, and protect their interests (the prophet inform the merits of such actions as “Whoever is in charge of (put to test by) these daughters and treats them generously, then they will act as a shield for him from the Fire.”⁷⁵

1.3.5.3 Muslim Woman’s right of ownership of property

A Muslim woman has the privilege to earn money, the right to own property, to enter into legal financial contracts and to manage all of her assets in any way she pleases. She can make business transactions and nobody claim her earnings including her husband. Islam has also provided a woman the right to inherit from her relatives. The Qur’ n states:

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ
أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا⁷⁶ م

⁷³ Surah Nisa 4:34

⁷⁴ *Tadabbur-i-Qur’an*, Maulana Islahi, , vol. 2, p. 291

⁷⁵ *Sahih al-Bukhari*. Kitab al-Adab. Chapter 2, dith 5995 see index serial number 61

⁷⁶ Surah al-Nis 4:7

“from what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share”.

Islam grants Muslim woman complete right to own her property she earned or take from her inheritance or dower or earn by her own means and spend according to her wish without permission of any male relative including her father, brother, husband or son.

“In this he reported that Umm al-Muminin, the wife of the Messenger of Allah ﷺ, Maimunah bint Al-Harith freed a girl born as her slave without asking for the Prophet's permission. When she mentioned this to him he said: If you had given her to your maternal uncle as a gift, your reward (with Allah) would have been greater.”⁷⁷

1.3.6 Muslim Woman's rights and obligations under Islamic teachings

For the social life activity of Muslim woman and man, both have separate spheres to function according to their roles. The Muslim man has social function in some particular public spheres and the Muslim woman in some others.

كُلُّ نَفْسٍ بِمَا كَسَبَتْ رَهِينَةٌ ﴿٨٠﴾

“every soul will be (held) In pledge for its deeds”

Muslim man and woman possess the qualities and characteristics Islam has granted to both genders equally, Allah will raise them to equal ranks and bless them with equal rewards. It will not affect their status, reward in the sight of Allah swt the Creator, Muslim woman raised children and carried out house, and family and the man performed the duties of earning and provision for his family under the commands of *Shar'iah* and established the *Shar'iah* injunctions for the sake of Allah Almighty pleasure. The Qur' n gives evidence that Muslim woman has complete capacity as man in her action regarding rights and obligations as she will be judge accordingly. In the word of Allah, Qur' n states:

⁷⁷*Sahih Al-Bukhari* .Chapter “A woman is permitted to free slaves and give gifts to someone other than her husband, unless she is mentally deranged.” dith:

⁷⁸Surah al-Muddathir 74:38

مَنْ عَمِلَ صَالِحًا مِّنْ ذَكَرٍ أَوْ أُنْثَىٰ وَهُوَ مُؤْمِنٌ فَلَنُحْيِيَنَّهٗ حَيٰوةً طَيِّبَةً ۗ

“Whoever works righteousness, man or woman, and has Faith, to Him will we give a new life, a life that is good and pure and we will bestow on their reward according to the best of their actions”.

Maulana Abul Kalam Azad has expressively advocated equal rights for Muslim woman he writes: “the Qur’ān not only creates a belief about the rights of women but clearly declares that they are equal to men in matters of rights. As man has rights over women, women have rights over men. In other words, women have to take in return for what they give, it is not right that men should demand rights from women and forget the latter’s rights. As women have obligations towards men, men also have obligations towards women”⁸⁰.

Maulana Qari Muhammad Tayyab (the Chief of Dar-ul-Uloom Deoband) advocates the equality of rights of man and woman in Islam. He writes “the fact is that woman enjoys the same rights as men, in certain respects, they enjoy even more rights. He goes on to say that Syeda Ayesha is the wife of the prophet ﷺ and she has half of the knowledge of revelation. The Prophet said about her that half of the knowledge of revelation should be acquired from my companions and the other half from Ayesha. After all Syeda Ayesha is a woman and Allah has given such a status to women that thousand of prophet’s companions are put on one side and a woman on the other side”.⁸¹

1.3.6.1 Exemption from religious obligations

Muslim woman is capable of performing mandatory religious obligations, such as Prayers, Fasting, *Zakat* and Pilgrimage. However in some situations Islam grant certain exemption to Muslim woman.

⁷⁹ Surah Al-Nahl 16:97

⁸⁰ *Tarjuman ul Qur’an*. Maulana Abul Kalam Azad. (Lahore: Islamic Academy. n.d.) vol 2. P.

⁸¹ *Fadilat al-Nisain Fiqh al-Qur’an*. Qari Muhammad Tayyab (Karachi: 1985) vol 8, p. 61.

أَيَّامًا مَّعْدُودَاتٍ فَمَنْ كَانَ مِنْكُمْ مَّرِيضًا أَوْ عَلَى سَفَرٍ فَعِدَّةٌ مِنْ أَيَّامٍ أُخَرَ⁸²

“(Fasting) for a fixed number of days; but if any of you is ill, or on a journey, the prescribed number (Should be made up) from days later. for those who can do it (with hardship), is a ransom, the feeding of one that is indigent. but He that will give more, of His own free will, - it is better for Him. and it is better for you that ye fast, if ye only knew”.

The muslim woman is not liable to observe prayers and fasting during her menstruation and postpartum after child birth.

» : أَتَجْزِي إِحْدَانَا صَلَاتَهَا إِذَا طَهَّرَتْ؟ فَقَالَتْ: أَحْرُورِيَّةُ أَنْتِ؟ كُنَّا نَحِيضُ مَعَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَلَا يَأْمُرُنَا بِهِ.⁸³

“A woman asked `Aisha, should I offer the prayers that which I did not offer because of menses. `Aisha said, ‘Are you from the Huraura’ (a town in Iraq?) We were with the Prophet () and used to get our periods but he never ordered us to offer them (the Prayers missed during menses).”

Narrated from Hazrat Ayesha that Fatima binte Abi Hubaesh inquired from the Prophet that she got persistent bleeding and did not become clean. may she gave up prayers?’

«لَا إِنَّ ذَلِكَ عَرُوقٌ، وَلَكِنْ دَعِيَ الصَّلَاةَ قَدْرَ الْأَيَّامِ الَّتِي كُنْتَ تَحِيضِينَ فِيهَا، ثُمَّ اغْتَسِلِي وَصَلِّي.»⁸⁴

“He replied, ‘No, this is from a blood vessel. Give up the prayers only for the days on which you usually get the menses and then take a bath and offer your prayers.”

Muslim woman is exempted from fasting during the month of Ramadan if she is pregnant mother or a nursing mother and she fears harm to her own health or that of her child. Abdulah bin Abbaas while explaining the verse; ‘For those who can do it (with hard-ship) is a ransom, the feeding of one, that is indigent’ he said “this was a concession granted to the aged man and woman who were able to keep fast; they were allowed to leave the fast and instead feed an indigent person for each fast; (and a concession) to pregnant and suckling woman when they

⁸² Surah Al-Baqarah 2: 184

⁸³ Sahih Al-Bukhari. Book of Menstrual period. dith 321.

⁸⁴ Sahih Al-Bukhari Book of Menstrual period. Chapter: If a woman gets menses thrice a month, dith 325

apprehended harm (to themselves)”.⁸⁵ Muslim woman is excused from circumambulation during hajj in the state of impurity. “Aisha said, ‘We set out with the sole intention of performing Hajj and when we reached Sarif, (a place six miles from Mecca) I got my menses. Allah's Messenger (ﷺ) came to me while I was weeping. He said 'What is the matter with you? Have you got your menses?' I replied, 'Yes.' He said, 'This is a thing which Allah has ordained for the daughters of Adam. So do what all the pilgrims do with the exception of the *Tawaf* (Circumambulation) round the Ka‘ba’”⁸⁶

1.3.6.2 Women’s ‘deficiency’ in wisdom and religion: an evaluation

This is tenderness of Islamic teachings towards Muslim woman that it exempt woman from religious obligations during her physical unfitness to observe them. Islam considers the facts and takes into account the physical changes associated with woman’s natural biological functions. However following are the two evidences which are generally mentions to lower the status of woman:

وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ ۗ ...⁸⁷

“... and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such As ye choose, for witnesses, so that if one of them errs, the other can remind her..”

The prevalence of evidences indicates that Muslim woman can be as intelligent as man and, therefore, they should be consulted and their perspectives respected in Islamic teachings.

Muslim Jurists have same observations and opinions regarding woman in legal rulings.

These deficiency in intellect and religion is explain in a detail dith below:

⁸⁵ *Sunan Abi Dawud* Book of Fasting. Chapter: The Beginning Of The Ordainment Of Fasting. dith: 2318 see index serial number 35

⁸⁶ *Sahih al-Bukhari*. Book of Menstrual Periods Chapter 1: dith: 294. See Index serial number 13

⁸⁷ Surah Al-Baqarah 2:282

“... and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such As ye choose, for witnesses, so that if one of them errs, the other can remind her..”

« أَبِي سَعِيدِ الْخُدْرِيِّ، قَالَ: خَرَجَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي أَضْحَى أَوْ فِطْرٍ إِلَى الْمُصَلَّى، فَمَرَّ عَلَى النِّسَاءِ، يَا مَعْشَرَ النِّسَاءِ تَصَدَّقْنَ فَإِنِّي أُرِيدُ : أَهْلَ النَّارِ : مَا يَا رَسُولَ اللَّهِ؟ قَالَ: تُكْفِرْنَ اللَّعْنَ، وَتَكْفُرْنَ الْعَثِيرَ، مَا رَأَيْتُ مِنْ نَاقِصَاتِ عَقْلِ وَدِينٍ أَذْهَبَ لِلْبَّ الرَّ : وَمَا نُفْصَانُ دِينِنَا وَعَقْلِنَا يَا رَسُولَ اللَّهِ : أَلَيْسَ : شَهَادَةُ الْمَرْأَةِ مِثْلُ نِصْفِ شَهَادَةِ الرَّ : فَذَلِكَ مِنْ نُفْصَانِ عَقْلِهَا، أَلَيْسَ إِذَا حَاصَتْ لَمْ تُصَلِّ وَلَمْ : فَذَلِكَ مِنْ نُفْصَانِ دِينِهَا»⁸⁸

“Narrated Ab Sa`id Al-Khudri: Once Allah’s Messenger () went out to offer the prayer of `Id-al-Adha or Al-Fitr prayer. Then he passed by the women and said, ‘O women! Give alms, as I have seen that the majority of the dwellers of Hell-fire were you (women).’ They asked, ‘Why is it so, O Allah’s Messenger ()?’ He replied, ‘You curse frequently and are ungrateful to your husbands. I have not seen anyone more deficient in intelligence and religion than you. A cautious sensible man could be led astray by some of you’. The women asked, ‘O Allah’s Messenger ()! What is deficient in our intelligence and religion?’ He said, ‘Is not the evidence of two women equal to the witness of one man? They replied in the affirmative. He said, ‘This is the deficiency in her intelligence. Isn’t it true that a woman can neither pray nor fast during her menses?’ The women replied in the affirmative. He said, ‘This is the deficiency in her religion.’”

Shar’iah draws objective of the rule for witness in practical matters to achieve justice by having two women support each other’s testimony in financial matters. *Shar’iah* does not define it a universal rule that all women are half as intelligent as men or that their testimony is always half of a man. Besides this narration the practices of the prophet and companions shows to praise woman’s wisdom in social matters. Woman has granted with a unique and complementary intelligence that can guide man in minor matters. For instance, it is reported that the Messenger of Allah consulted his wife Umm Salamah and she provided him with a key insight into his problem.

“Marwan reported: After the treaty of Hudabiyyah was concluded, the Messenger of Allah, peace and blessings be upon him, said to his companions: ‘Get up and offer your sacrifices, then shave your hair’. None of them stood up, and the Prophet repeated his order three times. When none of them stood up, the Prophet left them and went to Umm Salamah, and he told her about their attitude. Umm Salamah said: O prophet of Allah, would you like your order

⁸⁸*Sahih al- Bukhari*. Book of Menstrual Periods Chapter 6: A menstruating women should leave observing Saum, dith 304..

to be carried out? Go out and do not speak to them until you have offered your own sacrifice and have called the barber to shave your head”⁸⁹. “Narrated Ab Musa: Never was a hadith unclear to us - the Companions of the Messenger of Allah - and we asked 'Aishah, except that we found some knowledge concerning it with her.”⁹⁰ Masruq reported he was asked, ‘Was Aisha knowledgeable of the religious obligations?’ Masruq said: ‘By the one in whose hand is my soul, I saw the learned elders among the companions of Muhammad, ask her about the religious obligations.

Ibn al-Qayyim explains and writes: As far as testimony of a woman is concerned she is equal in honesty, veracity, piousness and virtue as any other being. However if it is apprehended that she will forget anything while testifying then it will be reinforced by someone of her caliber and then she will testify along with her. This will make them sturdier than the testimony given by a single man. Benefit of doubt favors two women like Umm darda and Umm Atiyyah than to a single man. It is narrated that Imam Ahmad said that if a man is dying and he writes a will and there are no men present at the moment but only women then testimony of women will be given the equal importance and it is affirmed by him.⁹¹

Early jurists have a dynamic approach towards woman’s testimony. Majority of the jurists did not accept or compel Muslim woman to testify in criminal investigations, legal punishments, and other matters outside of their social range, but they accepted a woman’s testimony as equal in her ordinary duties. Ibn Rushd writes: “As for the testimony of individual woman, meaning woman without man, it is accepted by the majority in personal rights which are usually not the purview of men, such as pregnancy, consummation, and ailments

⁸⁹*Sahih al-Bukhari*. dith. 2731

⁹⁰*Sunan al-Tirmidh* Chapters on Virtues. dith: 3883. See index serial number 49

⁹¹*al-uruq al-ukm yah*. Ibn Qayyam. Vol: 1. P. 136

affecting women”.⁹² Therefore, it is a misinterpretation of prophetic tradition that all Muslim women are ‘deficient in religion’ and ‘reduce in intelligence’. The given ‘reduction’ is in her legal capacity regarding finances and not in her intrinsic intelligence itself.

1.4 Status of married Muslim women in The Qur’ n and Hadith literature

In Islam, the woman is a legal partner to the marriage contract on equal basis. Marriage is a contract where both partners i.e. husband and wife equally possesses equal rights and obligations for the purpose of legitimate relationship and procreation of children. For its validity free consent is prerequisite in Islamic teachings. Muslim man is obligatory to pay dower as marriage gift and Islam exclusively entitled wife to manage her dower and guaranteed her of having its full possession:

وَإِنْ أَرَدْتُمْ اسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَءَاتَيْتُمْ إِحْدَهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا ؕ أَتَأْخُذُونَهُ بِهَتِّنَا وَإِنَّمَا مِئِينًا..⁹³

“but if ye decide to take one wife In place of another, Even if ye had given the latter a whole treasure for dower, take not the least bit of it back”

1.4.1 Pious Muslim man is to marry pious Muslim woman

Islam grants the right to Muslim woman and her marriage guardian to seek a pious man to marry with the woman.

الْحَيِّثُ لِلْحَيِّثِينَ وَالْخَيْثُونَ لِلْخَيْثَاتِ وَالطَّيِّبَاتُ لِلطَّيِّبِينَ وَالطَّيِّبُونَ لِلطَّيِّبَاتِ ..⁹⁴

“women impure are for men impure, and men impure for women impure and women of purity are for men of purity, and men of purity are for women of purity”

Islam grants Muslim woman the right to seek the equal status of prospective husband in marriage. Ab Hátim al-Mazani narrated that the Messenger of Allah said

⁹²*Bidayat al-Mujtahid*. Ibn Rushd. 4 p. 248

⁹³ Surah al-Nis 4:20

⁹⁴ Surah An-Nur 24:26

95 «إِذَا جَاءَكُمْ مَنْ تَرْضَوْنَ دِينَهُ وَخُلُقَهُ فَأَنْكِحُوهُ، إِلَّا تَفْعَلُوا تَكُنْ فِتْنَةٌ فِي الْأَرْضِ وَفَسَادٌ»

“If someone whose religion and character you are pleased with comes to you (to marry your daughter or ward), then marry (her off to) him. If you do not do so, there will be commotion on the earth and widespread evil.”

1.4.2 Equality of partners in marriage

The significant principle regarding equality of man and woman in the Qur’ n which says “that man and woman are part of one another which fundamentally determines the right and duties of man and woman in the roles of husband and wife with this fact that they are partners for life with mutual affection and understanding”. Islam gives this noble and universal message to humanity:

يَتَأْتِيهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً

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“O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (Like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you)”.

Marriage is a...a solemn covenant... مِيثَاقًا عَلِيًّا⁹⁷ in Islam which is unique in the way that the rights and obligations of the husband and wife who are equal partners to it are ordained by Allah Almighty Himself.

1.4.3 Mandatory approval of woman before marriage

According to Islamic Principle, Muslim woman consent is essential for valid marriage. Ibn

Abbas narrated that Allah’s messenger said:

98 " الْأَيْمُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا، وَالْبَكْرُ تُسْتَأْمَرُ فِي نَفْسِهَا، وَإِذْنُهَا صُمَاتُهَا "

“Al-Aim (divorced or widow) has authority on herself rather than guardian and consent of Bakr (unmarried) is consulted and the silence is her consent.”

⁹⁵ Sunan Tirmidhi, dith 866.

⁹⁶ Surah al-Nis 4:1 see also Surah Surah al-Sh r 42:11

⁹⁷ Surah An-Nisa 4:21

⁹⁸ Musnad. Imam Ahmad Ibn H nbal. dith :2167. (Multan: As-Sunnah publishers) 1421 h. Vol 1P. 317

A marriage is not valid if it is without the approval, acceptance and consent of the woman and it is forbidden to force a Muslim woman to marry someone that she does not allow.

“Narrated from Ai’sha, a girl came to her and said: my father married me to his brother’s son so that he might raise his own status thereby and I was unwilling’. She said: ‘sit here until the prophet comes’. Then Allah’s messenger came and I told him what she had said. He send word to her father calling him and he left the matter up to her. She said: ‘O messenger of Allah (ﷺ) I accept what my father did but I wanted to know whether women have any say in the matter.”⁹⁹

«عَنْ خُنْسَاءَ بِنْتِ خِدَامِ الْأَنْصَارِيَّةِ، أَنَّ أَبَاهَا زَوَّجَهَا وَهِيَ تَيْبٌ فَكَرِهَتْ ذَلِكَ، فَأَتَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَرَدَّ نِكَاحَهُ»¹⁰⁰

“Khansa’ binl Khidam al-Ansariyah said: ‘her father had married her while she was a non-virgin and she disapproved of the marriage. She went to the Prophet (ﷺ) and he annulled her marriage”

It is mandatory for the marriage guardian to obtain the woman's approval before the marriage whether she is virgin or previously married. It is not allowed to compel the woman to marry against her will. If anyone concludes a marriage contract that the woman is not pleased with, Islam has given her right to annul the contract.

1.4.4 Independence of consent and right of choice in marital affairs

In Islam muslim man could not marry a woman with out taking her free consent for the marriage and stipulations. Muslim woman can choose her prospective husband according to her own choice or she can send message to some pious person for marriage. Ab Huraira

(Allah be pleased with him) reported Allah's Messenger (ﷺ) as having said:

« الْأَيْمُ حَتَّى تُسْتَأْمَرَ، وَلَا تُنْكَحُ الْبِكْرُ حَتَّى تُسْتَأْذَنَ، قَالُوا: يَا رَسُولَ اللَّهِ، وَكَيْفَ إِذْنُهَا؟ قَالَ: ¹⁰¹»

“A woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought. They asked the Prophet of Allah (ﷺ): How her (virgin's) consent can be solicited? He (the Holy Prophet) said: That she keeps silence..”

⁹⁹*Sunan an-Nasai*. Imam Hafiz Abu Abdur Rahman Ahmad bin Shuaib bin Ali An-Nisai. The book of marriage. Chapter 36 Father marrying off a vigin when she is unwilling. dith no. 3271. Vol 4, p. 124. trans. Nasiruddin al-Khattab. (New York: Dar ul salam publishers) 2008. See dith index serial number 28

¹⁰⁰*Sahih al-Bukhari*. Book of Wedlock, Marriage (Nikaah) . dith 5138

¹⁰¹*Sahih Muslim* . The Book of Marriage. Chapter. dith 1419.

Muslim woman is given authority over herself that she can decide about her own self in her own interest. It is not a shameful and disgraceful act that a woman inform about her choices and conditions at the time of marriage contract. It is not consider valid for the marriage contract with out proper consent of both spouses.

كَانَتْ حَوْلَهُ بِنْتُ حَكِيمٍ مِنَ الْأَيِّ وَهَبْنَ أَنْفُسَهُنَّ لِلنَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.¹⁰²

“Narrated hashim’s father: khula bint Hakim was one of those ladies who presented themselves to the prophet for marriage”.

“It is reported on the authority of Jabir bin Abdillah who narrated that that Allah’s messenger() asked: ‘O Jabir! What type of lady have you married? I replied ‘I have married a matron’. He said ‘why, don’t you have a liking for the virgins and for fondling them?’ Jabir also said: Allah’s messenger said ‘why did not you marry a young girl so that you might play with her and she with you?’”¹⁰³

1.4.5 Presence of guardian in marriage to protect woman’s interest

Islam considers the physical vulnerability and delicacy of women therefore *Shar’iah* appoints marriage guardians over Muslim woman to protect woman’s interest and from deceit contract. For the first reason, it tis mandatory to have a guardian from woman to protect her interests in marriage contract.

104,, " عن أبي موسى، أن النبي صلى الله عليه وسلم قال:

“Ab Musa narrated that the Allah’s messenger () said: There is no marriage except with the consent of a guardian.”

Secondly, Allah Almighty make guardianship as mediators in case of dispute amongst husband and wife as is said:

¹⁰² *Sahih Bukhari*. Muhammad Ibn Ismail Bukhari., Book of marriage 67. Chapter : 30, is it permissible for a woman to present herself for marriage to somebody. dith: 5113. Vol: 7, p. 45.

¹⁰³ *Sahih Bukhari*, Book of Marriage: 67, Chapter: 43. dith. 5080. See Index serial number 50

¹⁰⁴ *Sunan Abu Dawud*. Book of Marriage:12. Chapter 19. Consent of the guardian. dith 2085. Vol 2. P. 521. At-Tirmidhi considered it to be Sahih.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ
بَيْنَهُمَا ...¹⁰⁵

“if ye fear a breach between them twain, appoint (two) arbiters, one from His family, and the other from hers; if They wish for Peace, Allah will cause their reconciliation...”

In case of dower (*mahr*) and other conditions in the marriage contract, guardian is appointed to protect the interests of woman. Syedna Ayesha (may Allah be pleased with her) narrated that the messenger of Allah said:

«أَيُّمَا امْرَأَةٍ نَكَحْتُ بِغَيْرِ إِذْنِ مَوْلَاهَا، فَكَأَنَّهَا بَاطِلٌ، ثَلَاثَ مَرَّاتٍ دَخَلَ بِهَا فَالْمَهْرُ لَهَا بِمَا أَصَابَ مِنْهَا، فَإِنْ تَشَاجَرُوا فَالسُّلْطَانُ وَلِيُّ مَنْ لَا وَلِيَّ لَهُ».

“ any woman is married without her guardian then her marriage is void. If he consummated the marriage with her, she is entitled to the dower for what he has attained from her. And if they differ, the Sultan is the guardian of one who does not have one.”¹⁰⁶

Thirdly for an orphan girl its consent should be taken by the guardian for the safeguard her interest. Her silence being constituted as her acceptance but if she refuses by showing with any unpleasant jesters it is not permissible to marry her off.¹⁰⁷ This principle is based upon the words of Allah in the Qur’ an:

وَإِذَا طَلَقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُمْ¹⁰⁸

“ when ye divorce women, and They fulfil the term of their (‘Iddat), do not prevent them from marrying their (former) husbands, if They mutually agree on equitable terms.”

Islam grants the guardians certain responsibilities to protect the interests of the ward in marriage and interests of minor but if the guardian prevents them then they are forbidden to do so.

¹⁰⁵ Surah An-Nisa 4: 35

¹⁰⁶ Sunan Abu Dawud. Book of Marriage:12 Chapter 19. Consent of the guardian. dith 2085no. 2083

¹⁰⁷ Also see An Nisai no 3270, At-Tirmazi no. 1027..

¹⁰⁸ Surah al-Baqara 2:232

“It is narrated from ibn Buraidah that his father said: a girl came to the prophet ﷺ and said: my father married me to his brother’s son so that he might raise his status thereby’. So the prophet ﷺ gave her the choice and she said: ‘I approve of what my father did, but it wanted women to know that their fathers have no right to do that.’”¹⁰⁹

The Qur’ n and ﷺ has granted married woman the right to chose her spouse as she has owner of her interests and is able to protect in better way. For the second marrage either after divorce or widow, woman can conclude her own marrage contract without certain guidence og her guardian as the prophet of Islam advised to his companions regarding woman consent at her marriage contact. It is reported from Salih bin Kaisan from Nafi bin Jubair bin Mutim from Ibn Abbas the Allah’s messenger (ﷺ) said:

«لَيْسَ لِلْوَالِيِّ مَعَ النِّيبِ أَمْرٌ، وَالْيَتِيمَةَ تُسْتَأْمَرُ، وَصَمْنَهَا إِفْرَارُهُ»

“the guardian has no command over the previously married lady and the orphaned girl is asked. And her silence is regarded as her consent.”¹¹⁰

1.4.6 *Shar’iah* responsibilities of husband and wife

Men and women are equal but not identical. Their physiology, psychology and biology all are different from men. Depending upon this Allah set some special roles for both and whose knows human being better than whose knows our creator does.

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ لِّلرِّجَالِ نَصِيبٌ مِّمَّا كَسَبُوا وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا كَسَبْنَ ۗ

“and In no wise covet those things In which Allah hath bestowed His gifts more freely on some of you than on others: to men is allotted what They earn, and to women what They earn:”

¹⁰⁹ *Sunan Ibn Majah* . Imam Muhammad Bin Yazeed ibn Majah Al-Qazwini.. Chapters on Marriage. Chapter One who arranges his daughter’s marriage when she is unwilling. ﷺ no. 1874. Vol 3. P. 77 (tran Nasiruddin al-Khattab) Riyad Maktaba Dar us Salam. 2007 see index serial number 21.

¹¹⁰ *Sunan Abu Dawud.*, Imam Hafiz Abi Daud Sulaiman bin Ash’ath. book of marriage:12 chapter 23 ﷺ : 2100. See index serial number 47.

¹¹¹ Surah Nisa 4: 32

Maulana Ameen Islahi considers “men and women are equal in status, but he views different social roles for men and women. Differences in role are due to physical structure and capabilities of the two sexes. Duties of woman revolve around home and children. She has to pay more attention to her home and children. Maulana Islahi points out that the main sphere of function of a woman is her home”.¹¹² However, it does not mean that Islam restricted woman to come out from her home and perform certain other activities. The Qur’ n thus states:

وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَيْنَ وَحَفْدَةً وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ¹¹³

“and Allah has made for you mates (and companions) of your nature, and made for you, out of them, sons and daughters and grandchildren, and for you sustenance of the best”

The Qur’ n considered marriage a sharing between two human beings and its objective is to fulfill conjugational gratification based of the relationship on love and mercy. Principles regarding marriage in Islam are clear and in harmony with human nature. Both man and woman have equal rights and obligations except of one responsibility that is of custodian of the family.

1.4.6.1 Kind treatment towards wife

In light of injunctions of the Qur'an, Allah Almighty and his prophet Muhammad ordered excellent treatment towards the wife such as generosity and best cohabitation with her. Allah the most Exalted says:

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا^ط وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا ءَاتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُبَيَّنَةٍ^ع وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ^ع فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَىٰ أَنْ تَكْرَهُوا شَيْئًا وَجَعَلَ

اللَّهُ فِيهِ خَيْرًا كَثِيرًا¹¹⁴

¹¹²Tadabbur-i-Qur'an, Amin Ahsan Islahi. vol. 6, p. 223.

¹¹³Surah Al-Nahl 16:72

¹¹⁴ Surah An-Nis 4:19

“ O ye who believe! ye are forbidden to inherit women against their will. nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, -except where They have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. if ye take a dislike to them it may be that ye dislike a thing”.

Islam orders husband to deal with his wife with dignity and in an equitable manner, not to hurt or injure her feelings. Husband is supposed s to show her love, appreciates her good qualities and to give her the impression that he needs her to attain happiness and tranquility in life. Prophet Muhammad () ordered and emphasizes to behave well to wives, and be generous with them, and he also clarified that the best of men is he who treats his wife best. It is narrated from ibn Abbas that the Prophet Muhammad () said:

«خَيْرُكُمْ خَيْرُكُمْ لِأَهْلِهِ، وَأَنَا خَيْرُكُمْ لِأَهْلِي»

“The best of you is the one who is best to his wife, and I am the best of you to my wives.”¹¹⁵ Equally important as discussed in Divine message the purpose of marriage is to establish a contented conjugal relationship based on the principles of equality, impartiality, generosity and kindness, fairness and justice.

1.4.6.2 Wife’s rights are similar as husband’s rights

Islam disciplines, guides, and nurture human desires and needs in manner that reinforces man’s humanity. Alah swt clarifies that the woman has rights towards her husband, just as the husband has towards her. Allah, the Exalted says:

وَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَ بِالْمَعْرُوفِ^٤ وَلِلرِّجَالِ عَلَيْهِنَ دَرَجَةٌ^٥.¹¹⁶

... “and women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them”.

Maulana Usmani explains that “the Qur’an has brought about a great revolution in the life of human beings, these four words gave women all that was their right but was always denied

¹¹⁵ *Sunan Ibn Majah* Chapter 50. Good treatment of women. dith no. 1977. Vol 3. P. 131.

¹¹⁶ Surah Al-Baqarah 2:228

them. With these words woman was lifted out of deprivation and dishonor and seated on the throne of equality”.¹¹⁷

“Narrated ‘Abdullah bin ‘Amr bin Al-`As: Allah's Messenger () said, ‘O ‘Abdullah! Have I not been formed that you fast all the day and stand in prayer all night?’ I said, ‘Yes, O Allah’s Messenger ()!’ He said, ‘Do not do that! Observe the fast sometimes and also leave them (the fast) at other times; stand up for the prayer at night and also sleep at night. Your body has a right over you, your eyes have a right over you and your wife has a right over you.’”¹¹⁸

Islam is religion that does not deny man natural tendencies or instincts, or pretend to achieve human purity by suppressing or destroying man’s basic physical need.

نَسَاؤُكُمْ حَرْثٌ لَّكُمْ فَاتُوا حَرْثَكُمْ أَنَّى شِئْتُمْ وَقَدِّمُوا لِأَنفُسِكُمْ¹¹⁹

“your wives are As a tilth unto you; so approach your. tilth when or How ye will; but do some good act for your souls beforehand”.

According to Sayyid Qutb each part of this divine speech explains an aspect of this most reflective and significant human relationship. The word حَرْثٌ provided a meaning of ‘tilth’

here with its connotations of creation in a context of fertility and procreation. Within this conducive and understandable atmosphere couples may seek each other’s comfort in any manner that will give them significant and most satisfying contentment.¹²⁰ In marital relation, husband and wife are not superior from one another but have reciprocal rights as well as obligations in relation to each other. A husband is a breadwinner and is under obligation to provide the basic necessities of life to his wife and to the rest of the family. However, in the matter of difference of opinion while managing the domestic as well as external affairs

¹¹⁷ The Noble Qur’ n (*Tafseer-e-‘Usmani*). ‘Allama Shabbir Ahmad Usmani (Karachi: Dar-ul-Isha’at) 2003.vol 1. P. 335.

¹¹⁸ Sahih Al-Bukhari Book 67Book of Marriage, Chapter : 90. Your wife has a right over you. dith: 133 see index serial number 62

¹¹⁹ Surah Al-Baqarah 2:223

¹²⁰ *Fi Zillal alQur’ n*. Sayyid Qutb. Vol 1, p. 273.

husband has the authority of deciding the final terms to avoid any damage or destruction to the marital relation or to a family unit.

1.4.6.3 Husband is protector and maintainer of wife

The social structure of Islam is based on family. At the time of marriage, Islam grants full capacity to draws conditions which she considers as a protection and security of her martial relation. Along with this *Shar'iah* grants wife with mandatory ownership of dower which is term as *Mahr* which symbolizing love and affection of husband in marriage contract. After marriage it is sole responsibility of husband for the provision to his family.

The Qur' n says:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ¹²¹

“Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.”

It becomes clear that the excellence which Allah almighty has given one over another or to men over women is not sexual superiority or excellence. It is due to the social functions that are performed by the two genders. This Arabic word ‘*qawwam*’ means “support, protection and supervision”¹²². Sayyid Abul A’l Mawdudi explains: “A *qawwam* or *qayyim* is a person responsible for administering and supervising the affairs of either an individual or an organization, for protecting and safeguarding them and taking care of their needs”¹²³.

“The Messenger of Allah said: All of you are guardians and are responsible for your wards. The ruler is a guardian and the man is a guardian of his family; the lady is a guardian

¹²¹ Surah An-Nisa 4:34

¹²² *Mufradaat Al-Qur' n*. Imam Raghayb Isphahani. Trans. Muhammad Abduhu Feroz Pur. (Lahore: Sheikh Shams ul Haq Publishers). 1987. Vol. 2. p.877

¹²³ *Tafh m al-Qur' n*. Sayyid Abul A’l Mawdudi (Towards understanding the Qur' n) Trans by Zafar Ishaq Ansari (United Kingdom: the Islamic Foundation) 1989. Vol: 2, p. 35

and is responsible for her husband's house and his offspring; and so all of you are guardians and are responsible for your wards.”¹²⁴

1.4.6.4 Wife's Right of Dower (Mahr) and Maintenance (Nafaqa)

Dower (Mahr) is a compulsory marriage present granted by a Muslim man to his future wife. The amount of this compulsory marriage gift is generally agreed upon by mutual understanding of the parties. The Qur' n:

¹²⁵ *وَأَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا*

“and give the women (on marriage) their dower As a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer”

Dower has a symbolic value which originates from husband's feelings of kindness and gentleness towards his wife. The purpose of dower in Islam is to raise the worth of wife and to elevate her to a higher status. The dower gives personality to a woman. For woman, the moral value of the dower is greater than its material value. According to Mufassirun the Qur' n has referred to three basic points in this verse:

Firstly dower is referred to as *saduqah* (gift), for it is a token of the truthfulness and earnestness of the affection of the man ¹²⁶. Similarly according to the opinion of Raghīb Isfahani the reason that sadaqah with fathah is because it is the sign of sincerity of spiritual faith

¹²⁴Sahih al- Bukhari Book of Wedlock, Marriage (Nikaah) Chapter: The woman is a guardian in her husband's house dith 5200. See index s.no. 36

¹²⁵ Surah al-Nis '4:4

¹²⁶*Tafs r Al-Kashaaf*. Imam Ibe Al-Qasim Jaar Ullah Mahmood bin Umar bin Al-Zamakhshari.

Second the pronoun *hunna* in this verse means that it is ordained that the dower belongs to the woman herself and not to her near relative. Dower is not the wages for having brought her up, nursed her and fed her .¹²⁷

Thirdly, the word *nihlatan* (willingly) makes it completely clear that the dower has no other purpose apart from being an offer, a present or a gift .

لِيُنْفِقَ ذُو سَعَةٍ مِّن سَعَتِهِ ۗ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَاءً آتَاهَا
سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا¹²⁸

“let the man of means spend according to His means: and the man whose resources are restricted, let Him spend according to what Allah has given Him. Allah puts no burden on any person beyond what He has given Him. after a difficulty, Allah will soon grant relief.”

Some men complained to the Syedna Umar bin khatab about the large amounts of dower that the women at their timewere demanding from their prospective husbands. Knowing it troubled that such a trend may discourage men from getting married. Therefore Syedna Umar announced in the mosque that he was announcing the an upper limit on the amount of dower. A wise woman stopshim and said to Syedna Umar: “You will not take away from us what Allah swt has given us. Syedna Umar asked her to explain her aurgument. Citing a clear Qur'anic verse, the woman established that the amount of dower can be quite high. Syedna 'Umar immediately responded: A woman is right and a man is wrong’. He then abandoned his proposal”.

In Islamic family structure, husband is required to provide maintenance to his wife and children. Woman in Islamic exempted from all financial struggles in the status of daughter and sister, father as her guardian to provide he substainace and in state of wife or mother its

¹²⁷ *Mufradaat Al-Qur' n.* Imam Raghav Isphahani. Trans. Muhammad Abduhu Feroz Pur. (Lahore: Sheikh Shams ul Haq Publishers). 1987.

¹²⁸ Surah At-Talaq 65: 7

responsibility of husband to provide provision. Since husband earns and spends his wealth, he by virtue of this fact, he becomes custodian of the interests of his family. In *Shari'ah*, wife is supposed to be obedient and guardian of the private life of her husband.¹²⁹

فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِي مَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ
الْفَرِيضَةِ. ¹³⁰

“provided ye seek (them In marriage) with gifts from your property, - desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) As prescribed; but if, after a dower is prescribed, agree mutually (to vary it), there is no blame on you,”

It is clear that dower originates in man's feelings of kindness and gentleness. Likewise provision of maintenance is obligatory on husband to provide to his wife and children. Even in case of revocable divorce, husband is mandatory to provide maintenance and provision to his wife.

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولَاتٍ حَمَلٍ فَأَنْفِقُوا
عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ وَأْتَمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ تَعَاَسَرْتُمُ
فَسْتَرْضِعْ لَهُنَّ أُخْرَى... ¹³¹

“... and if They carry (life In their wombs), then spend (your substance) on them until They deliver their burden: and if They suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. and if ye find yourselves In difficulties, let another woman suckle (the child) on the (father's) behalf...”

The rights and the duties of husband and wife fundamentally determines their roles. That's why Qur' n considered them kind on each other after dissolution of contract.

¹²⁹ *Tadabbur-i-Qur'an*. Islahi, vol. 2, p. 292.

¹³⁰ Surah al-Nis 4:24

¹³¹ Surah AT-Talaq 65:6, see also Surah Al-Baqara 2: 241

1.4.6.5 Polygamy and social justice amongst wives

Islam requires a kind and just treatment for a woman therefore to protect her from suffering of injustice and inequality. Plurality of wives is not specifically prohibited by divine command in Islam but it restricted their numbers and the permission is conditioned by just treatment with the wives, as each wife has given complete capacity to the ownership of the rights from her husband:

فَأَنْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَتًى وَتِلْكَ وَرُزْنٌ عَطِيءٌ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ
أَيْمَانُكُمْ ذَٰلِكَ أَدْنَىٰ أَلَّا تَعُولُوا¹³²

“marry women of your choice, two or three or four; but if ye fear that ye shall not be able to Deal justly (with them), then only one, or (A captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice”.

At the event of having more than one wives, husbands should treat their wives in a just manner. In just manner meaning thereby to maintain a balance and equality among them in the affairs of providing necessities, general maintenance and companionship meaning that in this regard all existing wives require equal division. However, equality in this perspective is not expected with regards to the affairs which are beyond the personal control of person such as the varied level of emotional intimacy or bond towards the spouses that is left out of the overall principle of equality among spouses:

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا اكْتَسَبَتْ¹³³

“...on no soul doth Allah place a burden greater than it can bear”.

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمِيلِ فَتَدْرُوهَا أَلْمُعَلَّقَةَ وَإِنْ
تُصَلِحُوا¹³⁴

¹³² Surah An Nisa 4:3

¹³³ Surah Al-Baraqaah 2: 286

¹³⁴ Surah An-Nisa 4: 129

“ye are never able to be fair and just As between women, Even if it is your ardent desire: but turn not away (from a woman) altogether, so As to leave Her (as it were) hanging in the air”. There is a specific exposition Maulana Wahiduddin Khan writes: “the Islamic commandments giving permission to marry upto four women does not mean having the right to seize four women and shut them up inside one’s home. Marriage is a matter of mutual consent. Only that woman can be made a second or third wife who is willing to be so. And when this matter rests wholly on the willingness of the woman, there is no cause for objection.”¹³⁵ In an attempt to strengthen the woman's position in marriage, the Qur'an affirmed her full legal capacity to contract marriage and receives her own dower.

1.4.7 Woman’s right to dissolution of marriage contract

As discussed earlier marriage is a firm contract in Islam but at stage when both spouses could understand that they could not able to continue the relationship and through arbitration council still they could not maintain the responsibilities towards each other therefore Allah has granted both the right of separation in a just way. Shariah has granted the right of divorce to man to give three divorce and dower to woman while separate her from the marriage contract like wise Islam grants woman to dissolve the marriage contract if she dislikes to continue the relation with her husband. Legally al-khul has same status of dissolution of marriage by Muslim woman as divorce by the man. It is expressed by Allah almighty through the verse of Surah Al-Baqarah:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۗ ¹³⁶

“if ye (judges) do indeed fear that They would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for Her freedom”.

¹³⁵ Woman in Islamic Shariah. Maulana Wahiduddin Khan. (New Dehli: The Islamic Centre) 1994. P. 120.

¹³⁶ Surah Al-Baqarah: 229

In the situations where the woman considers that she could not maintain the marital relation with her husband, Islamic law grants the right of separation to the Muslim wife by granting her legal capacity.

1.4.8 Socio-Religious responsibilities of husband and wife

Allah almighty demands from human beings to be socially responsible towards mankind according to the commands of Allah swt. The Qur'an grants a slight edge and superiority of man on woman in social context. The verse clarifies that it does not due to inherit weakness of the female gender but due to social context¹³⁷.

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ¹³⁸

“Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.”

Mufti Muhammad Al-Sh fi' explains this terms *Qawwam* as “in Arabic denotes a person who holds the responsibility or has the duty and charge to manage a job or run a system or take care of what has to be done about something, controlling all related factors therein. The standard role of a man, with regard to women, has been mentioned in this verse through the word, 'qawwam' which has been translated in various ways, the most common being in the sense of 'hakim' or one who rules, governs, or decides. Other alternates used are guardians, custodians, overseers and protectors”¹³⁹ Relation between rights and duties in Islam is reciprocal and cannot be divided into sections . However, man has been made more responsible in connection with the performance of social and economic obligations. Maintenance of woman is the basic responsibility of man in the Islamic Law. there is no such

¹³⁷ *The rights of women in Islam*. Asghar Ali Engineer. (Lahore: Vanguard 1996) P. 44.

¹³⁸ Surah An-Nisa 4:34

¹³⁹ *Ma'ariful Qur' n.* trans. Maulana Mufti Muhammad Shafi (trans. Maulana Mufti Taqi Usmani (Karachi: Maktaba-e-Darul-'Uloom) 2011. Vol. 2, pp.417-18

reason where this responsibility is placed on woman. Muslim woman is freed of the burden of social, political and economic responsibilities.

Giving the right of custodianship to man does not mean that woman merges her personality in man's entity. "According to Maulana Amin Islahi, woman is not to be considered as personal property; rather she is an independent entity. The view of Islahi is important, as there exist some societies including Muslim societies which do not give due status to women and continue to exploit them in the name of religion. The issue got much attention after the emancipation of woman in the Western industrialized societies. Islahi considered woman a fully independent member of society and asked man to honour this independent status of woman"¹⁴⁰. Allama Shabbir Ahmad Usmani explains that :

"the superiority of man over woman is established on two major reason, the one is natural and the other is artificial. The natural reason is that Allah has given excellence to some over others in their inherent qualities and virtues. The basic qualities are the quality of knowledge and the power of action.the second reason is material, men expend of their wealth on women as dowry, expenses of food, cloth and lodging and other necessities of life."¹⁴¹

Allah Almighty has placed woman's total financial responsibility on men. Before she is married, her father and brothers take care of her, and after her marriage, she becomes the responsibility of her husband. Woman has been made the means of human procreation. Then, the responsibility of being mothers of children and that of managing and holding the house and the family together has also been placed on her shoulders.

¹⁴⁰*Tadabbar Al-Quran ,islahi*. Vol 2, p. 294

¹⁴¹*The Noble Qur' n* .AllamaShabir Usmani (Karachi: Dar-ul-Isha'at) 2003.vol 1. P. 335.

أَنَّ رَجُلًا سَأَلَ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مَا حَقُّ الْمَرْأَةِ عَلَى الرَّوْجِ؟ قَالَ: «أَنْ يُطْعِمَهَا إِذَا طَعِمَ، وَأَنْ يَكْسُوَهَا إِذَا اكْتَسَى، وَلَا يَضْرِبَ الْوَجْهَ، وَلَا يَقْبِحَ، وَلَا يَهْجُرَ إِلَّا فِي الْبَيْتِ»¹⁴²

“A man asked the Prophet (): ‘What are the right of the woman over her husband?’ He said: ‘That he should feed her as he feeds himself and clothe her as he clothes himself; he should not strike her on the face nor disfigure her, and he should not abandon her except in the house (as a form of discipline).”

Man cannot handle the burdens of responsibilities in these areas. Sayyed Qutb explains that “it is needless to say, both man and woman are the creation of Allah swt, who does not wish to do injustice to anyone He has created. Indeed, He gives each of His creatures the abilities and talents that befit the duties assigned to them. both men and women are from Allah's creatures, and Allah never intends to oppress anyone from His creation.” Sayyed Qutb elucidates that the institution of marriage is based upon the contribution of both man and woman and they have been created with full of their abilities and skills and by no mean Allah Almighty has done injustice in their creation in a way of oppressing the opposite one. The role a man plays in any household as an in charge is out of the scope of this commentary. The role of women in contrary to this can never be challenged as she enjoys equal civil status within the family and in the outside world at large. Assigning values or obligations to any one of the gender does not discriminate him or her against the other gender, nor does their rights are suspended . Islam has assigned and distributed roles specified to each gender in discharging their duties and obligations.¹⁴³ The Obligation and responsibility on the husband based on the principle that it is mandatory on him to treat his wife with kindness, cause her no harm or grief to keep her honorably. ¹⁴⁴The Hedaya sums up the mutual rights and duties of the husband and wife in the following terms, with the usual twist in favour of enjoyment. The marriage has certain

¹⁴² *Sunan Ibn M jah*. Imam Muhammad bin Yazeed Ibn Majah Al-Qazwini. Chapters on marriage. Chapter:3. The wife's right over the husband. dith 1850. (English-Arabic trans. Nassiruddin al-Khattab. (Riyyad: Darussalam publishers) 2007. Vol 3, p. 60.

¹⁴³ *Fi Zil l al- Qur' n*. (in the Shade of the Qur' n) Sayyid Qutb Trans. M.A. Salahi and A.A. Shamis. (UK: The Islamic Foundation) 1999.vol 3. P. 113

¹⁴⁴ See Surah al-Baqarah 2:229-232; and Surah An-Nisa 4:19

legal consequences that it legalized the enjoyment of men and women as husband and wife. It has also a few restrains such as a woman is prohibited to appear in public, dower and maintenance of wife is obligatory on husband, established the prohibitions of affinity, provides rights regarding inheritance, obligation upon men of justice between the wives in case of practice of polygamy and physical submission of wife when called to the couch, right of husband to control wife when she tends to incline towards disobedience and expects from men to treat her with affection and grace further it also declares unlawful the conjunction of two sisters and other similar categories.¹⁴⁵

1.4.9 Conclusion of the Chapter

The family in Islam is a unit in which husband and wife is unite and share life together under rules and discipline that is based on mutual love and compassion. The main objective of marriage institution in Islam is the promotion of mutual affection, procreation and upbringing of children according to Islamic teaching and respect the dignity of husband and his wife. Accordingly, the two partners of the contract are equal in status. Islam uplifted the status of Muslim woman in social context as female child, sister and mother and gave them dignity and equal right that are granted by the Qur'an and a dith of the Prophet . In the general rules of Islam based on the teachings of the Qur'an and a dith of prophet Muslim men and women are of equal status. Both have the same spiritual status as their origin is the same. Therefore both Muslim man and woman are supporter to each other. There are some special privileges for Muslim woman in some situations where they are exempted to perform religious obligations. Islam affirms the absolute spiritual equality of believing man and woman, and assigns both an equal rank before Allah Almighty. In legal matters according to

¹⁴⁵*Hidayah*. Imam Marginani. Vol I, p. 393.

innate biological differences between Muslim man and woman Islam give privilege to woman in the interest of justice but it doesnot constitute that woman is lesser in wisdom and religion on the basis that *Shar'iah* exempts her from her biological conditions. Legal exemption does not mean that woman witness become unequal in all fields of life.

Muslim Man is obligatory to spend his money on the family but a Muslim woman's dower, inheritance and maintenance is entirely her own wealth to spend as she pleased. Qur'an makes Muslim man custodian of his family and make it mandatory on him to provide provision and protect to his family interest, in this social connect Islam grant an edge to Muslim man over woman, because woman is physically vulnerable in this regard. Furthermore, the role of the wife is summarized in the Qur'anic statement that "women have rights similar to that of her husband, according to what is equitable; but husband have a 'degree' over them". Divine code of living considers human nature given to both Muslim man and woman to enable them to discharge the duties assigned to each of them. It maintains justice in the distribution of duties according to their capacity. In conclusion, Islam promotes equality of man and woman, recognizes their unique strengths, and makes them equally subject of *Shar'iah* because of their capabilities.

CHAPTER: 2

SIGNIFICANCE AND MEANING OF DOCTRINE OF LEGAL CAPACITY IN ISLAMIC LAW

2.1 Introduction of the Chapter

The foundational legal philosophy of *Shar'iah* is that Allah Almighty is the source of law and the individual human is the intended recipient of the law. As discussed in the previous chapter under to discussion of how woman as a subject of *Shar'iah* (Islamic law) is addressed in The Qur' nic text by the supreme Lawmaker, *al-hakm* Allah Almighty is the originator of the law, and prophetic traditions. It is significance that *Shar'iah* has an advance legal system. In Islamic legal system, the source of command (*Hukm*) is the Creator. The Command of *Shar'iah* (*Hukm*) comprises of four rudiments, which interact with each other to give rise to responsibility and rights to obey the law. These elements of Islamic law are: Sovereign Law Giver (*Hakim*), the relevant law (*Hukm-e-Shari*), the act to which the hukm is related (*mahkumk fih*, also referred to as *mahkum bih*) and the subject who performs the act (*mahkum alayh*) that is, the person who is under an obligation to obey the law¹⁴⁶.

The present chapter explains how Islamic jurisprudence examines the intersections of these elements in discussions on the nature of human obligation to the laws of Allah. Discussions on the connection between law and the Lawgiver include an analysis of the source of obligation and the nature of the individual obligated by the Lawgiver to the law. The discussion on the final, and for most significant aspect the individual obligated by the law (*al-ma kum aly*), is addressed only in the very final stages of most legal theory texts and frequently in a section on legal capacity (*al-ahliyyah*) emphasizes on factors which causes the

¹⁴⁶ Jurisprudence in Islam. Tauqir Mohammad Khan. (India: Pentagon Press) 2007. P. 7

complete and deficit legal capacity for the obligation and execution of law by the individual *mukallaf* (person under legal obligation).

This study concludes with the note that Islamic jurisprudence provides complete legal status to the muslim woman for obligation and execution of commands of Allah Almighty on the basis of Islamic legal doctrine of the responsibility *Dhimmah*.

2.2 Doctrine of Legal Capacity in Islamic Law (*Shari'ah*)

The triangle of the Lawgiver, the law and legal subject manifests in Islamic jurisprudence as *al-hakm* (the Lawgiver or Sovereign Ruler), *al- ukm* (the law), and *al-mahkum aly* (the legal subject). Collectively, the triad of law (*ukm*), Lawgiver (*al-hakm*) and individual (*al-mahkum aly*) form the pillars (rukun) that sustain the 'the value of the law'.¹⁴⁷ The subject or the *muhkum alayah* is the person whose act invokes *a hukm*. In *Shar'iah* parlance, he is known as the *Mukallaf*:

“the *adillah shariyyah* and the *ahkam* that is the laws or values that regulate the conduct of the *mukallaf*, are the two principal themes of *usul-al-fiqh*.”¹⁴⁸

The person to whom the command of the *Shar'iah* is addressed (*muhkum alayah*) has been defined as: “*Mahkum alayah* is a person whose act is referred to by divine communication (i.e. whose act is subject to divine communication). He is called *mukallaf* (person under legal obligation)”¹⁴⁹ It is an essential condition for an obligation affecting this person that he has capacity, whether he performs the act directly or through delegation. The first requirement for this is that he be able to understand the communication creating the obligation. In addition to this, there are a large number of other conditions that must be fulfilled before the law that can

¹⁴⁷ Ibid. p. 163.

¹⁴⁸ Principles of Islamic Jurisprudence. Kamali, Mohammad Hashim. (UK: The Islamic text society) 2003. P. 13

¹⁴⁹ *Usul al-Fiqh al-Islami*. Wahbah al-Zuhayli Vol: 1, p: 158, (Damascus: Dar al-Fikr 1986).

operate against or for a person. These conditions are all related to legal capacity, known as *ahliyyah* in juristic terminology¹⁵⁰.

2.2.1 Etymology of Legal Capacity (*Ahliyyah*)

Lisan al-Arab Al-Muheatt defines *ahl* means “worthy of”¹⁵¹. The word *ahl* has been used in the Qur’an and implies that right and obligation relate to capacity. The Qur’an says:

فَأَنْزَلَ اللَّهُ سَكِينَتَهُ عَلَى رَسُولِهِ وَعَلَى الْمُؤْمِنِينَ وَأَلْزَمَهُمْ كَلِمَةَ التَّقْوَى وَكَانُوا أَحَقَّ بِهَا أَهْلَهَا¹⁵²
“Allah sent down His tranquillity to His Messenger and to the believers, and made them stick close to the command of self-restraint; and well were They entitled to it and worthy of it”

a. Absolute Fitness

The literal meaning of the word *ahliyyah* is absolute fitness or ability. *Mu’jam al-Wassit* defines: “When it is said that a person is capable of doing something or of undertaking some work, it implies that he has the ability to do so. It is said a person is capable of doing something it means that the accomplishment of that task would be expected of him”¹⁵³

b. Sufficient Qualifications

The Arabic word *ahliyyah* means “sufficient qualifications, the possession of which enables the possessor to enjoy something or be qualified for certain matters”¹⁵⁴.

c. Absolute Competence to fulfill the act

Ahliyyah in another way means absolute competence. It is said: “so and so is competence for this act”, When he is competent for its performance, for its demand from him, or its entitlement for it.

¹⁵⁰ The Principles of Islamic Jurisprudence. Hassan, Ahmad. (Islamabad. Islamic Research Institute. 1995).

¹⁵¹ *Lisan Al-Arab Al-Muheatt*. Yusef Khaiyyatt and Nadeem Marasshi (ed).vol: 1, p.125. (Beirut).

¹⁵² Surah Al-Fath 48:26

¹⁵³ *Al-Mu’jam Al-Wassit*. Vol: 1,p 31. (Egypt: Maktaba As-Suruk Ad-Dawliyya. 1425h)

¹⁵⁴ *Lisan alArab al Muheatt*. Yusef Khaiyyatt and Nadeam Marasshi (ed)(Beirut)

Literally it means fitness of a person for performing an act, or for its demand of him, or for his entitlement to it. Therefore *ahliyyah* is define as “competence of a person for acquiring rights and exercise them and for liabilities and their fulfillment”.¹⁵⁵

2.2.2 Legal and technical definition of capacity

Some jurists used the word in its literal sense to convey the legal or technical meaning. The majority of the jurists, however, employ the term in a restricted sense. This use associates it with the concept of rights that underlies all laws. But their generality and the jurists use this word in the sense of special competence for certain specific matters. Technically it is defined as follows:

“Ahliyyah means man’s aptitude by which he becomes fit for applying the command to him”.

Ahliyyah of a man for something means his fitness for the issuing forth of that thing from him and its demand of him. In the parlance of *Shrai’ah* it means his competence for the rights to which he is entitled and for the obligation to which he is subject.

Al-Zarqa defines legal capacity (*al-ahliyyah*) as “Description presumed in a person rendering such a person a possible candidate to receive a legislative injunction”¹⁵⁶.

As-SAb nee defines *al-ahliyyah* as “the ability of a person to oblige, be obliged and conduct ones affairs by oneself”¹⁵⁷.

Al Elami defines *al-ahliyyah* as “...the fitness of a person to enter into obligation, that is, to bind and be bound”¹⁵⁸.

¹⁵⁵*Al-Taqrir wal-Tabhir: Sharh ala Taabir al-Imam al-Kamal ibn al-Humam. Ibn Amir al-Hajj. (Cairo: al-Matba al-Kubra Al-Amiriya. 1324/1906) vol:2. P 164*

¹⁵⁶*Al-Madkhal Al-Fiqhi Alam. Al-Zarqa ,Mustafa Ahmad. (Beirut. 1959) Vol: 2, p. 733*

¹⁵⁷*Al-Madkhal LidirasatAl-Fiqh Al-Islami. Al-Sabouni, Abd Al-Rahman (Damascus: Al-Matbaah Al-Jadidah. 1978) Vol:2, p. 24*

¹⁵⁸*The Marriage Contract in Islamic law in the Shar’iah and Personal Status Laws of Egypt and Morocco. El-Alami, Dawood S. P: 49. (London: Graham & Trot man. 1992).*

Some legal theorists have used the word *ahliyyah* as complete competence to do the act. Ibn Amir al-Hajj explains in *al-Taqrir wal Tahbir* as “*Ahilyyah* of a man for a thing means his competence for its issuing forth from him, its demand from him, and acceptance by him”.¹⁵⁹ Mustafa Ahmad Al-Zarqa a contemporary jurist defines *Ahliyah* as a quality which Allah swt determines as a law giver in a person to make him a subject of *Shar’iah*, commandments.¹⁶⁰ From these definitions Mahdi Zahraa concludes that *al-ahliyyah* is “a required set of qualifications in accordance with which the person becomes able to acquire rights, bear obligations and conduct actions and transactions that are able to produce their legal effects.”¹⁶¹

2.3 Basis for Understanding the Command (*Khitab Allah*)

Legal capacity in texts of classical legal theory, discussions on *ahliyyah* generally begin with an analysis of *aql* (reason) which is established as the foundation of legal capacity. There are three main conditions for the application of the command of *the Shar’iah*, to a person i.e. subject of law (*mukallaf*) under legal obligation. i.e. reason (*aql*), puberty (*bulug*) and legal capacity (*ahliyyah*)¹⁶².

2.3.1 Reason and Understanding (*aql*)

Legal capacity in classical legal texts discussions on *ahliyyah* generally begin with an analysis of ‘*aql* (reason) which is established as the foundation of legal capacity.’¹⁶³ The purpose of giving the command to as person is its compliance and obedience. If a person doesnot

¹⁵⁹*Al-Taqrir wal-Tahbir: Sharh ala Taabir al-Imam al-Kamal ibn al-Humam*. Ibn Amir al-Hajj (Cairo: al-Matba al-Kubra Al-Amiriya. 1324/1906) vol.:2. P. 164

¹⁶⁰*Al-Fiqh al-Islami fi Thawbihi al-Jadid*. Al-Zarqa, Mustafa Ahmad. (Damascus: Maktaba Jamiah Damishq. 1963) Vol:2. P 739

¹⁶¹The Legal Capacity of Women in Islamic Law. Zahraa, Mahdi Arab Law Quarterly.. (1996) Vol 11, No3 245-63

¹⁶²*U l al Sarakhs Imam-Sarakhs* vol.2, p. 87.

¹⁶³*Usullbid*. p. 90

understand the command, he cannot comply with it. Therefore it is essential that the person who is subject of law (*mukallaf*) should be capable of understanding the command and the legal obligation (*taklif*). The reason is that legal obligation is a communication or address (*khitab*) and a person who is devoid of reason and faculty of understanding cannot be addressed. The power of understanding (*fahm*) is based on human intelligence, for the intellect is the instrument of understanding. But the intellect, being a hidden faculty, the lawgiver has tied the legal obligation with a quality which is apparent, regular and sensible. That quality is legal majority (*bulugh*) coupled with intelligence. If a person comes of age, has soundness of mind, behaves normally, and there appears no abnormality in his faculty of intelligence, he becomes *mukallaf* (under legal obligation). As for the power of understanding, it naturally varies from person to person¹⁶⁴.

2.3.2 Puberty (*Bulug*)

Linguistically, the term refers to the fullest realization of a thing, and it refers to people in two ways. The first is a reference to when an individual becomes old, i.e., when a person passes the age of forty and enters the later stages of life. The second refers to attaining puberty. According to the renowned lexicographical work, *Lisan al-'Arab*: “*Bulug* implies a boy or a girl having a nocturnal emission (*i talama*) and thus signaling the time at which they acquire responsibility”.¹⁶⁵ Technically, “*Bulug* is defined as the physical and sexual maturity of male and female bodies. *Bulug* is determined by nocturnal emission, and ejaculation, while female *Bulug* is determined by menstruation, nocturnal emission and pregnancy”.¹⁶⁶

¹⁶⁴ *Kashf al-Asrar*. Abd Al-Aziz ibn Ahmad al-Bukhari. (Constantinople: Maktab al-Sanai, 1307) Vol:4, p. 352

¹⁶⁵ *Lisan al Arab*. Ibn Manzoor.

¹⁶⁶ *An Introduction to the Study of Islamic Law*. Hassan, Hussain Hamid. (Islamabad: Islamic Research Institute. 1997) p. 157

Mulla J wan explains, *bulugh* (sexual maturity) has a role in determining reason. However, the law stipulates puberty as the condition for achievement of reason (*aql*). Puberty or sexual maturity plays a definitional role in determining legal capacity, and there are certain assumptions about the body, its nature and its form associated with sexual maturity. In his reference to sexual maturity J wan addresses, for the first time, a matter of legal capacity that is not entirely dependent on intellectual maturity or reason, *bulug* being a reference to physical maturity and *badan* (the body). By extension, the ultimate determinate of reason and therefore of legal capacity is sexual maturity (*bulug*).¹⁶⁷ This interplay of *badan*, *aql* and *ahliyyah* (of body, reason and legal capacity), prevails through the remaining discussion on legal capacity, as these three elements come to constitute the individual as a subject of the law.¹⁶⁸

2.3.3 Legal capacity (*ahliyyah*) of the subject

The condition for legal obligation is the fitness of a person for the application of law to his actions. Here *ahliyyah* means the fitness for address (*ahliyyah al-khitab*) or fitness for command (*ahliyyah al-hukm*). Imam Al-Razi defined as follows: “*Ahliyyah* means man’s aptitude by which he becomes fit for obeying the command to him.”¹⁶⁹

Ahliyyah (capacity) of a man for something means his fitness for the issuing forth of that thing from him and its demand of him. In the parlance of the *Shari’ah*, it means his competence for the rights to which he is entitled (*lahu*) and for the obligation to which he is subject (*alayh*). It is trust about which Allah swt has informed that man has carried it, as His word reads in Qur’an:

¹⁶⁷ *N r Al –Anwar Ma a Hashiyat Qamar A l-Aqmar*. J wan P. 231

¹⁶⁸ Islamic Jurisprudence. Imran Ahsan Khan Nyazee. (Islamabad: Islamic Research institute) p. 47.

¹⁶⁹ *Al-Mahsul fi ilm al-usul al-Fiqh*. Al-Razi, Fakr ud Din. Muhammad ibn Umar. (Riyadh: Imam Muhammad bin Saud Islamic University. 1399H). Vol: 2. P. 40

لَا يَرْقُبُونَ فِي مُؤْمِنٍ إِلَّا وَلَا ذِمَّةً¹⁷⁰

“They do not observe toward a believer any pact of kinship or covenant of protection.”

The intelligence possessed by him realizes the capacity of a man for legal obligation, since intelligence is the basis of power of understanding. A person cannot be competent for understanding the divine command without intelligence, like animal or inanimate objects. This shows that intelligence precedes capacity for legal obligations. Defining the essentials, Hussain Hamid has mentioned six conditions for legal obligations:

1. Existence of command (*Hukm e-Shariah*) which contains the obligation.
2. Knowledge of the person under legal obligation about the *Hukm*.
3. A person's legal capacity for understanding the command.
4. A person's power of fulfillment of the command, whether it relates to commission or omission.
5. Freedom or power of choice to obey the command *Hukm*, and
6. Subjection of man to the Islamic state for inflicting punishment in the case of committing a crime¹⁷¹.

According to Ahmad Hassan these conditions indicate that

“*ahliyyah* (capacity) is a quality in a man which makes him subject of law, and since it grows throughout his life and undergoes changes from his embryonic stage until his death, the lawgiver has determined his capacity in different phases of his life and promulgated commands for him accordingly”.¹⁷²

¹⁷⁰ Surah Taubah 9:10

¹⁷¹ *An Introduction to the Study of Islamic Law*. Hassan, Hussain Hamid. (Islamabad: Islamic Research Institute, 1997)

¹⁷² *Principles of Islamic Jurisprudence*. Hassan, Ahmad vol:1, p.,292. (Islamabad. Islamic Research Institute, 1995)

2.4 Doctrine of *Dhimmah*

The basis of legal capacity is human life. Every human being, according to the Islamic legal doctrine, has been gifted with the responsibility, technically called *Dhimmah*. It is at once a privilege and responsibility inherent in human nature. It is inseparable from him. The word *dhimmah* literally means covenant. “*They observe not toward a believer the ties either of kinship or of covenant*”.

This convent and the responsibility therefore had its origin when the human species was first created and is mentioned in the Qur’an as the primordial covenant between the man and Allah swt at the time of creation of man. The responsibility (*dhimmah*), being a trust (*amanah*) as a trust by the Qur’an, was offered to all the creatures, but they refused to undertake it; it is only man who undertook it. As mentioned above in the Qur’an which says

إِنَّا عَرَضْنَا الْأَمَانَةَ عَلَى السَّمَوَاتِ وَالْأَرْضِ وَالْجِبَالِ فَأَبَيْنَ أَنْ تَحْمِلْنَهَا وَأَشْفَقْنَ مِنْهَا وَحَمَلَهَا الْإِنْسَانُ ^ط
“We offered the trust to the heavens and the earth and the mountains, but they refused to undertake it and were afraid of it; and man undertook it.”

Man has been singled out for legal obligation, as he alone has the quality of bearing the responsibility (*dhimmah*). Another verse shows that this quality is inherent in man.

وَكُلُّ إِنْسَانٍ أَلْزَمْنَاهُ طَائِرَهُ فِي عُنُقِهِ ^ط
“every man’s fate we have fastened on His own neck”.

The word *tair*, literally means augury and it has been explained as divine decree, fate and acts of man. This refers to the quality of bearing responsibility, which is inherent in man. The jurists have named it *dhimmah salihah* (full responsibility). Allah swt has created man, appointed him the subject of His trust and honored him with intellect and inherent quality of

¹⁷³ Surah Ahzab 33:72

¹⁷⁴ Surah Al-Isra 17:13

bearing responsibility. By virtue of this quality he becomes competent for the inherence of rights and discharge of obligations.

2.4.1 *Dhimmah* is a cause of Legal Capacity

The quality of *dhimmah* is a cause of legal capacity and intellect is its condition. Imam Bazdawi defines in *Usul* as “In the *Shar’iah* it means a soul or a person who bears the responsibility through his (primordial) covenant”¹⁷⁵. In this definition *dhimmah* has been defined as a person, the bearer of responsibility. According to some jurist, *dhimmah* is a person and not as quality. A definition has been enunciated by Sadr al-*Shar’iah* and explained by al-Taftazani:

“*Dhimmah* literally means covenant, and in the *Shar’iah* it means a quality by which a man become fit for what he is entitled to (rights) and what he is subject to (obligation)”¹⁷⁶. The definition explains that *dhimmah* is a quality. Some contemporary scholars regard the capacity of obligation and quality of bearing responsibility i.e. *dhimmah* as identical.

According to them *dhimmah* means the capacity for inherence of rights and obligations. But the majority of legal theorists draw a distinction between the two. The capacity of obligation (*ahiyah al-wujub*) means fitness of a person for the inherence of rights and obligations and *dhimmah* is the place where the rights and obligations rest.¹⁷⁷ Legal capacity *ahliyyah al-wujub* (capacity for obligations due to and from the individual) arises out of *dhimma* (human accountability to Allah swt).

¹⁷⁵ *Kashf al-Asrar*. Abd Al-Aziz ibn Ahmad al-Bukhari. vol 4, p.1359

¹⁷⁶ *Al-Tawdih sharh al-Talwih*. Sadr Al-Shariah.vol:2; pp. 161-162

¹⁷⁷ . Principles of Islamic Jurisprudence. Hassan, Ahmad Vol:1. p.298

وَإِذْ أَخَذَ رَبُّكَ مِنْ بَنِي آدَمَ مِنْ ظُهُورِهِمْ ذُرِّيَّتَهُمْ وَأَشْهَدَهُمْ عَلَىٰ أَنفُسِهِمْ أَلَسْتُ بِرَبِّكُمْ قَالُوا بَلَىٰ
شَهِدْنَا¹⁷⁸

“when Thy Lord drew forth from the Children of Adam - from their loins - their descendants, and made them testify concerning themselves, (Saying): ‘Am I not your Lord (Who cherishes and sustains you)?’-.”

Dhimma refers to the covenant which man acceded to with his Lord on the day of (covenant) with a pronouncement *Am I not your Lord* , he said. he affirmed. Having admitted Allah’s swt lordship on the day of Covenant man confirmed that all his laws are valid for him and are incumbent upon him as subject of Islamic laws.

2.4.2 *Dhimmah* is essential to the capacity of legal obligation

Dhimmah is essential to the capacity of legal obligation but it is not exactly the self-same thing or its substance. In other words, capacity of obligation depends on *dhimmah* and rests on it, but they are not identical. Some scholars are of the opinion that there is no need for assuming the existence of *dhimmah* for the establishment of capacity of obligation. There is no obstacle to its accomplishment without the supposition of *dhimmah*. A contemporary scholar Hussain Hamid has defined *dhimmah* as follows:

“A *dhimmah* is the legal quality which makes the individual a proper subject of law, that is, a proper addressee of the rule which provides him with rights or charges him with obligations .In this sense the *dhimmah* may be identified with the legal personality. It is for this reason that every person is endowed with a *dhimmah* from the moment of birth. Equally it follows that the *dhimmah* disappears with the person at death”¹⁷⁹.

¹⁷⁸ Surah Al-Araaf 7:172

¹⁷⁹ An Introduction to the Study of Islamic Law. p. 345

Legal capacity derives from *dhimmah* (accountability) and only humans are thus accountable.¹⁸⁰ *Adam*, the first human, is the singular representative of all humanity and therefore *dhimma* is undifferentiated at birth and all humanity has accountability. Believers and unbelievers both have accountability but the unbeliever is not similarly accountable in religious matters. The slave and free are also both accountable but the slave's accountability is reduced because a slave is owned by another person. Men and women have the equal accountability for obedience to Allah Almighty and sex difference does not distinguish accountability to Allah swt.

2.4.3 Doctrine of *Dhimmah* and legal personality

In Islamic law, the Muslim scholars have widely deliberated upon the conception of *dhimmah*. *Dhimmah* is commonly defined as an acknowledged imagined source which comprises the rights as well as obligations connecting to a person similar to a bottle carrying all present and future rights and obligations. Al-Zarqa' presents *dhimma* "as a juristic container presumed in a person in order to encompass all its debts and obligations that are related to it".¹⁸¹

Al-Sanhouri defines it as a "juristic (*Shari'ah*) description that is presumed by the legislator to exist in a human being and according with which [the person] becomes able to oblige and be obliged". Therefore, the concept of *dhimmah* characterizes that angle of the legal personality that is thought to provide an explanation of the rights and duties of a person that includes the both of religious as well as of worldly nature. As *dhimmah*, lives together with the legal personality of a person that comes into existence at the birth of a person and concludes upon the death of a person. However, as discussed further foetuses and embryos may have

¹⁸⁰ Ibid. p. 346

¹⁸¹ *Al-Fiqh al-Islami fi Thawbihi al-Jadid*. Al-Zarqa, Mustafa Ahmad. (Damascus: Maktaba Jamiah Damishq. 1963) Vol:2. P 739

certain rights and as a result may enjoy a kind of restricted or limited kind of *dhimmah*. Furthermore, *dhimmah* may remain to exist even after the death of a person till the event when all of his rights and obligations are completely satisfied. With regards to the conclusion of *dhimmah*, jurists in Islamic law carried three views.

The jurists of Maliki school of law and some of the Hanbali believe that “*dhimmah* ends upon the death of the person and the obligation to settle its debts becomes related to its properties if there are any, otherwise its obligations lapse”.

Al-Shafi'i jurists and the rest of the Hanbali jurists believe that “*dhimmah* continues to exist after the death of the person until debts and other obligations are settled: for instance, if someone is injured as a result of falling in a hole that was dug by a person before he died. In this case the *dhimma* of the deceased will be liable for the compensation of the injured person”.

anafi jurists believe that *dhimma* does not end upon the death of the person but, in fact, it is weakened and the only thing to strengthen it is if the deceased has left some properties or a guarantor, otherwise the debts lapse .¹⁸²

2.5 Conditions for legal capacity (*Ahliyyah*)

From the above-mentioned definitions, there are four qualifications which are significant for *ahliyyah* that includes,

1. A person (*Mukalaf*)
2. A person's ability to attain rights (*MukaffalBihi*)
3. A person's ability to have obligations
4. A person's ability to legally perform actions and transactions effectively

¹⁸²*Al-Madkhal LidirasatAl-Fiqh Al-Islami*. Al-Sabunee, vol:2 p. 75

Natural human beings possess natural personality¹⁸³ that is related to the living existence of a natural human being it initiates at the birth of natural human being and comes to an end at his death. A person who is a natural human being is considered as an entity able to acquire rights and perform duties legally granted by *Shariah*. All human beings alive on earth are natural human beings carrying a natural legal personality without having regard to their sex man or woman, colour white or black, beliefs, age minor or major or their ability to do or disability to perform either mentally or physically.

2.6 Aspects of legal capacity (*Ahliyyah*).

The legal capacity has two aspects or features:

2.6.1 Eligibility for duty

The first feature of legal capacity is eligibility for duty. This is applied to an individual due to being a human whether he is male or female and of minor or major age till the time he is dead or as per *anafi* jurists even after the death till his financial debts are settled.¹⁸⁴ Legal capacity of a person grows along with the development stages of a person's life starts from conception and consists of the stages of being minor age having limited legal capacity then attaining full legal capability and finally as a rational person. In the matter of a child who is not born yet the legal capacity is incomplete but that child enjoys certain rights but would be taken back if for any reason he would not come to this world alive. The reality of birth makes legal capacity of child active and applied in social and financial affairs by the guardian.

¹⁸³ The concept of living status

¹⁸⁴ *An Introduction to the Study of Islamic Jurisprudence*. P. 347.

2.6.2 Capacity to act on one's own behalf

The second feature is the decision-making capacity of an individual to perform on his own will and behalf. This is the time when an individual is completely able to carry rights and perform duties and also expect the performance of duties towards him from other persons. This capacity enables a person to perform his lawful functions in his social life in the light of available rights and duties. The foundation of this level of legal capacity is rational thinking based on reason. If an individual has a rational thinking grounded in reason he enjoys the complete decision making capacity however if he is minor or of unsound mind the complete legal capacity would not be available but limited one.¹⁸⁵ There are a few other mental states that may limit the legal capacity of a person which includes dementia and madness. In these mental states the persons subject to it have no capacity to perform social and financial functions and would become under the mandatory guardianship for performance of these social functions. In certain specific situations in which an individual is mentally incapable of performing his essential finance related functions either by squandering his assets or is susceptible to become subject to financial fraud his financial guardianship would be appointed.¹⁸⁶

2.7 Stages of legal capacity (*Ahliyyah*)

Ahliyyah or legal capacity can have multiple kinds that depend upon age and mental ability or disability of a natural person. Scholars of Islamic law provides two aspects of legal capacity of a person as explained below and five separate stages of *ahliyyah* that conveniently explain these multiple conditions of *ahliyyah* doctrine. The *ahliyyah* of human beings that includes men and women initiates from at the event of birth, grow along with the various

¹⁸⁵ Al-Ahwal Al-Shakhsiyyah. Abu Zahra, Muhammad Pp. 511-517. (Cairo 1957)

¹⁸⁶ Legal Capacity with Special reference to the Marriage Contract. El-Alami, Dawood S Arab Law Quarterly. Vol :16 No2. (1991) pp. 190-204

developmental stages of life and finally comes to an end at the event of death of a human being. Islamic scholars clearly define these five developmental stages of life and the related stages of legal capacity of human beings at these developmental stages.¹⁸⁷ These are as under:

- (i) Embryo
- (ii) Infancy (Minor)
- (iii) Age of Discretion
- (iv) Puberty
- (v) Maturity

2.7.1 At the very initial stage that prevails while pregnancy before the birth of a child the fetus possess a limited *ahliyyah al-wujub* as the fetus possess very limited rights and obligations related and depending upon its actual birth¹⁸⁸. According to the Islamic Jurisprudence Encyclopaedia (*Al-Mawsu'ah Al Fiqhiyyah*): “The foetus has certain rights based on *ahliyyah al-wujub* and *dhimma*. *Ahliyyah al-wujub* of the foetus is [in fact] restricted. However, Al-Bazdawi says that the foetus has an absolute *dhimma*, even though its legal capacity is restricted due to the fact that the foetus is subject to both possibilities of life and death.”¹⁸⁹

2.7.2 The infancy stage initiates from birth and continues till the infant acquires the age of discernment. While at this infancy level a child has a full *ahliyyah al-wujub* and has ability to attain rights as well as obligations. Even though expressions of choices, words uttered, actions and stipulations made by a child carries no legal worth¹⁹⁰ and therefore has no legal impact however children are under settled obligations.¹⁹¹ The Islamic scholars provide the kinds of

¹⁸⁷ Al-Wajeez fi Usul Al-Fiqh. Zaidan, Syed Abdul Karim. Pp. 116-117. (Lahore: Maktaba Rehmania Publishers)

¹⁸⁸ Al-Sabouni Abd Rahman concludes that fetus has a restricted *ahliyyah al-wujub*, but fetus does not have the ability to act, therefore, it cannot bear obligations. p.28

¹⁸⁹ *Al-Mawsu'ah Al-Fiqhiyyah* (Kuwait), vol. 16, p. 119.

¹⁹⁰ *Ibid.* pp.743-744

¹⁹¹ *Ibid.* p. 750

obligations of a child that are imposed upon the child either for his benefit or for the benefit of others, which are provided below.

(i) Stipulations or transactions made by the guardian known as *wali* on behalf of a child for the complete advantage of a child.

(ii) Civil liability¹⁹² and

(iii) Obligation specified by law.

2.7.3 The next stage initiates at the age of discernment¹⁹³ and continues until the child attains the puberty. While at this level a child enjoys complete *ahliyyah al-wujub* and limited *ahliyyah al adaqasira* known as civil discretion capacity. Islamic scholars endorsed this *ahliyyah al adaqasira* to fulfill the requirements of a child and to assist the growth of a child at this developmental stage. In the light of scholars view the behavior of a child can be categorized into three kinds.

(i) A behaviour that involves any kind of damage to a person resulting in loss to that person. Such kind of behavior is not permitted to be exercised either by a child or by his guardian. Such behavior when exercised would have limited legal effect.

(ii) Secondly, an action either performed by child or his guardian that brings advantage or profit such as getting gift or donation is permitted and would be considered valid and carrying the weight of complete legal impact.

(iii) Thirdly, an action that may result either in expected benefit or unexpected loss that may include sale purchase or rent agreements. This kind of action might be permitted to be stipulated by the discerning minor. However, this action is not permitted and would not bring

¹⁹² Ibid. Al-Zarqa, pp.750-752

¹⁹³ Ibid. pp. 754-755

any legal effect unless endorsed by the guardian either prior to or after the subjected transaction or by the discerning child at the event of reaching the age of majority.¹⁹⁴.

2.7.4. Puberty stage starts when the initial sign of puberty shows up and the stage continued till the stage of maturity. Puberty can either be circumstantial at the event when the natural signs of puberty show up that includes emission in case of boy or and menstruation periods in case of a girl. A person either man or woman can be considered of the age of puberty when the natural puberty signs appear that are presumed to be signs of puberty in the light of local customs or expertise in any particular culture. Moreover, an age of puberty may differ from person to person, place to place and time to time.¹⁹⁵

At this stage of life men and women carry complete religious capacity known as *ahliyyah ad diniyyah* and are considered answerable to Allah regarding their religious obligations. However their *ahliyyah al-ada* is not to full extent till they reach the stage of maturity.

2.7.5 Al Zarqa stated that the maturity (*Rushd*) is, “the ability to see and foresee risks and accordingly make reasonably good decisions regarding one’s own actions and transaction”¹⁹⁶.

The jurists which are in majority provides specific criteria to evaluate whether any person has obtained the age of majority or not yet. In view of Al-Sh fi’¹⁹⁷ and the Zahiri¹⁹⁸ jurists this yard stick which is applied to the man and woman both is the maturity related to physical and mental level when the person obtains a sound moral character in both religious and transactional affairs.

¹⁹⁴ See Ibid Al-Zarqa, p761

¹⁹⁵ *Al-Ahwal Al-Shakhsiyyah*. Abu Zahra, Muhammad. Pp. 511-517. (Cairo 1957)

¹⁹⁶ Ibid al-Zarqa pp. 772-778

¹⁹⁷ *Al-Umm*. Al-Shafie, vol 3.pp. 215-218

¹⁹⁸ *Al-Aysal fi Al-Muhallah al-Athar*. Ibn Hazm, Vol: 7, pp, 149-151

In addition Maliki¹⁹⁹ and Hambali²⁰⁰; jurists also endorse this yardstick of maturity related to mental and physical performance and stressed on acquiring enough prudence in relation to validity of transactional affairs. At the event of acquiring maturity human beings either men or women obtain complete *ahliyyah al wujub* and complete *ahliyyah al ada* that is a complete legal capacity unless the person is having a defect related to his or her mental or physical abilities that results as an impediment to the legal capacity.

Islamic law has not provided any certain time for maturity of a person. However Imam Abū an-Nafīṣ considers the age of maturity as eighteen years for men and seventeen years for women and some jurists consider fifteen years of age as maturity age for both men as well as women. These age limits do not make any difference between puberty and maturity and represent these both stages at identical time. However, it is possible that the age referred by the jurists in this regard can be viewed as to represent a maximum age limit of puberty and a minimum age limit of maturity.

2.8 Kinds of legal capacity (*Ahliyyah*)

On the basis of Legal capacity it is classified into: “capacity for the inherence of rights and obligations and capacity for the exercise of right and the discharge of obligations”.

This definition indicates two types of capacity according to *anafis*.

“These are called *ahliyyah al-wujub* and *ahliyyah al-ada* or the capacity for acquisition (of rights) and the capacity for executioner performance of duties. Capacity for acquisition enables a person to acquire both rights and obligations, while capacity for execution gives him the ability to exercise such rights and perform his duties”²⁰¹. Mullah Jwan elucidates legal

¹⁹⁹ *Al-Modawwanah al-Kubra*, Al-Asbahi, Malik bin Anas. vol:4, p295.

²⁰⁰ *Al-Rauod Al-Murbe bi-Sharhi Zad Al-Mustaqne- Mukhtasar Al- Muqne*. Bahouti, Mansour Vol: 1, p. 229. (Beirut: Al-Maktabah al-Thaqafiyyah)

²⁰¹ *Ibid* Ahmad Hassan.. p.294

capacity in association with intellect. Intellect establishes one's ability to understand issues along with when puberty and sexual maturity that determines the adequacy of a legal person with intellect for acquire obligations. Mullah J wan discuss legal capacity into two forms:

1. First type is legal capacity for obligation (*ahliyyaht al-wuj b*), which depends upon accountability or legal personality of the individual and this has been established by the covenant between Allah and man.
2. Second type is legal capacity to acts (*ahliyyaht al-ada*) of which there are two forms. The first is insufficient legal capacity to act and occurs when either the body or the intellect is not sufficiently formed. The second form is complete legal capacity to act and impliefficiency of the intellect and of the body. A further requirement for sufficient legal capacity to act (*ahliyyaht al-ada*) is puberty²⁰².

According to the views of Mullah Jiwan subject of the law; in addition to intellect or reason, is also constitute by indication to the body. Complete legal capacity is determined by the sufficiency of each of reason and body confirmed by puberty. Puberty entails the realization of sufficiency in the intellectual and physical aspects of an individual and affirms complete legal capacity to act. Insufficiency in either body or intellect results in incomplete legal capacity to act. The body is now inextricably linked with legal capacity and sexual maturity is a determinate of the body's sufficiency for legal capacity. Accountability, the body, reason and puberty constitute social determinates for legal capacity²⁰³. A life of a person in relation to his capacity to execute is separated into three stages.

²⁰² *Nur Al-Anwar*. ibn Ab Sa d ibn Ubayd All h J wan. p. 734.

²⁰³ *Ibid Nur Al-Anwar*.p. 736.

At first stage that is considered to start from birth till the time of discernment or acumen. During this period a person carries no power to execute as the person is not completely rationale.

At the second stage that starts with the age of reason around seven years of age till the time of maturity. During this period a person has a limited capacity to execute which permits him to execute certain functions that are advantageous for a person including acceptance of gifts and bequest however, prohibits certain other actions that might be harmful for a person such as granting of gifts. Execution of remaining acts which do not come within the scope of these kinds of actions are dependent upon the permission of the guardian of such person.

At the third stage that initiates with the age of maturity and judgment a person is considered to carry fundamentally a full executive capacity.²⁰⁴

2.8.1 Legal capacity of obligation (*ahliyyah al-wujub*)

Ahliyyah al-wujub is the ability of a man and woman to attain rights and to carry obligations of *Shari'ah*.²⁰⁵ Imam Al-Sarkhasi defines *ahliyyah al-wujub* as the capacity of obligation which means suitability for department the command of obligation of *Shari'ah*. If the person irrespective of gender difference fulfill all the requirement as being subject he will be suitable for obligation being imposed on the person but one who does not complete the conditions, will not be fit for observing the obligation.²⁰⁶ al-Taftazani's defines this capacity which refers to both rights and obligations: "The capacity of obligation means fitness of a man for the rights

²⁰⁴Legal Capacity with Special reference to the Marriage Contract El-Alami, Dawood S Vol 16 No2. (1991) p. 198

²⁰⁵*Al-Madkhal Lidirasat Al-Fiqh Al-Islami..* Al-Sabouni, Abd al-Rahman,.P 25.

²⁰⁶. *Usul As-Sarkhasi.* As-Sarkhasi Vol 2, p 232.

to which he is entitled, and for what he is subject (i.e. obligation) as prescribed by the *Shari'ah*".²⁰⁷

The initial angle of al-ahliyyah that is known as by scholars of Islamic law as capacity of eligibility (ahliyyah al wujub) is related to primary conditions that must be existed in a human entity to qualify as a natural and legal person. It is related to the alive status of a human men or woman and exist along with and becomes an integral element of the legal personality.²⁰⁸ *Ahliyyah al-wujub* exists in every living human being regardless of sex, colour, creed, race, age, mental or physical ability or disability²⁰⁹. The first is *ahliyyaht al-wuj b* (capacity for obligations due to and from the individual). This personal capacity for obligation (*ahliyyaht nafs al-wuj b*), which is an individual's suitability for obligations due from and to the individual exists by virtue of *dhimma* (human accountability to Allah almighty). All humans are accountable to Allah and capable of fulfilling obligations to others and of having others fulfil obligations to them²¹⁰. The basis of capacity of obligation is humanity. Hence, the legal theorists have asserted that this capacity is established for a man as a human being. There is no distinction between a person under legal obligation (*mukallaf*) and others.²¹¹

2.8.1.1 Kinds of capacity of obligation (Ahliyyah al-wujub)

Ahliyyah al-wujub has been classified by Islamic jurists into full (*kamila*) and imperfect (*naqisah*). al-Sabouni further terms the said two forms as positive and negative element of

²⁰⁷ *Al-Talwih ala l –Tawdih*. Al-Taftazani, Saad al-Din Ibn Umar (Cairo:Dar al-Ahd al-Jadid lil-Tabaah. 1952) vol 2, p. 161.

²⁰⁸ *Al-Fiqh al-Islami fi Thawbihi al-Jadid*. Al-Zarqa, Mustafa Ahmad.Pp.736-737

²⁰⁹ *Al-Ahwal Al-Shakhsiyyah* al-Sibaie, p78

²¹⁰ Ibid. p. 79

²¹¹ Ibid. *An Introduction to the Study of Islamic Law*. p. 358.

ahliyyah al-wujub. According to him, the negative element is the ability to acquire rights whereas the positive element is the ability to bear obligations.²¹²

2.8.1.1.1 The Perfect (kamila) capacity of obligation

The perfect capacity is one by which a man acquires all rights and liabilities, such as the capacity of a man after his birth. The imperfect capacity is established for a child in a womb before his birth. By having this capacity a man becomes fit for acquiring rights and obligations and no man is devoid of this capacity. As soon as the child is born, he bears the perfect quality of holding responsibility and by virtue of this quality he possesses the capacity of obligation perfectly. A child has only the perfect capacity of obligation till he reaches the age of seven years. The age of seven years has been fixed as the age of discretion (*tamyiz*). Upto this age a child is capable to bear such liabilities and obligations as are to be met by his guardian as his agent, such as *zakat* and *sadaqah e-fitr*. A child before reaching the age of seven years has no capacity of execution because of his physical weakness and immaturity of mind.

2.8.1.1.2 The imperfect (Qasirah) capacity of obligation

Imperfect *ahliyyah al-wujub* concerns “the person’s ability to acquire limited number of rights and bear certain obligations. This kind of *ahliyyah* is restricted to the fetus and embryo during pregnancy. The capacity of obligation is established for a child in womb before his birth”²¹³.

The imperfection of capacity in respect of a child in womb is that by which he acquires only rights and not liabilities. That is because the child in womb before his separation from his mother is considered to be her part in a certain respect. Therefore he will be manumitted by the manumission of his mother and he will include in her sale if she is sold subservient to her.

²¹² *Al-Madkhal Lidirasat alFiqh alIslami.. Al-Sabunee, Vol 2, p 24.*

²¹³ *Al-Fiqh al-Islami al-Zarqa, p743-744.*

In this respect an independent capacity of obligation should not be established for it. But since he has a separate life and is destined for separation, he is not her part in every respect; therefore he has an independent capacity of obligation, even though it is imperfect²¹⁴. The embryo is not entitled to the rights²¹⁵ which require acceptance by it, nor is he liable to settle the expenses on its property for its poor relatives. The reason is that the capacity of ownership of property is imperfect.²¹⁶

2.8.2 Legal capacity of execution (*ahliyyah al-ada*)

Ahliyyah al-ada known as discretion capacity provides the other angle of legal personality in Islamic law. *Ahliyyah al-ada* when possessed by a person provides him ability to manage and perform his affairs by himself. Al Zarqa provides that *Ahliyyah al-ada* as “the ability of a person to initiate actions the consideration of which depends on a sound mind”.²¹⁷ Al-Sibae, Mustafa and al-Sb nee refer to “*ahliyyah al-ada* as that which qualify of the person to execute actions /transaction that are considered able to produce their legal effects”.²¹⁸ Al-SAb nee also defines it as the “ability to effect actions that are recognized by law”.²¹⁹

Therefore, *Ahliyyah al-ada* consists of the three basic characteristics that includes (i) sound mind, (ii) understanding and (iii) discernment. The object is to have understanding and full comprehension of the actual purpose of the actions, impact and side effects of such actions and finally to take responsibility and therefore full liability of the actions performed by a

²¹⁴ *Islamic Jurisprudence*. Ahmad Hassan .vol 1. P. 301

²¹⁵ An embryo is entitled to those rights which required no acceptance. These include are:

-) Right to parentage
-) Right to inheritance in the property of the relatives
-) Right to bequest being made in its favour
-) Right to receiving religious endowment (*waqf*) being made in its favour
-) Right to manumission (Ahmad Hassan vol 1: p 301)

²¹⁶ *Usul al-Fiqh al-Islami*. Wahbah al-Zuhayli Vol: 1, p. 65

²¹⁷ *Al-Fiqh al-Islami Zarqa* P. 738.

²¹⁸ *Al-Ahwal Al-Shakhsiyyah fi Al-Sibae* and *Al-Sabunee* P 13

²¹⁹ *Al-Madkhal Lidirasat Al-Fiqh Al-Islami*. Al-Sabunee P31.

person. When all the above mentioned components of *Ahliyyah al-ada* are present in a person either man or woman it is considered that such person reached the stage of possessing a complete legal capacity. As a person is enjoying a complete legal capacity hence the injunctions of *Shariah* would be applicable upon him and he would be completely liable for all his deeds that may involve enjoyment of rights and performance or non-performance of obligations in life.²²⁰ The second kind of ahliyyah, Mulla Jiwan defined as follows ahliyyah al-ad ' which is further divided into two types. First one is Insufficient (*q ir*) which is centered upon inadequate skills and abilities Second one is (*al-qudrat al- q ira*) which relates to the inadequacy of the intellect or mind and body (*al-'aql al- q irwa al-badan al- q ir*).

This is tested upon two important abilities of a person first of all is the person able to comprehend the command given by other person and secondly is the person capable enough to act upon the command being given. Therefore, if these two tests are sufficiently met then the stage of completion (*kamila*) is attained. However if both these conditions are lacking the test to check the truthfulness is not fulfilled. If these conditions are analyzed from the human growth then a person lacks both these abilities when he is a toddler but at the same time that toddler is capable enough to achieve these two abilities when he will grow up. A child is physically weak and intellectually feeble but at the same time, he will grow into a mature person because he is capable of doing so. However, this does not goes in consonance with the person who is mentally disable because his mind will remain weak no matter how fast his physical growth is, he would not achieve the level of (*kamila*).²²¹

²²⁰ Ibid Al-Sabouni, Abd al-Rahman. p. 31

²²¹ *Nur Al-Anwar*. ibn Ab Sa d ibn Ubayd All h J wan, (Delhi: Kutub Khanah Rashidiyah, 1960). P. 48

The first type of legal capacity, the capacity for obligations, rests upon the accountability of the individual. The second type, the capacity to act, rests upon reason and physical body of the individual. Sufficiency of reason or intellect entails the ability to comprehend a command and sufficiency of the body entails the ability to act on a command. People are born with the potential for sufficiency, in both intellect and body, and these elements develop gradually as an individual grows. Imam Nasafi details two important types related to the capacity to act or function in a certain way. First of all if there is children who has not reached puberty but is capable enough and has the acumen to atleast differentiate then he would fall into the first category which is the incomplete or insufficient capacity to act. Likewise, if the person has some mental disability he would also falls into the same category as he has attained full age but unable to achieve the intellectual maturity. This condition also denotes insufficiency to act in a certain way. The second category rests upon the condition of being sufficient enough to have developed reason based on intellect and an adequate growth of body. (*al-qudrat al-k milawa al-badan al- k mil*)' to act with. When these two conditions fulfilled, it means a person is capable enough to understand the commands ordained by Almighty Allah. It is nonetheless to say that with these conditions fulfilled a person would be able to apprehend a command given by Allah on the basis of his intellect and be able to act upon certain command depending on the physical capabilities.

However, these two elements in themselves are not sufficient for an individual to claim complete capacity to act. In addition to the physical ability to perform an act there is also puberty or maturity, the legal requirement for determining sufficiency in the intellect and the body is puberty. In the absence of this a child's legal capacity to act remains incomplete

(*qasir*), becoming complete only upon puberty, and in its absence, an age determined for puberty.²²²

Since the acquisition of complete mental or physical capacities happens only after experience, the Legislator, in order to facilitate things, has established puberty as when reason most often becomes mature.

2.8.2.1. Kinds of capacity of execution (*ahliyyah al-ada*)

The capacity of execution *shliyyah al-ada* bases on its nature and conditions could be of three kinds such as firstly, obsolete (*madoumah*) secondly, restricted (*naqisah*) and thirdly, full (*kamila*).

2.8.2.1.1 *Ahliyyah al-ada madoumah* is ascribed to persons those who have not still attained the age of judgment or have attained it but for some reason are not able to fulfill its related requirements.

2.8.2.1.2 *Ahliyyah al-ada naqisah* could be ascribed to those certain persons who fulfill the requirement of judgment but still have not acquired a certain required mental as well as physical level of maturity. A basic characteristic of *ahliyyah al-ada* is the existence of sound mind, understanding and judgment a person who does not possess any of these attributes is considered to carry a restricted *ahliyyah al-ada* unless such person has attained an age of discernment.

2.8.2.1.3 *Ahliyyah al-ada kamilah* can be ascribed to any natural human being or person who has attained the age of maturity and fulfill its required conditions of sane, free, mature and having *rushd*²²³

²²² *Islamic Jurisprudence*. Imran Ahsan nyazee. P. 56

²²³ *Al-Fiqh al-Islami -Zarqa*, Mustafa Ahmad P. 733.

2.9 Classification of legal capacity (*Ahliyyah*) according to liability

The capacity is divided into three kinds according to the type of liability associated with act:

2.9.1 Legal capacity for criminal liability (*Ahliyyah li kitab al-jinai*) it is based on the ability to comprehend the *khitab al-jinai* i.e. the communication pertaining to criminal acts.

2.9.2 Legal capacity for worship (*Ahliyyah li khitab al-Ibadat*). It is based on the ability to understand the *khitab al-ibadat* i.e the communication from the lawgiver pertaining to acts of worship.

2.9.3 Legal capacity for transaction (*Ahliyyah li khitab al-Muamalat*) it is based on the ability to understand the *khitab al-muamalat* i.e. the communication from the Lawgiver pertaining to the *muamalat* ²²⁴.

Two of these are civil and criminal liability, while the third is an addition because of religious law. The reason for separation the capacity of execution into these types is to indicate that a person may, for example, be in possession of the capacity for the transaction but not the capacity for punishment. To put it differently, all three kinds of capacity may be found in the person who is sane and a major, but one or more of these may be lacking in other persons.

2.10 Impediments of legal capacity (*Awarid al-Ahliyyah*)

There are certain situations or events that may have an impact upon the full legal capacity as they occur. Scholars of Islamic law provides and discusses multiple deficiencies associated with mental and physical health issues that may become an impediments to the legal capacity of a person. As a result of such impediments owing to physical and mental health deficiencies, legal capacity of a person would become deficient and limited in the view of *Shari'ah*. These impediments are called as *awarid al-ahliyyah* which is defined as: “A state which is not

²²⁴*al-Tawdih*, Sadr al-Sharaiah vol:2 . p 755.

necessary for man and which is incompatible with legal capacity”. The circumstances affecting the legal capacity are those matters which are not essential to it. They are initially accidental; i.e. they are qualities or circumstances which change the commands such as journey, or destroy the capacity, for it prevents the capacity of obligation or capacity of execution from establishment, such as death, sleep, and a fainting fit²²⁵. Mullah Jiwan describes the classification as subject that hold up legal capacity are of two types, *sam w* (providential), which depend on Allah Almighty without any choice for His servant. There are eleven: minority, mental ineffectiveness, mental disability, forgetfulness, sleep, unconsciousness, slavery, illness, menstruation, post-partum bleeding and death. After these come the acquired (*muktasib*) impediments which are the opposite of providential. They are eight: ignorance, drunkenness, jest, travel, foolishness (the spendthrift), error coercion and bankruptcy.²²⁶

In short, impediments are those circumstances which are incompatible with the legal capacity of man in general and which are not necessary for him. These defects are classified into two categories;

1. The work of providence (caused by natural causes) (*awarid samawiyyah*). These are circumstances which are beyond the control of man; and
2. Incidental (caused by the person’s action) (*awarid muktasabah*). These are circumstances, which are under the control of man. He has power to create them or to omit their removal. They are of two types: first, those which are occasioned by a person himself, such as

²²⁵ Ibid. *al-Tawdih*, vol:2 . p 755

²²⁶ *N r Al-Anw r Ma’a H shiyat Qamar Al-Aqm r. Jiwan.* P. 286.

ignorance, drunkenness, jest and mistake; secondly, those which are created by man other than the person himself such as duress or coercion²²⁷.

The progression of the first eleven impediments reflect the passage of experiences, bodily and intellectual, throughout an individual's lifetime, beginning with minority or pre-pubescence (*ighar*) and ending with death (*mawt*). They map a progression in the maturity of the body and the mind from childhood into adulthood concluding in death. Interspersed are the various contingencies of body and mind an individual may encounter in the course of life *inter alia* mental incompetence, mental deficiency, unconsciousness, sleep, forgetfulness, slavery, illness, menstruation and post partum bleeding. The next eight impediments are contingencies that an individual may encounter during a lifetime.

2.10.1 Natural causes of defective capacity (*awarid samawiyyah*)

These are causes that are beyond the control of the subject (*mukallaf*) and result from an act of the Lawgiver and Creator. Amongst the impediments, two are sex-specific to women: *ai* and ,menstruation and post-partum bleeding. These are grouped together and are the only impediments that relate exclusively to women. The two references to women are notably limited to the bodily aspect of legal capacity. The remainder of the discussion on legal impediments does not separate into impediments that affect the intellect and the body, but the division is easily discerned: The jurists classified into following categories, namely;

1. impediments to the intellect are mental incompetence, mental disability, forgetfulness, ignorance, jest, foolishness (prodigality), error
2. impediments to the body: illness, menstruation, post partum bleeding, death, travel, force
3. impediments to both intellect and body: minority, sleep, unconsciousness, drunkenness.

²²⁷ibid. p 755

2.10.1.1 Minor (*Sighar*)

A minor is called *sabiyy* until he attains majority. Infancy is considered one of the circumstances, which affect a person's legal capacity. Hence, a child is one of those persons who bear defective capacity. this, in fact, is not a cause of defective capacity or even an obstacle in its way, but a necessary stage in the growth of the human being. It is considered as a cause for noting its effect upon capacity (*ahliyyah*). Minority does not affect capacity of acquisition (*ahliyyah al-wujub*) all rights and obligations are acquired as their establishment requires a *dhimmah*, which is the basis of capacity for acquisition. The jurists maintain that the minor is liable for compensation of property destroyed by him, for goods and services bought, for maintenance of relatives and also for zakat according to some²²⁸. The first discussion refers to children, who are by default insufficient in *aql* and *badan*. J wan discusses six aspects of insufficient legal capacity (*ahliyyah qa ira*), explaining that when dealing with children, whose legal capacity is always *qa ir* (insufficient), then the validity of their acts is determined by reference to the nature of the act and the nature of benefit derived from the act. In terms of the *huq q Allah*, acts such as belief are valid (*sa i*) and acts such as unbelief are unpleasant and not pardonable. Acts which are neither beneficial nor harmful revolve between these two values. Similarly, as regards what is not relevant to the rights due to Allah swt (*huq q Allah*), such as sale, marriage, manumission²²⁹. The validity of the act performed by a child depends upon the benefit therein for the child. Beneficial acts which entail worldly benefit, such as accepting gifts are valid. Acts, which entail definitive harm (*arar mu addad*) such as unilateral repudiation and manumission entail, are not valid. The validity of acts that are between the two are determined by the opinion of the child's guardian, the modern

²²⁸ *Usul Al-Sarakhsi*, vol 2, p 335.

²²⁹ *N r Al-Anw r Ma'a H shiyat Qamar Al-Aqm r. Jiwan.* P 290

scholars who write the theory of legal capacity indeed supported the opinion, as the *adith* narrates, that women's intellect *was* indeed insufficient then this would have been the place to discuss the nature and consequences of insufficient female legal capacity, but no jurist did so²³⁰. The person who possesses deficit capacity is not subject to the *khitab al-jinai*, he cannot be held criminally liable. The minor is liable to *tadaib*, the reason being that the *khitab al-jinai* is applicable to that person alone who comprehends the *khitab* fully. This is based on the principle of legality in Islamic law. *anafī* treat the issue of legal capacity of the minor in a somewhat different way. Al-Sarakhsi and Sadr *al-Shar'iah* explains it as:

1. Financial transaction are established against the dhimmah of the minor. Though he cannot meet them personally due to the absence of the capacity for execution, the Lawgiver allows his *wali* (guardian) to stand in his place and represent him through a substitutionary duty. Minor is also liable for any damage caused to another's property and for the maintenance of wives and near relatives. He is also liable, except in the views of *anafī*'s, for the payment of zakat.
2. Criminal liability doesnot exist in the case of a person who has not attained puberty, because he is not *mukallaf* and the *wali* cannot stand in his place for criminal offences, punishments being deterrent for the offender himself and not for those who represent them. This, however, holds true as far as *hudud* and *qisas* penalties are concerned, a child over seven may be liable to some suitable form of *tadib*. This may not be interpreted to mean that a minor can be awarded penalties other than hudud, if he is over seven as is done in the law.
3. Ibadat are not obligatory on the minor as he does not possess the capacity for execution.²³¹

²³⁰ Islamic Jurisprudence. Imran Ahsan Khan Nyazee. P. 84

²³¹ *Usul Al-Sarakhsi*, vol 2, p 335. Sadr al-Shariah, *al-Tawdih*, vol 2, p. 762.

2.10.1.2 Insanity (*Junun*)

Insanity and lunacy is defined as “ Janun is the mental derangement which, except in rare cases, prevents the issuing of the acts and utterances in the normal manner as they issue forth in sanity”. Insanity in view of Al-Sibae, Mustafa and Al-Sabune is “a mental disability of a degree that causes a person to depart from the normal attitude of human beings”²³². In the view of As-Sabune “insane persons are those who have lost their mental faculties and ability to discern between right and wrong”²³³. This definition carries more accuracy as the word normal in the prior definition lacks clarity and might be interpreted by scholars as a less level of insanity and therefore may give rise to controversy. A more suitable way of defining insanity can be that insanity is a losing of mental discernments and mental faculties to such a level that a person either man or woman may lose his or her ability to manage the worldly affairs in a sensible manner. This definition as agreed upon by the scholars is referring to the disability of an insane individual to enjoy the full legal capacity of execution known as *ahliyyah al-ada*.

There are two kinds of lunacy:

1. *Asli* (regular) is one when a person attains puberty during his lunacy.
2. *Tari* (casual, irregular) is that which appears after a person has attained majority and sanity with mature understanding.

These two classes of lunacy do not affect the capacity of obligation as it is established legal responsibility (*dhimmah*). It affects capacity of execution and destroys it, for it is established by intelligence and discretion. The legal effect of a lunatic is the same as minor not possessed understanding in respect of his dispositions and acts. Scholars of Islamic law provide that

²³² Al-Sabae, Mustafa and Al-Sabune *abd*, p. 175

²³³ “*Al-Madkhal Lidirasat Al-Fiqh Al-Islami*” Al-Sabune, p.197

insane individuals are like undiscerning children and therefore they only enjoy legal capacity known as *ahliyyah al-wajub* and their legal capacity known as *ahliyyah al-ada* no longer exists. Individual's insanity could be of different nature it can be for a short period - temporarily or for a long period – permanently or it can be periodical associated with different periods or continuous without any intervals. In all these types of insanity the complete legal capacity would not be in existence and *ahliyyah al-ada* would be considered disabled during the time any of the abovementioned nature of insanity would prevail in a person.

2.10.1.3 Mental derangement ('*Atah*, '*At hah*)

Idiocy ('*atah*) is defined as “Idiocy is the mental derangement of a person who is confused in his speech and speaks something like sensible man and sometimes like lunatics”.²³⁴ Mental derangement is considered a kind of mental weakness that results into weak and limited mental ability to apprehend facts, confused ideas without reasoning and inability to execute ideas into valid actions. Condition of mental derangement can be of serious nature that comes close to the state of insanity that would bring deranged person into the category of insane person declaring their *ahliyyah al-ada* as inactive and non-existent. Secondly, condition of mental derangement can be of a trivial nature where such legal capacity would become of limited nature *ahliyyah ada qasirah* like the capacity of a discerning child.

2.10.1.4 Sleep (*nawm*)

Sleep and fits of fainting have relevance for purposes of *ibadat* as well as for crimes and torts. They don't affect *ahliyyah al-wujub* because the attribute of humanity (*insaniyyah*) is intact. Person in such condition don't understand the *Khitab* (command of Shariah). Their capacity to understand things is temporarily affected and prevented from normal functioning. The liability

²³⁴ *Al-Tawdih*. Sadr As Shariah vol 2, p. 168

for missed ibadat linges against such a person and these have to be performed as qada (delayed performance).there is no liability for punishments and transactions but compensation is another matter for which there may be strict liability.²³⁵

2.10.1.5 Unconsciousness (*ighma*)

Unconsciousness can be experienced for a long continuous tenure or for a little tenure of time. In this condition an individual lost their physical and mental sense and ability to communicate with others in social environment. While this tenure of unconsciousness the legal capacity *ahliyyah al-ada* is non-existent and during the period when this state of unconsciousness prevails the unconscious individual may only carries *ahliyyah al-wujub*.²³⁶

2.10.1.6 Slavery (*riqq*)

Slavery has been defined as follows: “Slavery is a defect in legal capacity created by the Shariah, being an impediment to having the powers of bearing witness and holding the office of a judge and other offices”. The nature of slavery is punitive, it cannot be partial. A person cannot be partly slave and partly freeman. Ab Yusuf and Muhammad bin Al-Hassan holds the view that if a person emancipates a slave in part, the latter will be completely free. If a person of unknown parentage admits that he is slave in part, he will be treated as a slave in all legal matters. Ab an fah holds that a slave can be emancipated in part, but he will be treated as a slave in legal matters unless he is emancipated in full or he makes payment for his partial slavery. He argues that the freedom of a slave means removal of his masters proprietary right. it is not realized until he emancipates him in full or makes the payment of the remaining portion. it is not the effect of emancipation (*itaq*) as presumed by Ab Yusuf

²³⁵ *Al-Tawdih*, Sadr al-Shariah, vol2 ,p. 760-762

²³⁶ *Ibid*. p. 764

and Muhammad. According to Abū an-Nafī, emancipation can be divided into parts but not liberty²³⁷.

A slave enjoys other primary rights except the right to property. He has right to marry and divorce. According to an-Nafī, a slave has full right to the protection of his person and life. Similarly if a slave admits of having committed the criminal offence, his admission will be held. He will be liable to the punishment of retaliation or hadd. A slave therefore, not competent for holding offices of responsibility involving power and privilege such as a guardian, judge, and a trustee (*mutawalli*). Similarly he is not eligible for bearing witness in view of his degraded status.

2.10.1.7 Forgetfulness (*nisyān*)

This is a state in which a person is not very careful about things though he has full knowledge of them, as distinguished from sleep and fits of fainting in which such knowledge is lacking. Forgetfulness does not affect *ahliyyah al-wujub* nor does it affect the capacity for execution *ahliyyah al-ada*. The *khitab* (command of Shariah) becomes operative as soon as the person remembers. Transactions undertaken by such a person are valid and enforceable against him. The *anafis* have divided forgetfulness into two kinds. The first kind is called *asli* (original). It means that a person forgets the discharge of a duty while he has nothing which reminds him to do it. The second kind is one which occurs through his negligence (*taqsir*) despite the obtaining of a situation which may remind him to do the duty. In the first case forgetfulness forms an excuse, but in the second case he is reprimanded and his act will be void. *Al-Bazdawī* is of the opinion that forgetfulness in cases other than fasting and proclaiming Allah's name at the time of slaughtering an animal does not form an excuse, for the other cases have no semblance of these cases where forgetfulness has been declared an excuse. Hence they cannot be combined

²³⁷. *Kashf al-Asrar*. Abd Al-Aziz ibn Ahmad al-Bukhari. 1307 vol 4, pp 1401-05

with these two cases because of frequent occurrence of forgetfulness in them. Further in the other case there obtains a situation which reminds a person his omission.²³⁸ Forgetfulness does not effect the capacity of obligation. All rights and liabilities that are building on a non-forgetful person by this address are binding on a forgetful person.

2.10.1.8 Menstruation (*hayd*) and *prepartum* (*nifas*)

Both are ritual impurities and carry the same legal effect. They do not destroy the legal capacity of obligation nor the capacity of execution, for they don't affect the legal responsibility, intelligence (*aql*), understanding (*tamyiz*) and power of the body (*qudrat al-Badan*). All these faculties survive the existence of menses and child-bed. The *dith* from the Prophet () indicate that purification from menses and bleeding after child birth is a condition for the validity of prayer and fasting. However the injunctions of observing prayer during menses have been extinguished and the injunction of observing fasts has been deferred. The same rule applies to obligatory circumambulation of the Kabah during hajj²³⁹. The reason is determined by grades of authority amongst which women rank the lowest and that by virtue of *dith* literature women are insufficient or deficient in intellect and deficient in religion.

2.10.1.9 Terminal illness (*marad al-maut*)

Terminal sickness is a kind of serious nature of illness which takes the person ultimately towards his death. The mind of an ill individual suffering with terminal illness is most of the time occupied with the thoughts that he would ultimately expire and his life would come to an end due this terminal sickness. For having a legal impact upon the subjected legal capacity terminal illness must fulfill three prerequisites which are explained below.

²³⁸ *Kashf al-Asrar*. Al-Bukhari, Vol 4, p 1396.

²³⁹ *Ibid*, vol 4, p, 1432-1433.

(i) Sickness should exist till the time of individual's death²⁴⁰

(ii) Sickness should not exist for more than a year unless if the sickness is damaging the health of an individual on continuous basis with the passage of time and taking him towards ultimate death.

(iii) The person suffering with terminal disease must have lost their mental and physical abilities to execute their regular duties and functions in life in an appropriate and sensible manner.²⁴¹

Islamic scholars for reason to take the precautionary measure to protect the interests of associated persons of the terminally sick individual such as his legal heirs and creditors, grant such individual a limited discretion capacity *ahliyyah ada naqisah* during the entire tenure of his terminal sickness. Even though such person manages his personal daily affairs but his capacity is of limited nature owing to his terminal illness and his conduct towards his affairs would have limited impact such as only upon a portion of his financial properties. The volume of this portion may vary considering the total amount of the belongings of an individual in form of financial properties and their liabilities such as debts. In cases where the liabilities are parallel or in excess of the properties of a terminal sick individual then he has no capacity to deal with his properties. In situations where the liabilities are fewer than the properties of a terminal sick person then he may deal regarding the properties to an extent of one-third of the properties left behind after satisfying all his prevailing liabilities. Dealing with more than one-third portion of the properties of terminally sick person in such situations is required to be approved by his legal heirs and creditors.²⁴²

²⁴⁰Ibid Al-Zarqa opcit pp802-803

²⁴¹ Al-Zarqa opcit 802

²⁴²Ibid. Al-Zarqa . p. 805

2.10.1.10 Death

Death signifies a state of total incapacity, a state when a person is deprived of all powers. The legal effect of death is that it negates the capacity for the performance of obligations relating to this world. The effect of death on the rights and obligations of the deceased is considered with reference to the injunctions relating to this world. These acts are of four types related to legal obligation, his liability with respect to any property recoverable from him for the need of others, his own rights against others relating to his needs and lastly matters which do not relate to the satisfaction of his needs.²⁴³

2.10.2 Incidental /Acquired Causes of defective Capacity (*awarid muqtasabah*)

Jurists of Islamic law have identified a few major acquired causes of defective capacity as.

2.10.2.1 Ignorance (*jahl*)

Abd Al-Aziz AlBukhari explains Ignorance (*jahl*) as: “It is a quality which is an antonym of knowledge even where there is probability and imagination of knowledge”²⁴⁴. It has four kinds:

- i. *Jahl batil bil shubah*. Inexcusable ignorance of the law which is free from doubt. Ignorance of the law which is based on the clear text of the Qur’ n, Sunnah of the prophet, consensus of opinion and whose interpretation is not open to doubt will not be an excuse. If the Islamic state makes an agreement of protection of the unbeliever, the violation of some of the Islamic injunctions by them will not be taken as a crime. If a Muslim destroys the wine owned by a non-Muslim, he shall compensate for it, for wine is a valuable property according to the non-Muslim. Abū Abū an-fah holds this view. but al-Shāfi‘ī holds the view that if a

²⁴³ *Principles of Islamic Jurisprudence*. Ahmad Hassan. p. 329

²⁴⁴ *Ibid. Kashf al-Asrar*. al-Bukhari. Vol 4, p. 1450

believer or unbeliever destroy the wine of a non Muslim he will not pay any compensation for it.

ii. *Jahl duna jahl al-kufir*. Ignorance which is lower than ignorance of an unbeliever. This kind of ignorance will not be accepted as an excuse in the eyes of Allah swt. This is based on obstinacy and abandonment of clear evidences. This ignorance comes from the doubt in the interpretation of Divine commands and become sectarians in the religion such as *Mutazila, Rawafid, and Khawarij*.

iii. *Jahl yaslahu shubhatan*. Ignorance of law, which is of an uncertain or doubtful nature. If the law is not covered by the clear injunction, or consensus or juristic opinion is divided on an issue which make it certain, in such cases ignorance is excused. Another kind of doubt relating to ignorance is one about proof. It means a general rule exists about a certain issue but it is not applicable in a certain situation on account of another rule which specifies the general rule.

iv. *Jahl yaslahu udhran*. Ignorance of the law, which is held to be an excuse for violation of the law. For instance, if the guardian of an adult virgin muslim woman gives her in marriage without her knowledge about her marriage, she has the option to repudiate the marriage when she comes to know of it. But if she keeps quiet after her knowledge about her marriage, her option will be nullified²⁴⁵.

2.10.2.2 Intoxication (*sukr*)

Intoxication may result owing to excessive consumption of alcohol or other related substances that may cause intoxication and a person may lose mental abilities to perform worldly affairs in a prudent manner. Scholars in Islamic law have classified the intoxication into two kinds

²⁴⁵ *Al-Tawdih fi hall Ghawamid al-Tanqih*. Sadr Al-Shariah, Ubayd Allah b. Maud al-Mahbubi. (Cairo:Dar al-Ahd al-Jadid lil-Tabaah. 1957) Vol 2, p 180.

such as permissible intoxication and prohibited intoxication. The permissible intoxication is through consumption of substances in form of liquid or non-liquid form which are not specifically prohibited in Islamic law²⁴⁶ that includes medicine or drugs consumption of which comes within the scope of the principle of necessity when the person is sick or ill.

The second kind of intoxication that is prohibited one is owing to the intentional consumption of alcoholic liquid drinks and non-liquid drugs which are specifically prohibited in *Shari'ah*. Firstly, the permissible intoxication at the time of need brings a defect that would result in bringing to an end the *ahliyyah al ada* as long as the person is under the influence of intoxication. Therefore, all performed actions and affairs which are executed by a person while in the state of intoxication are not considered valid until they are approved by the intoxicated individual man or woman at the time of entering back into a phase where they may perform their functions with full mental abilities.²⁴⁷ In second kind of intoxication that is prohibited in Islam scholars in Islamic law carry two views. The first view provides that prohibited intoxication results in declaring the *ahliyyah al ada* of the person defective and he would no longer have the full legal capacity.

The other view provides that prohibited intoxication would not have an impact upon the legal capacity of a person. All affairs performed by an intoxicated individual would be considered as valid and carry legal effect apart from confessions that can be rescinded as they come out of intoxication and able to think clearly and perform their functions properly.²⁴⁸

2.10.2.3 Jest (*hazl*)

A person uses words without intending to convey either their primary or their secondary meanings, he is said to speak in jest (*hazl*). Speaking in jest has no effect on the capacity for

²⁴⁶ Ibid. *Al-Tawdih al-Tanqih*. Sadr Al-Shariah, p. 181.

²⁴⁷ Ibid. p. 182

²⁴⁸ Islamic jurisprudence. Imran Ahsan Khan. P. 57

acquisition, rights as well as obligation will, therefore, be acquired. Jest is not incompatible with the capacity of execution, because the basis of this capacity is sanity and understanding. And jesting is not incompatible with them²⁴⁹.

2.10.2.4 Weakness of intellect (*safah*)

Spendthrift individuals are unable to conduct their financial matters prudently by applying their appropriate discretion. Therefore, their ability is considered defective in the view of *shariah*. As per Al Siba'ie and Al Sabouni, spendthriftiness is kind of trivial mental defect that may erode the ability to manage the financials affairs as a reasonable prudent individual and considering the commands of *Shari'ah* specified in this regard. The definition provides two kinds of spendthrift persons. First is an individual who squander or waste their financial belongings including money and other assets without any profitable return. Secondly a person having weak ability to consider his financial benefit and often stipulate financial transaction that result into financial ruin. This second kind of disability is unwise behavior relating to mismanagement of appropriate financial discretion and not a mental disability to conduct financials affairs prudently that is a characteristic specific for spendthrift person. This second type of person comes within the scope of interdiction (*hajr*) and is similar to discerning child who carries *ahliyyah ada naqisah* restricted discretion capacity. It is a view of majority of the Islamic jurists on the basis of the interpretation of the verse of The Qur' n. However Imam Ab an fah and the Zahiries do not agree with the majority of these jurists and prescribe unlimited legal capacity for the spendthrifts. These jurists provide that at the moment when the children of sound mind reaching the age of puberty and enjoying maturity no interdiction (*hajr*) can be applied upon them. The anafi jurists states that interdiction (*hajr*) can be

²⁴⁹Ibid. 60

applied only upon three types of persons that includes (i) an ignorant medical practitioner, (ii) a corrupt jurist and (iii) a bankrupt, as these persons can have a damaging approach for other human beings.²⁵⁰

2.10.2.5 Journey (*safar*)

Journey doesn't destroy the legal capacity of man, for a traveler is posses of intellect and power of performing obligatory acts. He has both legal responsibility (*dhimmah*) and capacity (*ahliyyah*). Therefore journey is not considered to be one of the circumstances which affect legal capacity. It is obligation and one of the cause which call for easing because it is one of the causes of hardship, whether realor putative. The *Shar'iah* has granted concession in the discharge of some obligations to a traveler, however it is remarkable that journey does not totally eliminate the legal obligation but temporarily impedes its imperativeness in some cases. Journey neither destroys legal capacity, nor eliminates legal obligation and demand of performance of obligatory duties. Instead, it prevents its immediate application and imperativeness in certain cases²⁵¹.

2.10.2.6 Mistake (*khata, subhah*)

Mistake is a deed or word which springs forth from a man without his intention as the result as the result of careless by his directly pursuing a matter which is other than he one intended by him. The law about an act done by mistake varies in respect of the rights of man and the rights of Allah swt. The person doing an act by mistake is given the benefit of doubt in respect of rights of Allah, but as to his liability for an injury or loss caused to another right, mistake will not be held to be a good excuse in law. The person responsible for the injury will have to compensate for it. Mistake is a good ground for modifying certain obligations, and it causes

²⁵⁰ Introduction to the Islamic Law. Hussain Hassan. p. 78

²⁵¹ *Kashf al-Asrar*. Abd Al-Aziz al-Bukhari.vol4, p 1496.

the lightening or commutation of punishment. As for the rights of men, mistake is not a good excuse for extinguishing the offence. The mistake does not destroy the capacity of the declaratory law, for this capacity is realized by possession of legal responsibility and capacity of obligation. Mistake does not negate the capacity of defining law (*ahliyyah khitab al-taklif*). The basis of this kind of capacity is the understanding of the divine communication. That is realized by possessing intellect and discretion. A person who makes a mistake is possessed of perfect intellect and understanding, but mistake is sometimes an impediment to legal obligation because of one of its conditions, and sometimes it is a defect in respect of intention. Hence the dispositions made by mistake are void. As for the impediment, the knowledge of the cause of the command of Shar'iah is necessary, like the command itself²⁵² As for contracts and dispositions made under a mistake, the *anafis* hold that they are validly constituted (*tanaqid*) but they are defective or irregular (*fasidah*) and are not operative (*ghayr nafidhah*). The reason is that intention is sufficient for the constitution of a contract and disposition but consent is an essential condition for their operation. The early *anafi* jurists are said to have kept silence on the question of the contract of sale made under a mistake, it is considered to be constituted but irregular (*fasid*) by the later jurists.²⁵³

2.10.2.7 Coercion (*ikrah*)

Coercion is defined as “Coercion or duress means to urge another person to perform that to which he does not consent, and that which he would not choose to perform personally in a direct manner if he were left alone”.²⁵⁴ “Coercion or duress means to urge a man by another man to perform an act which he dislikes, and which he would not intend to perform personally

²⁵² .*ibid.* *Kashf al-Asrar*. p 1501

²⁵³ *Al-Talwih ala l –Tawdih*. Al-Taftazani, Saad al-Din Masud ibn Umar Vol2, p 195. (Cairo:Dar al-Ahd al-Jadid lil-Tabaah). 1952

²⁵⁴ *Talwih*. Al-Taftazani, vol 2, p. 196.

in a direct manner if he were not urged on it by threat”.²⁵⁵ Effect of coercion on legal capacity, coercion is not incompatible with *ahliyyah al wujub* because its basis is humanity and coercion doesnot annihilate it. Nor it is incompatible with *ahliyyah al ada* because its basis is intellect and discrimination. Coercion affects intention or free will.

2.10.2.8 Bankruptcy

Bankrupts or insolvents are the persons owing to their financial miscalculations and wrong monetary conduct carry huge debts which are beyond their capacity to return to creditors. Islamic scholars following the tradition of the prophet take preventive measures regarding the legal capacity of the insolvent person to protect the interests of creditors at the event of bankruptcy. As in creditors interests on their request an interdiction can be imposed upon the insolvent by a judge who for satisfaction of the debts of the creditors may confiscate and then sell all the financial assets of the insolvent and make payments to the creditors from the proceeds of the sale. If these sale proceeds would be insufficient to satisfy the liabilities of the creditors then the debts of creditors would be satisfied from those proceeds in proportion to their claims an approach that is also known and endorsed in present day English Law as *paripassu*. At the event when the bankrupt possess no property or possess the property which is of little amount barely sufficient to fulfill his personal limited needs or the needs of his family then in such situation these measures might not be taken unless his financial position reaches to a stage where he is in a position to satisfy his liabilities towards creditors. In both of these situations the attitude of the insolvent individual would be considered invalid until it got the approval of a judge or creditors.²⁵⁶

²⁵⁵ *Kashf al-Asrar*.vol 2, p 1502

²⁵⁶ *Principles of Islamic Jurisprudence*. Ahmad Hassan. p. 148

By the end of the discussion on impediments to sufficient legal capacity, *it is* observed that on the subject of the law that the impediments are conditions that affect the sufficiency of either the body or the intellect of an individual. The individual is a person who has full sufficiency of body and of intellect. Alterations of body and intellect through the various impediments affect an individual's legal capacity for actions and obligations. The general discussion on legal capacity imagines an individual who is not affected by any of the list of eighteen impediments. In addition to subject of the law is predicated upon the body of a child that matures from childhood to adulthood, from insufficient legal capacity to act to complete legal capacity to act through the progressive development of the intellect and the body and with the potential to encounter any of a variety of eighteen impediments through which it may embody different forms of legal capacity. Only one amongst these impediments to legal capacity is sex-specific and this refers only to the biology of women²⁵⁷. In the legal imaginary of the text a normative subject with complete legal capacity is reasoning and post-pubescent (an adult), in full control of their mental capacities (not mentally incompetent, unconscious, drunk, asleep, forgetful, in error or jesting), not enslaved, under no duress, not ill and close to death, and not menstrual or post-partum.

2.11 Woman legal capacity in *Shari'ah*: Complete or Deficit

Classical Muslim jurists never discuss or entitle woman as separate subject of the Islamic Law under the doctrine of legal capacity. Rather as mentioned above woman is distinguished as legal subject in contemporary laws. Classical jurists did not define a single legal category for woman while discussing legal capacity and its types. Legal capacity reflects on more than sufficiency of body and intellect, legal accountability (*dhimma*) and puberty. In contemporary views gender difference becomes legally implicit into differential treatment of women in

²⁵⁷ Ibid. p. 150.

Islamic law. These differences come in the matters of age, property, marital status, social experience and public presence of women may determine a woman's legal in-capacities. To contextualize imperfect legal capacity with normative understanding of women's legal capacity, Imran Ahsan explains that the jurists argue a woman cannot say in judgment in matters where she cannot give testimony. Accordingly, a woman may not judge in *add* penal matters if she cannot bring evidence in *add* penal matters. The discussion on judicial office and heads of state links with findings on women's evidence. Further argument on imperfect capacity of woman, a woman can also not lead a state when the head of the state is necessarily tasked with implementing *ud d* penal laws²⁵⁸. In all issues the disagreement relies on medieval juristic consensus and not based on reason, discernment or puberty, which are the criteria in the doctrine of legal capacity as earlier discussed above. Imran Ahsan Khan Nyazee explains in his book the imperfect legal capacity as a condition that applies to slaves and women. The reference to slaves is dismissed in a summary few lines; a slave may not possess the right of ownership, even though a slave owns the capacity for obligations related to worship and criminal offences. The reference to women is detailed.

“A woman is said to possess imperfect legal capacity. Those who hold this view deny her the right to be the head of state, the right to be judge (*qazi*) and the right to testify in cases being tried under *udud* (penal law) and *qisas* (retribution) provisions. In addition to this, she does not have the right to divorce, like the right given to a man, she is given a share in inheritance that is equal to half the share of male heirs, and the *diyyah*(sic) (compensatory payment), paid in compensation of her death is half of a man.²⁵⁹.”

²⁵⁸ *Outlines of Islamic Jurisprudence*, Imran Ahsan Khan Nyazee. p. 43

²⁵⁹ *Ibid. Outlines of Islamic Jurisprudence*, Imran Ahsan Khan Nyazee. p. 45

Nyazee presents an idea of imperfect capacity for women, and acknowledges objection to the distinction of women's legal capacity as "imperfect or deficient in anyway" and finally promises "reasons or solutions". Thus, the opening statement to his presentation of women's legal capacity characterizes women's legal capacity as a matter that Orientalists object to and something that is contested by women who struggle for emancipation. Similar contentions appear in only one other characterization of legal capacity, the fictitious person. There, he explains, the concerns of the modern world require that modern scholars work hard 'to accommodate' the fictitious person into Islamic law"²⁶⁰. Accommodations to the modern world, however, do not entail similar relief for the list of imperfections that formulate women's legal incapacities. Included in the list are evidence, inheritance, right to divorce, *diyya*, judicial office and being head of state²⁶¹.

As discussed earlier in this chapter deficient capacity occurs in human beings where conditions are met for legal capacity²⁶². A minor possesses complete capacity for acquisition but lacks the capacity for execution until puberty, is free from criminal liability and is not obligated in matters of worship. His capacity for execution is further divided into three types; a guardian may act on behalf of the minor in purely beneficial transactions, purely harmful transactions are not permitted to him or on his behalf, and transactions vacillating between profit and loss must be ratified by a guardian as discussed above 2.8. In the absence of these conditions discussed by the classical jurists' therefore when jurists discussed reason, discernment and puberty it should be applied to muslim women only. None of these matters discussed on

²⁶⁰ Ibid p 46

²⁶¹ Ibid 48

²⁶² as in the case of a fetus who has not been born, or full mental development as for a child, or where the attribute of being a human is missing entirely, as for corporate entities. deficient capacity for acquisition characterises the unborn child, the dead person, whose death obligations are performed by others on his behalf and the fictitious person (such as the treasury (*bayt al-mal*) or an endowment (*waqf*)), which lacks *dhimma*.

woman's legal capacity. The normative views disqualify woman on the basis of gender. It may disqualify woman from observing obligations that are addressed to the generality of legal subjects. Shariah gives equal capacity of evidence in the matter of obligation in maintaining legal order, protecting the rights of others and holding society accountable, according to Nyazee, how does the preclusion of women from this capacity affect women's obligations and responsibilities as members of society who are equally subjects of the law.

2.12 Conclusion of the Chapter

The study and discussion on legal capacity *ahliyyah* in texts of classical legal theory generally begins with an analysis of *aql* (reason) which is established as the foundation of legal capacity. The discussion extends to the origin and nature of obligation, explicated by the concept *dhimma* (human inviolability or accountability) and the capacity to act upon an obligation, i.e. legal capacity or *ahliyyah*. From this follow the different types of legal capacity i.e. *ahliyyaht al-wuj b*, which is the legal capacity for acquisition and may also be referred to as the capacity for obligations due to and from a person, and which is the legal capacity for execution or the capacity to act.

The numerous impediments of legal capacity which may preclude accountability for obligation. These impediments are separated, some are considered (natural or given by *Shari'ah*) while others are considered (acquired). For each impediment the text defines the impediment and its implications for legal capacity. There are eleven natural impediments and eight impediments are acquired. Islamic jurists categorized eight kinds of defective legal capacities of persons which are further divided into two groups while considering the impact of the nature of defective legal capacity. It is evident that such categorization has no reference to the gender of the person involved and includes within it both male and female.

The defective legal capacity of persons that comes within the scope of first group is limited for the personal well being and protection of the concerned child, insane person and spendthrift. The defective legal capacity of persons that includes terminally ill people, bankrupts, slaves and apostates that comes within the scope of second group is limited for the well being and protection of other people connected to them in any way.

To summarise, in terms of impediments affecting the intellect, the individual first is without intellect in the womb. At this stage there is no capacity to act (*ahliyyaht al-ada*) but there is capacity for obligations (*ahliyyaht al-wuj b*) and so the foetus has a claim to inheritance and to property transacted in their name. Upon birth the child claims these as well as other obligations owed to or expected from the child and, given the child's bodily insufficiency, the expectation is that these are carried out on behalf of the child by a guardian. Furthermore, a child may also become discerning, one whose mind is developed but whose body is not, and claim a different status until puberty. Once a discerning child is proven to have attained physical maturity, i.e. puberty, the child may now be considered an adult, with all the attendant adult obligations, and with complete capacity to act. A child may also not become a discerning child but progress directly from the situation of a minority to that of an adult with complete capacity to act. Thereafter, the individual will move through some or all of the intellect-related impediments during the natural course of life (mental incompetence, mental deficiency, sleep, forgetfulness, illness, unconsciousness, death), some of which may curtail the capacity to act and render it incomplete and others not.

In terms of physical progression, the individual is at first physically unable to carry out the required activities. Then, following physical capability and maturity in the form of puberty,

demonstrated by menstruation for females and sexual dreams for males, physical insufficiency ends and sufficiency begins.

It is concluded that the subject of the *Shar'iah* is an individual whose legal capacity is determined according to reason or intellect. Legal capacity is determined by the sufficiency of reason and of the body, in addition to which are the requirements of legal accountability and puberty. Legal accountability to Allah Almighty (*dhimma*) is not distinguished between man and woman in Islam. However it is the precondition for legal capacity and conveys legal capacity for obligation while puberty, accompanied by sufficiency of intellect and body, conveys complete legal capacity to act. The subject of the law is determined by body of an individual who matures physically and intellectually from childhood to adulthood, in the course of which the individual will encounter a number of impediments that convey different forms of legal capacity. Full or sufficient legal capacity rests in a legal individual who is free of the impediments that affect the sufficiency of either the body or the intellect.

However It is concluded that, Nayazee's discussion of legal capacity has yet to suggest a form of in complete legal capacity that is exclusively specific to woman, in the manner that the narrative of women as imperfect legal subjects . He has not given any suggestions that gender difference is has created any impediment to legal capacity.

Accordingly, the subject of the law is a person who has full sufficiency of body and of mind, and hence full legal capacity by virtue of being free of all the impediments to legal capacity. Only one amongst the eighteen impediments to legal capacity references sex difference and it addresses women's biological functions of menstruation and postpartum. The requirements for reason and puberty show how that the legal subject is discoursed through ideas of mental and physical sufficiency. Accountability, intellect, body and puberty are the key elements, the

ideological apparatus that organizes the jurists' thoughts on legal capacity. Further, women specifically have the lowest levels of reason and are identified with the gender specific form of legal impediment to legal capacity. Because it is uncover in the discussion above on menstruation and post-partum bleeding that these are potential impediments to legal capacity.

CHAPTER: 3

LEGAL CAPACITY OF MUSLIM WOMAN IN MARRIAGE CONTRACT

3.1 Introduction of the Chapter

In Islam marriage is considered an important institution that is evident from the fact that Islam guides for maintenance of pleasant relations and mutual love between husband and wife. Marriage assists man and woman to preserve purity moreover; it provides the true legal means of human reproduction, growth and continuation of the family. Mawlavi Mumtaz Ali in *Huquq un-Niswan* describes marriage as: “Islam attaches great importance to the institution of marriage, the aims of which are twofold: to insure the survival of the human race, and to provide human beings with companionship, happiness, and support. Children need greater care for longer than the offspring of other animal species, and thus the formation of stable families is essential for the survival of human society. But beyond the basic need for reproduction and survival is the need of adult humans for sympathy and companionship. Unless marriage fulfills both of these aims, Allah’s purposes for a just society cannot be achieved”²⁶³. Dr Westermarck provides three vital element of marriage in his book such as: “the gratification of the sexual impulse, the relation between husband and wife apart from it and procreation of children.”²⁶⁴

According to *Shar’iah* injunctions, “Marriage involves a process in which a man and woman by means of a particular form of contract (*‘aqd*) are united and live together legitimately as husband and wife”. Therefore, Islamic law prescribes a number of legal principles which are essential or crucial for a legitimate marriage i.e. offer and acceptance by the couple and

²⁶³ *Haquq e Niswan (urdu)* mawlavi Mumtaz Ali. (Lahore: Dar al Ishaat 1898). P. 39

²⁶⁴ *Women in Islam*. Mohammad Mazheruddin Siddiqi.(Lahore: Institute of Islamic Culture)1972, p. 37.

guardian for marriage along with dower (*Mahr*). Islam law provides rules and regulations that contribute to attain of the goals of marriage such as to keep the sense of satisfaction and limpidness for both the husband and wife. According to *Shar'iah*, marriage is a contract with free consent between two equal parties and no one has right of priority of consent upon the other. A woman and man as equal parties can stipulate their own conditions in marriage contract considering their own particular requirements and priorities at that particular time of marriage such as *Mahr* the wife demand from her future husband. Two just witness testify these conditions in the presence of both parties when they give their acceptance and approval to marry the marriage solemnizes²⁶⁵. The present chapter describes the legal capacity of Muslim woman regarding marriage contract and following issues are discussed in detail:

- (i) Legal Capacity of woman regarding Consent in marriage contract
- (ii) Interfaith Marriage and legal capacity of Muslim Woman
- (iii) Legal status of Guardianship in marriage contract
- (iv) Impediments in marriage
- (v) Legal obligations regarding Dower (*Mahr*)

This chapter discusses the legal capacity of woman regarding her role as a partner in marriage contract. One of the most fundamental capacities which Islamic Law defines is the woman right to choose a prospective future partner and dower which is wife's significant right that she enjoys and is made obligatory by Allah Almighty upon her husband as discussed in chapter 2. The woman has the complete legal capacity to determine her dower in the marriage contract and has its complete ownership. The present chapter explains *Shar'iah* injunctions regarding concept of free consent of woman equal to the man in front of Islamic law and role of marriage guardian in *Shar'iah* injunction. It also explain the woman legal capacity that is

²⁶⁵ *Rights of Women in Islam*. A.A. Engineer pp.98-99.

entitled her to the right of dower (*Mahr*) in various situations and explore whether she has competent legal capacity that entitled her to draw conditions and amount of dower as equal partner of the marriage contract.

In this chapter that it is discussed that marriage acquire severe restrictions upon women as legal subjects. Finally it argues with unique legal incapacities imposed upon women through marriage cause or 'being a wife' to be potential impediments to women's legal capacity.

3.2 Marriage as socio-religious contract

Islam has developed a complete code for institute of marriage and define it a social and solemn contract, the Qur' n says:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ وَأَخَذْتُم مِّنْكُمْ مِّيثَاقًا غَلِيظًا...²⁶⁶

“and How could ye take it when ye have gone In unto Each other, and They have taken from you a solemn covenant?”.

Based on the Qur' nic principle of 'solemn Contract', marriage demands rights and obligation upon spouses. Which are reciprocal and somehow particular to husband and the wife individually. Marriage is a contract of companionship this implies that both the husband and wife should attempt earnestly to build marital life on the basis of mutual trust fidelity and love; and cooperate each other in strengthening the foundations of the family and raising the children because it is absolutely essential to a valid union that the woman gives her consent .

In *Shari'ah*, marriage is in its essence a civil contract. It makes its foundation on the same principles and ruling like other contracts in *Shari'ah*. Nevertheless, this is not only an ordinary civil contract but Muslim jurists considered bond of matrimonial contract to be at the same time worldly matter and act of worship. In Islamic family law, marriage is a contract between two equal parties. Therefore, according to Islamic rulings woman is to be a subject

²⁶⁶Surah al-Nis 4:21

the marriage contract²⁶⁷. Even though marriage in Islam is often considered a religious function, the *Shar'iah* does not prescribe any particular form of marriage ceremony. However, the required marriage contract, whether oral or written in form, may be supplemented by ceremonies of religious or social significance. The *Shar'iah* developed the understanding of marriage into a matrimonial contract. Considering the marriage institution significant, Islam law concern has always been to ensure that the marital relations should remain strong therefore laid down certain rules and regulations to attain these objectives.

3.3 Status of marriage obligation (*hukm*) in *Shari'ah*

In Arabic '*zawaj*' used for marriage means association and coming together²⁶⁸. The word speaks by the Qur' n in the same meanings of 'bringing together or of being together' marriage, the term '*nikkah*' is used which is defined as "a purposeful contract to obtain and possess an enjoyment.". However, it generally indicates marriage.²⁶⁹The Qur' n as a firm divine relational sacred bond attributes a marital contract resulting in a relationship of marriage. A marital contract must be entered into by the man and woman with the prime will to establish a long term permanent relationship. Even a slight though or feeling intended to establish a relation for the time being or for a short period would declare it as an illegitimate contract. As there are many rights required to be protected and duties required to be performed that are attached to it therefore a marital relationship must be a long term and carry a required force. If a marital contract fails to be a long-term and lacks required force to protect rights and perform duties then it would be in the best interests of the parties to end that contract in a dignified manner as prescribed by *Shari'ah*. Marriage merges the sacred and

²⁶⁷ *Woman rights in Islam*. Ali Asghar. P. 53

²⁶⁸ *Lisan al Arab*. Ibn Manzur. P. 37.

²⁶⁹ "Nikkah" is stated in Quran in several places e.g. *Surah al-Baqarah* :221, 230, 232; *Surah al-Nisa*':3, 22, 25; *Surah an-Noor*: 3, 32, 33 and *Surah al-Ahzab*: 49. See chapter 2 of the thesis.

contractual rights and obligations of man and woman in Islam. As a marriage is not only based on contractual relationship but also on a sacred one, guided by the divine authority which has more force as compared to contractual authority. Divine authority provides the boundaries within which certain alterations can be made through contractual arrangements. The provision that a marital contract can be brought to an end through the medium of declaring divorce does not correspond in any manner that a marital contract establishes a weak and temporary kind of relationship.

In legal term it is recommended (*Mandub*) based on the saying of Prophet ﷺ. ²⁷⁰ Imam ibn al-Tabari mentioned that Arab men in before event of Islam used to marry many women simultaneously and no person or law was ever stop them to marry more than this number.²⁷¹

It was observed that before Prophet Muhammad ﷺ, there was no limitataion upon the capacity of the Arab men regarding the number of wives they can have in life. However, there were certain recognised resolutions regarding the rank of the women a man married but neither conventions nor any particular laws to commanda man how many number of wives they should have in life.²⁷²

In primitive society before Islam man enjoyed a complete right over women in marital and divorce affairs. Husband had unlimited rights of marriage and divorce. There was no law to restrict man to marry more women and he may abandon his wife anytime at his will. The institution of marriage was not present in pre-Islamic era. There were only different kinds of sexual unions which were characterized as form of marriages but that lacked any defined legal

²⁷⁰ Jami At-Tirmizi. Book on Marriage. Chapter: *What Has Been Related About The Virtues Of Marriage And Encouraging It.* dith: 1080. "Abu Ayyub narrated that: The Messenger of Allah said: Four are from the Sunan of the Messengers: *Al-Hayat*, using *Atar*, *the Siwak*, and marriage".

²⁷¹ "*Tafsir al-Tabari*" vol. 4, p. 233

²⁷² *The Sociology of Islam*, Reuben Levy, p. 144.

system,²⁷³ the result was that a man in pre Islamic era was at liberty to conduct as many marriages as he desired. It is provided that if all the relevant facts and related factors are considered that *inter alia* includes, absence of contract and legal guardian, having no share of wife in the inheritance of husband, quick and simple way to divorce, the absence of secluded period soon after divorce or widowhood, the non existence of iddah known as waiting period it can be conveniently concluded that institution of marriage was not that sacred and in no way can be considered as fixed or binding carrying a strong bond.²⁷⁴

The *Shar'iah* transformed marital practices before Islam including polygamy and divorce and made reforms through giving principles and rules. The *Shar'iah* accorded Muslim woman various privileges and changed marriage into an institution in which the woman is considered a significant partner having certain rights. For instance, the dower regarded as a price of bride given to the father was converted into a marriage gift only for the wife after marriage and made it her individual belongings. The jurists of Sunni School of law have difference of opinion on the ruling on marriage. Majority of Hanafi, Maliki and Hanbali jurists have the opinion that the ruling on marriage is recommended (*sunnah*)²⁷⁵. Jurists of Al-Shafi'i school of law argue: "the default ruling on marriage is permissible (*mubah*) for mature man or woman both"²⁷⁶. However, these jurists agreed unanimously that the rulings might change according to situation and circumstances. Followings are the rulings on status of marriage by different jurists of school of law:

²⁷³“The Changing Role of Muslim Women’, *Islam and the Modern Age*”, John L. Esposito. Vol. 4, issue: 3, 1973 p54.

²⁷⁴ *Beyond the Veil*, Cited in Fatima Mernissi (London: al-Saqi Books) 1985, p. 67

²⁷⁵ *Bidayat alMutahid*. Ibn Rushd. Vol 2, p., 2

²⁷⁶ *Kitab al Umm*. Imam Shafii. Vol 2. p. 178

- 1) Jurists of *Zahiri* school of law consider marriage an obligatory act upon a man who has financially established to support his prospective wife and he is very sure that if he would not marry he would commit adultery.²⁷⁷
- 2) anafi jurists argue Marriage as recommended for those who can provide maintenance and dwelling. Nevertheless, he can still maintain his carnal desire²⁷⁸.
- 3) A man who can neither provide maintenance to his wife and children nor fulfill his marital obligation relating to carnal desires and have defects in his or her legal capacity to contract marriage, marriage is prohibited for them, but only when the opposite partner i.e. wife is financially sound and not expect carnal desire from the marriage.²⁷⁹
- 4) If a person has debts and he would not be able to provide maintenance to his wife and he has deficit capacity to fulfill his marital obligations, then marriage is forbidden for him²⁸⁰.
- 5) Generally it is a permissible act to conduct marriage if a person fulfills its conditions.²⁸¹

3.3.1 Capacity of minor in marriage contract and Option of puberty (*Khayar al-Balugh*)

Islam has a concept of adulthood in conducting a valid contract. Islamic legal concept adulthood is defines as “the *mukallaf* is a legally and morally responsible person as one who has reached physical maturity, is of sound mind, may enter into contracts, dispose of property, and be subject to criminal law. Above all, he is responsible for the religious commands and obligations of Islam, for bearing the burden (*taklif*) laid upon him by Allah Almighty”.²⁸²

The Qur’ n emphasize on the concept of *Nikah* irrespective of age because it main concern is a union between man and woman for *procreation* and *solace* for each other²⁸³. *Shar’iah* does

²⁷⁷*Al Muhallah*. Ibn Hazm. Vol.11. p. 34.

²⁷⁸*Badai Al-Sanai*. Al-kasani. Vol. 2, p. 228.

²⁷⁹*Fath al-Qadir*. Ibn Humam. Vol. 2, p. 342.

²⁸⁰ *Ibid*. p. 342

²⁸¹*Radd al Mukhtar*. Ibn Abidin. Vol: 3. P. 7

²⁸²*Introduction to Islamic Law* Joseph Schacht (Oxford University Press, 1964), p. 4

²⁸³Surah Ar-Rum 30:21

not fix any particular age when discretion should be presumed. There are two opinions about marriage of a minor:

First: this opinion is by two prominent jurists Abubakr al-Asam and Ibn Shubrumah that child marriage is not allowed by *Shar'iah*²⁸⁴. They give basis of their view mentioned in the Qur'an:

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ ءَانَسْتُمْ مِّنْهُمْ رُّشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ²⁸⁵.

“make trial of orphans until They reach the age of marriage; if then ye find sound Judgment In them, release their property to them; ...”.

anafi, Al-Shafi'i, Maliki and Hanbali jurist on this issue that marriage of minor is lawful provided marriage guardian constructs it, presents second view²⁸⁶. These Jurists argue that the Qur'an talks about marriage with a minor girl who has not attain puberty.

وَأَلَّتِي يَبْسُنَ مِنَ الْمَحِيضِ مِنْ نِّسَائِكُمْ إِنْ أَرْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَالَّتِي لَمْ يَحِضْنَ²⁸⁷

“such of your women As have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three Months, and for those who have no courses (it is the same):...”

The proponents of the first views argues that a marriage by a minor is nullify because of the reason that for legitimate contract, it requires consent of both man and woman which is non-existent in case of minor or insane persons. The proponents of the second view argue that marriage guardian, mostly the father²⁸⁸, could contract his minor ward in marriage in an exercise of guardianship (*Wilayat*). Imam Abubakr al-Anfah stated accordingly that : “The guardian has full authority to marry his minor girl whether she is a virgin or previously

¹³ *al-Mabsut*. Imam Sarakhsi, Vol 4, p. 193

²⁸⁵ Surah An-Nisa 4:6

²⁸⁶ *Badai al-Sanai*. Kasani. Vol 2 p 241.

²⁸⁷ Surah At-Talaaq 65:4

²⁸⁸ “Hanafi School of law includes a broader range of family guardians in the absence of the closer ones. Her guardian is understood to be the father, if the father is not alive, then the grandfather, then the blood brother, then the uncle (father’s brother), then cousin (father’s brother’s son), then the mother”.

married. anafi School of law however, allows an incumbent at the age of puberty to repudiate a marriage contracted before puberty by guardians other than the father or grandfather. Furthermore, anafi school of law give option to a mature woman to select her husband and conclude the marriage contract by her own because the parties to marriage contract should be sound mind who have attained puberty.”²⁸⁹

Other schools of Islamic law²⁹⁰ allow father or grandfather to exercise marriage guardianship institution and in some cases they may appoint agent. In case of absence of these guardians, other guardians have to wait until the woman give consent after attainment of puberty. The marriage contract involves primarily the agreement (*ijab and qubul*) by the bridegroom and the bride’s guardian whom she has authorized by her consent to conclude the contract on her behalf.

In Juristic discussions the difference between male and female child with respect to right to marry is the rule of emancipation on attaining puberty. A male child is automatically emancipated from his guardian authority upon reaching maturity ,but a woman is not consider to be emancipated from her guardian’s authority until two conditions are fulfilled for her complete legal capacity: “to marry and protected by her husband and the evidence of trustworthy witnesses that she could able to manage her property”.²⁹¹ Jurists who advocate child marriage however do not authorize father’s (guardian’s) pronouncement on mature woman when she attained maturity and prudence after attaining puberty. Majority of the jurists including anafi Jurists have the opinion that according to Shar’iahin contract under the legal age i.e. minors are subject to guardian consent. On attaining majority the man or

²⁸⁹ *Mohammad Law*. Syed Amir Ali, vol 2, p. 275.

²⁹⁰ Sunni School of law including Shafi, Hanbli and Maliki., *Kitab al-Fiqh ala al-Madhahib al-Arba'a*, Al-Jaziri, Abd al-Rahman vol.4, pp.21, 22.

²⁹¹ *Al-Hidaya*. al-Marghinani vol. 1, p. 491.

woman withdrawn the consent and they may refer the case to the court. The guardian has an important role to play at the event of their marital contract. Mature man and woman on attaining the age of majority are supposed to have sound mental capabilities to enter into marriage contract. They are considered completely independent to decide regarding their marriage and no legal hurdle can be created on their way to get married.

Islamic jurists have difference of opinion regarding the minimum age of man and woman interested to enter into a marital contract. Rules of Islamic law provides that Muslim man and woman are completely independent to enter into marital contract on attaining puberty furthermore the court has authority to approve the younger adolescents marital contract if the evidence of future couple puberty is available before court. In such situation anyone husband or his wife after attaining the complete marital age may proceed for abolition of marital contract even without obtaining the prior consent of his or her guardian.

A Muslim woman is given “the option of puberty” technically known as *khiyar al-bulugh*, according to which the woman has given option to choose or reject her husband who has been given in marriage by her marriage guardian in her childhood. A free Muslim woman has the option of accepting or rejecting the marriage on reaching maturity.

«أَنَّ أَبَاهَا زَوَّجَهَا وَهِيَ كَارِهَةٌ، فَخَيَّرَهَا النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ».

“a young virgin girl came to the Prophet and mentioned that her father married her to someone) while she disapproved. So the prophet allowed her to choose.”²⁹²

It is not appropriate for a guardian to marry her minor girl with someone without her consent. In case the guardian’s action is improper or injudicious, the judge has the right to revoke the marriage agreement. Islam has given Muslim woman complete legal authority of freedom to choice and repudiation her marriage contract. A. A. Asaf Fyzee writes in *Outlines of*

²⁹² *Sunan Abu Dawud*. Imam Abu Daud Sulaiman bin Ash‘ath. Book of Marriage chapter 23 dith no. 2096, (trans Yasir Qadhi. New York: Dar ulsalam publishers) 2008 Vol 2. p. 526.

Muhammadan Law: “if a Muslim minor has been married during minority by a guardian, the minor has the right on attaining majority to repudiate such marriage. This is called *khiyar al bulugh*”.²⁹³

3.4 Status of conditions in the marriage contract

The marital contract is specifically mentioned in the Qur'an and is a well-established and indeed integral part of the marriage. Muslim Jurists have different stances on the conditions that can be stipulated by the husband and the wife and inserted in marital contract. The wife has the complete legal right to insert number of necessary conditions before entering into a marital relation. Therefore, these conditions are not clearly forbidden by Islamic scripture.

anafi and Maliki jurists divide these conditions into valid and irregular conditions, however, their criteria in this regard varies²⁹⁴. Al-Sh fi‘ Jurists, like Maliki jurists, also divide conditions into valid and void. According to these jurists valid conditions are permissible and are binding upon the parties whereas invalid conditions render the marital contract invalid. Jurists of Hanbali school of law define “two conditions that are collateral to the marital contract and they provide some lawful advantage to one of the two contracting parties, for instance, a condition that the husband will not marry another woman or husband will not take wife away from her home town etc the parties are bound by such conditions”.²⁹⁵

Majority of the jurists restricted on the acceptability of superficial conditions and stipulations in marital contract while the Hanbali School of law seems moderate in this matter. It is evident from the concluding discussion of Jurists of Sunni schools of laws that legitimate conditions which are in accordance to the evident principles of Qur’an and Sunnah of the Prophet can be inserted in marital contract. Marital contract is considered as legal privilege

²⁹³ . *Outlines of Muhammadan Law*. Asaf A.A. Fyzee (New Dehli: Oxford University Press) 1974. P. 94

²⁹⁴ *Al-Durr al-Mukhtar*, Ibn Abidin. vol. 2, p. 405.

²⁹⁵ *Mughni Al-Muhtaj*. Shirbini (Cairo: SharikahwaMatba‘ahMustaf al-Babi-al-Halabi, 1993, vol. 3, pp. 226

for woman to provide the conditions she consider necessary for their matrimonial life. Prior consideration and declaration of conditions would be commendable act in *Shar'iah* that is essential to the success of the marriage and would enhance the prospects of marriage. The woman has full legal capacity to demand her conditions in the marital contract considering her personal needs and requirements. These conditions *inter alia* may include the demand of a monogamous relationship with her husband and the right to dissolve her marriage by own if she regards it indispensable. Majority of Jurists have consensus of the basis feature of consent of both parties and complete offer and acceptance of concerning parties. Therefore it is concluded that legally fundamental condition of matrimonial contract is “offer from one side and acceptance from the other side willingly.”²⁹⁶

3.5 Elements of marriage contract in *Shari'ah*

In classical Islamic literature, family laws especially marriage and divorce has been significantly discussed by majority of Jurists of different schools of law. This extensive study on Islamic Family law illustrates the growth of the legal system in of *Shari'ah*. Majority of the Jurists have consensus on major issues which laid down the basic principles of the marriage contract. In minor details jurists differ in their opinions on the basis of principles they adopted according to their school of law. The fundamental conditions and crucial features of matrimonial contract according to the Muslim jurists are discussed as:

According to Imam Al-Shafi'i, “matrimonial contract has four crucial requirements; offer and acceptance, contracting parties i.e. husband and wife, two witnesses and presence of guardian”²⁹⁷. In this regard, Hanafi Jurists acknowledged one foremost feature that is offer

²⁹⁶*Badai al-Mujtahid* . Ibn Rushd. Vol 2. P. 27.

²⁹⁷*Nihayat al-Muhtaj*, Ramli. vol. 6, p. 207

and acceptance of both parties to this contract²⁹⁸. The most significant condition of the marriage contract in *Shar'iah* is the offer made by one partner and an acceptance by the other partner of the contract. Although in Juristic view a woman's guardian plays his significant role in this contract but primarily woman's consent is imperative for a valid and legally binding contract on the parties.

3.5.1 Witness in marriage contract

Additionally, for legal binding of the offer and acceptance of the contract, it is primary condition of the valid contract that it must be announced in the presence of two Muslim mature witnesses to declare contract valid. "The contract is a legal written document between two adult persons, in which there is an offer by one party and an acceptance by the other in the presence of two witnesses. The consent of future wife is essential for the marriage contract to be valid. Any kind of coercion on any party from the relatives or anyone else would inevitably declare the marital contract as invalid"²⁹⁹. Therefore Islamic law establish two witnesses present at the conclusion of the marriage contract who has to ensure that both the man and the woman give their consent freely without any coercion and both parties accept it whole heartedly.

3.5.2 Consent of parties to the marriage contract

In *Shari'ah* the consent both parties are the essential element of civil contract with this requirement that both have complete legal capacity to understand the conditions of the contract.

Generally in marriage offer is made by the guardian of the bride who declares the conditions of marriage of the future bride with a person with whom woman is ready to enter into

²⁹⁸ *Badai al-Sanai*, Al-Kasani. vol. 2, p 229

²⁹⁹ "The Status of women under Islamic Law and Modern Islamic Legislation". Jamil Ahmad Nasr. (Boston: Brill publishers) 2009. P. 31

marriage contract and then the groom accepts the offer and the contract of marriage along with the agreed terms is considered to be concluded". In accordance with anafi Jurists there is no specific way of offer and acceptance for marriage, any lucid expression that transmit the intentions of parties to one another will suffice. However, there are certain terms that are relevant in this regard such as *qabiltu*, *raditu*, *tazawwajtu* etc. There is difference of opinion between jurists of Al-Shafi'i and Hanbali school of law in this regard as they prohibit to transmit offer in words other than *zawaj* and *nikah* considering that these terms transmit the true intention of parties to marital contract in transparent and an unambiguous way.³⁰⁰

Marriage contract provides a complete authority that allows parties who enter into matrimonial contract with their free consent and forced marital relation according to *Shar'iah* rulings are strictly prohibited as it ends the purpose of matrimonial bond. Earlier Muslim jurists unanimously agreed for the valid matrimonial contract offer and acceptance must be in clear words from both parties to express their clear consent regarding the marriage. Contract without the consent of parties is considered irregular and void that can be terminated³⁰¹.

3.5.2.1 Consent of the Muslim woman- A prerequisite of contract

In *Shar'iah* rulings the consent is essential element in marriage institution because marriage under Islam is a contract³⁰². A Muslim marriage is contracted and expressed in the priorities by declaration and consent. The marriage is in its essence is a consent of a man and woman to live together with each other while fulfilling the rights and obligation towards each other. A marriage is considered to have a contract between two persons who have potential and complete capacity to enter into the contract with complete will and consent and make it valid. The parties must understand the nature of the marriage contract and there must be mutual consent

³⁰⁰ *alMughni al-Muhtaj*. Shirbini (Cairo: SharikahwaMatbaahMustaf al-Babi-al-Halabi, 1993) vol. 3, p 534

³⁰¹ *Family Law in Islam*, Mansoori, p.27

³⁰² Surah An Nisa 4:21

otherwise without these elements no contract of marriage can be valid, therefore free consent of mature person is not only vital for a valid marriage but is definitely essential.

" إِنَّ أَبِي رَوَّجَنِي ابْنَ أَخِيهِ، لِيَرْفَعَ بِي حَسَبِيَّتَهُ، قَالَ: فَجَعَلَ الْأَمْرَ إِلَيْهَا، فَقَالَتْ:
" أَنْ تَعْلَمَ النِّسَاءُ أَنْ لَيْسَ إِ

“a girl came to the prophet and said ‘my father married me to his brothers son so that he might raise his status thereby’. So the prophet gave her the choice and she said ‘I approve of what my father did, but it wanted women to know that their fathers have no right to do that.’”³⁰³

One of the contemporary jurist Saʿid Mustafa writes: “ unjustified prevention of marriage is a failing in duty rather than an Abuse of right i.e. guardianship is intended to be in the interests of the person to whom it applies. The estimation of this benefit is left to the guardian according to what he sees as the fitness or otherwise of the suitor. He has the right not to give in marriage the person under his guardianship to someone who is not her equal and the right to object to a marriage and demand separation. The right of the guardian, like any other right, is restricted by the requirement that it be used for the purpose for which it exists”³⁰⁴.

The consent of the couple is vital for the validity of the marriage. According to *Shari'ah*, man and woman has absolute legal authority to enter in marriage bond with free will and without coercion. Without the woman’s consent and approval on her conditions, the marriage is void. In Shariah, the wife is an equal legal partner in contracting the marriage. The Qur’an shows that there is not compulsion in the matter of marriage; there is no doubt that the institution of marriage is encouraged so that human progeny is sustained to woman who would have enjoyed no legal rights. Islam preferred a middle way it encourages marital institution while making it clear that rights and obligations on both parties. Muslim jurists unanimously agreed on the freedom of consent of man and woman in marriage contract. There agreement is based

³⁰³ *Sunan Ibn Majah*. Muhammad Bin Yazeed ibn Majah Al-Qazwini. The chapters on marriage. Chapter 12. One who arranges his daughter’s marriage when she is unwilling. dith no. 1874. Vol 3. P. 77 (tran Nasiruddin al-Khattab) Riyad Maktaba Dar us Salm. 2007.

³⁰⁴ *Al-Huquq al-Zawjiyyah fi al-Shari'ah al-Islamiyya*. Al-Said, Mustafa pp.172-175.

on the evidences provided by the The Qur' n and traditions of the Prophet in which woman has given complete legal capacity to decided about themselves and *Shar'iah* gave the women the option of having their marriages void

3.5.2.2. Legal capacity of mature virgin woman regarding marriage contract

The chapter on marriage in Marghinani's *Hedaya* discusses the form of a marriage contract consisting of formal expressions of offer and acceptance, both indicating consent, rather than the foundational inward aspects of objectives of marriage contract.

The section "guardianship and equality" in the *Hedaya*, however, direct with an affirmation; "an adult woman of sound mind, whether married previously or not, may contract a marriage by virtue of her own consent",³⁰⁵

In another place he writes an adult female may engage in the contract without her guardian's consent. A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians ; and this, whether she be a virgin or a *Siyeeba*. This is the opinion of Ab an fah and Ab Yusuf, as appears in the *Zahir-rawayet*. It is recorded, from Ab Yusuf, that her marriage cannot be contracted except through her guardian. Muhammad holds that the marriage may be contracted, but yet its validity is suspended upon the guardian's consent .³⁰⁶

In the discussion above on marriage displayed the capacity that an adult woman be controlled in her capacity to contract a marriage. The opinion is divided between Ab anifa and Ab Yusuf, who requires the contract also be consented to by her guardian. The juristic permissibility stems from the nature of the act which in this case pertains to something that is purely her personal right. Being sane and holding discretion, she possesses the legal capacity

³⁰⁵ *Al-Hedaya*, al-Marghinani, vol.1, p. 494

³⁰⁶ *Ibid Al-Hedaya*. Vol 1, p. 494

for contracting marriage.³⁰⁷ Imam Abū an-Nafiʿ is amongst the unique proponents of the view that an adult woman may independently contract her marriage (as a man may). His reasoning and that of the school in general, pertains to a woman being addressed directly by the lawgiver, and her “maturity of thought”. These provide her freedom with respect to marriage and to transact her property. Accordingly, it is not permitted to the guardian to force a virgin who attains majority to marry. Imam Al-Shāfiʿī disagrees. He takes the analogy of the minor girl who is unaware of the complexities of *khul* due to lack of experience. It is also for this reason that the father takes possession of the dower (*maḥār*) without her consent³⁰⁸.

By contrast *anafi* Jurists maintained that a mature free woman is addressed directly by the communication from the Lawgiver, therefore no one has authority over her to force her. The authority over the minor by contrast is due to the lack of maturity of thought, which becomes complete upon attaining her puberty on the evidence that the communication from the Lawgiver becomes directed towards her. In *Shariʿah*, a mature woman is therefore, just like a man, and her capacity for being free with respect to marriage is just like her freedom to carry out transactions in her possessions. The father takes possession of her daughter on the basis of her implied consent for he cannot do so if she forbids it. Further a woman may not contract the marriage of another woman on her behalf. Women, in the jurists’ assessment, being weak of reason are prone to deceit and thereby to defeat the benefits of marriage, amongst these procreation.³⁰⁹ The marriage contracts due to its sacred character Muslim jurists have tried to provide certain precautions so that marriage institute is secured from defective decisions. Therefore in juristic opinion father and other guardians safeguard interest of woman and support her in right choice in marriage contract. While *Sharʿiah* does not make requirement for

³⁰⁷ Ibid., *Al-Hedaya*, p. 495.

³⁰⁸ *Al-Umm*. Imam Shāfiʿī. Vol 2. P. 47

³⁰⁹ *Al-Hedaya*. al-Marghinani. vol. 1, p. 491.

a guardian or an agent in marriage, however a woman is encouraged to marry through her guardian to maintain her modesty. The consent of an adult virgin Muslim woman is essential³¹⁰, According to Al-Sh fi' 's and Maliki's Schools for the legitimacy of a marriage contract but she cannot entered in it on herself and contract on her own behalf without marriage Guardian (*Wali*).

3.5.2.3 Juristic views on capacity of woman in marriage contract

The marriage contract cannot be completed or valid without consent of marriage guardian. Marriage must be solemnize through the guardian. Thus, as per jurists of Al-Sh fi' School of law, a woman cannot independently contract to the marriage and marriage guardian's will and agreement is required to complement the recognized capacity of the woman, to support woman to understand the marriage contract, to draw the terms and conditions of the contract, and to guard the woman from a deceitful contract, or protect her from marrying a person who is not suitable for her socially and morally³¹¹. The Hanbali jurists give weightage to the opinion of Ibn Hamble regarding the mature married or unmarried woman who attained puberty and quality of prudence that she may dispose of her properties with or without consideration of the guardian³¹²

That is not in the case of Maliki School of law for an unmarried woman, she has restricted legal capacity until she marries. The basis of the opinion is that her father may always conclude her marriage without her permission and that restricted her full capacity. Even after her marriage a woman, by the jurists of Maliki school of law, still as partially detract from full capacity due to the acts she performs without consideration, such as issuing guarantees or making gifts are not allowed without the husbands authorization. Somehow, acts of

³¹⁰*Badai al-Sanai*. Kasani, Alauddin (Cairo: Sharakat al-Matbuat al-Islamiyyah) Vol 2. p 229

³¹¹.ibid p. 48

³¹²*al-Mughni*, IbnQudama (Berut: Dar al-Fikr) 1985 vol 4, p .512-514

disposition with proper consideration such as selling, buying or letting are allowed with no need for husband's authorization³¹³

anafi jurists explain their opinion on the authority of Imam Abū Abīn al-Fah and Imam Abū Yusuf that without the consent and presence of a matrimonial guardian a marriage of a mature woman can be concluded her marriage. Imam Abū Abīn al-Fah maintained that for a sane, adult and prudent Muslim woman, guardianship is not obligatory. The reason is she may be permitted to dispose her property because of complete legal capacity of sound mind and maturity. As for she can dispose of her property due to such capacity therefore the principle here is that whoever may sell of his belongings and properties by his own responsibility may contract his own marriage. Based on this argument that she is entitled to conduct her own marriage contract whether she was previously married or a virgin. And the marriage guardianship is exclusively for prepubescent females. On the other hand, Imam Abū Abīn al-Fah maintained that it is a delegation, not guardianship, for the sane, adult female therefore mature woman's marriage is concluded without the consent guardian, who requires the contract also be consented to by her guardian. The scholars reason that permissibility stems from the nature of the act which in this case pertains to something that is purely her personal right. Being sane and holding discretion, she possesses the legal capacity for contracting marriage. Any act a woman is obligated to perform depends upon the permissibility of that particular act and nonetheless she has an equal right to perform any act which she is permissible to do and which pertains to her personal right. For this purpose she must possess the legal capacity to perform such an act. It is because of this legal capacity in the form of being sane and having a possession over the mind that she is capable of entering into any kind of business, marrying someone of her own choice. The widowed women are

³¹³Ibid. *al-Mughni*, p.514

also given free choice to remarry as she possesses the legal capacity to do so. Subsequently, as per this concept husband and wife no matter what status they have in the society will be considered equal however, the women is given this right to raise objection over the status of her husband who is not equal in status. To this point Abū Abī an-fah and Abū Yusuf has not allowed the marriage between the two with husband having a lower status than her wife as according to them there are certain matters that cannot be sorted out entirely through law. This viewpoint was also followed by Muhammad-al-Shaybani.³¹⁴

anafi jurists don't consider this adith authentic because of the the bad memory of the narrator Az Zuhri due to which the dith become invalid. By the way of tracing *sanad* of this adith, majority of the jurists considered it is a correct adith and they used it to support their argument for the guardianship.

The dith was narrated by a number of Ashab of the messenger of Allah including Syedna Umar Ibn Al-Khattab, Abdullah Ibn Masud, Ali Ibn Abi Talib, and others. Imam Muhammad al-Qurtabi argues: “on this matter that It is enough to rely on what Ibn Uniyyah reported about Ibn Juraij that he asked Al-Zuhri about this adith and he did not know it. Nobody else said this about Ibn Juraij except Ibn Uniyyah. On the other hand, many other narrators reported that Al-Zuhri narrated this adith. Even if it is true that Al-Zuhri did not know or remember the adith, this is not necessarily an argument against the isnad of the dith, because many other trustworthy people including Sulaiman IbnMusud and Ja’far Ibn Rabica stated that they had this dith from Al-Zuhri. If Al-Zuhri forgot the dith, that would be something very natural because he is only a human being and humans are not immune to forgetting”³¹⁵.

³¹⁴*Al-Hedaya*. vol. 1, p. 497.

³¹⁵*Jami al-ahkam al-fiqhiyyah* Al-Qurtubi, Muhammad, , vol. 2, p. 185

Based on this argument adopted by majority jurists, they consider it valid and they considered consent of parties, witness and guardian as an essential part of marriage contract. Due to its essentiality in marriage contract, guardianship become an important aspect of validity of the contract. Majority jurists of Sunni school of law however differ with each other on the obligatory element of guardianship and the legality of marriage contracted in the absence of the guardian. Muslim Jurists differentiate between two situations:

1. First, there is no disagreement between the jurists in principle regarding the fact that woman who has previously marriage experience, i.e. (*thaiyyab*) who can choose their new husbands.
2. However they disagree on whether the woman can conclude her marriage by own single will or must her consent be combined with that of her male guardians³¹⁶.

According to Hanafi jurists the legal capacity of a woman is absolute to contract herself in marriage who is sane and mature and guardian's consent is not a substitute for mature woman consent. However, in Al-Shafi'i's and Maliki's school of Law though the consent of adult virgin is same as in Hanafi but without the consent of guardian she cannot contract herself in marriage.

Al-Shafi'i's and Maliki's school of law has the opinion that the only consent of adult virgin muslim woman is not enough for concluding the marital contract it should be concluded through the legal guardian of woman. The consent to marriage can be granted in express or implied terms. A woman who was once in a marital relationship or a woman who is developed enough to comprehend the conditions of a marital contract the consent to marriage is required to be expressive. Secondly, in the matter of virgin girl the Islamic jurists of all schools keep the similar stance that a smile of a woman or silence might be considered an

³¹⁶*Kitab Al-Mabsut*. Imam Sarkhasi. p 157

implied consent to marriage. In the narration reported by Aisha (r.a) Messenger of Allah () has said, a virgin must be consulted in everything regarding herself, and if she is silent, it signifies consent.

"عَنْ عَائِشَةَ، أَنَّهَا قَالَتْ يَا رَسُولَ اللَّهِ إِنَّ الْبِكْرَ تَسْتَجِدُّ . رِضَاهَا صَمْتُهَا" ³¹⁷

“Aisha narrated: I said Oh Allah’s messenger, a woman feels shy to give consent in marriage, he said, her consent is expressed by her silence”.

According to the views of the anafi jurists, woman has full legal capacity to decide about her prospective husband and get to know about him to meet the requirements of suitability *Kafu* therefore a mature woman can contract her own marriage without coercion on the part of her guardian or male relatives. The guardian has the right to object her decision about a man who is not fulfilling the requirements of *kufa*. The anafi Jurists Imam Yusuf and Imam Muhammad both have the view that “ any woman do her marriage contract, if the partner is according to his status then marriage of both will be done. Only the guardian has the right to do objection if the husband is not according to her status. If both are agreed and they have same status the right of guardian has abrogated”³¹⁸ Al-Mawwaq quotes the Andalusian jurist, Ibn Lubb, as saying “The requirement of a guardian is only to assure that the (requirement of) *kafi'a* is met, (which is accomplished) by means of the guardian’s judgment”.

(a) Requirement of Equality of Status (Kafu)

According to the jurist of anafi School of Law, the guardian may object her choice of prospective husband if he doesnot fulfill the requirements of *Kafu* i.e. the he has no good virtues, or she contract for less than the appropriate dower or it become apparent that her husband will deceive her in regard to his own financial position ³¹⁹. The mature unmarried girl must specify her dower equal to the dower given to female of her family and status. Imam

³¹⁷Sahih Al Bukhari. Book of wedlock Chapter 63 dith 5137"

³¹⁸*Nikkah may walikhasiyat*. Anwar Muhammad Noor (Lahore: Wahdat Foundation 1999) p 155

³¹⁹*Woman in Islam*. Ahmad, Naseem (New Dehli: APH Publishing corporation, 2003) p 562

Abū Abū an-fah declares that “If she selects a suitable match and does not settle for a reduced dower, then the marriage is valid and allowed. Her consent is essential for the validity of marriage consent.”³²⁰

(b) Requirement of Status of dower (Mahr)

A man who proposes a woman to marry should be equal in status to proposed woman and that the dower in marriage should be in accordance with her status. In this situation the guardian is not supposed to prevent marriage as it would be this would be considered as unjustified restraint upon marriage. It would be considered either as an Abūse of the right of guardian or failure of performance of his duty towards the woman. This later stance is held by al-Al-Shafi‘ī providing that “if there is a dispute in a case of unjustified restraint it should be investigated by the authorities and if it is concluded that the guardian is preventing the woman from marrying he should be ordered to allow the marriage. If he does not, then it is the duty of a judge to give her in marriage or to appoint a different guardian to do so. He also says that it is a sin for the guardian to prevent marriage”.³²¹ Therefore meeting the basic requirements of *Kafu* in *Shari’ah*, the partners of the contract compatible in their religion, social class, education standards and physical appearance.

3.5.2.4 Legal capacity of previously married woman (Thayyib)

Islamic Law has given the legal right to the Muslim woman chose her prospective husband and get to know about him as a partner of contract woman’s consent is essential for the validity of the marriage contract.³²² According to principles of *Shari’ah*, a divorced or widowed woman has the right to remarry without consultation of her guardian. The Qur’an

³²⁰ ibid p. 563

³²¹ *Al-Umm*, Imam Shafii. Vol.7. pp.89

³²² *The Rights of Women in Islam, an authentic approach*. Haifaa A. Jawad (Britain MACMillan Press 1998)

approved betrothal of divorced or widowed woman during her waiting period (iddah). In *Shar'iah* neither age nor previous marriage impedes a woman from contracting new marriage. There are many examples which can be cited from the early Muslim community in which Muslim women were re-married after they were divorced or widowed. The first marriage of Prophet ﷺ is from a widow Syedna *Khadija (may Allah be pleased with her)*. While Islamic law makes no requirement for a guardian or an agent in marriage, nevertheless a Muslim woman is encouraged to marry through her guardian to maintain her modesty. Messenger of Allah ﷺ is reported to have made the following statement a previously married woman shall not be married till she gives her consent, nor should a virgin be married till her consent is sought.

3.6 Capacity of Guardianship in marriage contract and its *Shar'iah* Injunctions

Islamic law discusses woman and the minor as a subject of legal guardianship, which includes male relatives' inter alia father, grandfather, or nearest male relatives who has authority to protect the interests of the insane and minor and manage their property till their majority.

“As to who must have a guardian in manage, the jurists have taken different positions. The general view is, however, that minors the insane, and inexperienced or irresponsible persons of either sex, must have a guardian yet the jurists focus on the woman's need for guardianship while little is said about the need of the man for the same”.³²³

This guardianship extended to the marriage of female where it plays an imperative role in the marriage agreements. “In Hanbali, Al-Shafi'i, and Maliki school of law the doctrine of the legal guardian includes the father or grandfather of the woman he must play a role in the marriage contract: without the imperative existence and consent of a guardian woman's

³²³*The Family Structure in Islam* Ibid. p. 758.

marriage would not be valid”.³²⁴ Abd Al Ati has established the meaning of *wali* in some detail. “Guardianship (*wilayah*) is the legal authority invested in a person fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently, that is, someone who has limited or no legal capacity. it is the authority of the father or nearest male relative over minors, or insane or inexperienced persons who need protection and guardianship”³²⁵. Linguistically, the word “*wilayah*, which is the Arabic equivalent for guardianship, means (family) relationship, and it comes from the Arabic root *wali*”.³²⁶ The term according to *Shar’iah* refers to "the ability to make a contract and put it into effect"³²⁷. Therefore, the wali, or guardian, is the person who has the capacity to put into effect someone else's marriage contract whether this someone is a young woman or man ³²⁸. The jurists define the authority and limitation of guardianship in detail in their eminent literature. They differ in their roles on the basis of marriage guardian (*wali*) and the ordinary legal representative (*wakil*). Marriage guardian (*wali*) is normally the nearest male relative in whose absence a community or State leader supposed to performed the responsibility according to tradition of the Prophet. The fact remains that Guardianship is considered as a right awarded to or as a duty assigned to the person to guard the interest of another person, recognized by *Shar’iah*. The motive of the guardian act on behalf of the female is to protect woman’s interests in marriage contract. anafi school of law stance is that it is applied upon minor girls as they do not carry complete capacity to sensibly protect their interests. Mature and mentally sound women enjoy complete independence while entering in

³²⁴ *Mukhtalaf al-Shi a fi AhkamalShari a.*, al-Hilli, al-Hasanibn Yusuf ibn al-Mutahhar (Iran: Islamic Sciences Research Center, 1991). v ol7, pp.:114–17.

³²⁵ *The Family Structure in Islam*. Hammudah Abd Al-Ati. P. 97.

³²⁶ *Lisan al-Arab*, IbnManzur . p. 407

³²⁷ *AI Ahwal- al-shakhsiyyah*, AbuZahrah, Muhammad (Egypt: Dar Al- Fikr Al-Arabi, 1957), p. 122.

³²⁸ “*The Family Laws of Islam*”, Siddiqi, Muhammad Iqbal, (Delhi 1988), p. 71.

commercial contracts of buying and selling when they have attained major age and rational in this regard. Therefore, it seems completely appropriate that these women should have also freedom regarding the marital contract as well. A legal representative (*wakil*), is a person who has consented through a private agreement to represent another party with the limits of authority delegated to him by the principal party. This delegated authority may include arrangement of marriage subject to the consent of the guardian El Alami has rightly pointed out that: “The jurists who insist on guardianship in marriage seem to consider that it is a duty rather than a right of the guardian, or at least a synthesis of both. While the guardian has the right to conclude a marriage on his ward's behalf and to give consult or object to her unwise choice, it is his duty to exercise this right in her best interests and he is enjoined to take her wishes into consideration”.³²⁹

Marriage guardianship can never pass to the mother, the father’s mother, or any other agnate or cognate relative (a relative having a common maternal ancestor) in the absence of a father, an agnate grandfather, or a legal guardian, but has in those circumstances, to be vested in the judge. Only the judge has the power to act as the marriage guardian for an adult who has reached the age of majority in a sane state, then has later become insane.³³⁰ Types of guardianship are divided under two categories in respect of the marriage of the woman according to the classical jurists:

3.6.1 *Wilayat al-Ijbar* (guardianship that is based on compulsion)

“Guardianship (*wilayat al-ijbar*) is exercised over a person of no or limited legal capacity wherein the guardian may conclude a marriage contract which is valid and takes effect

³²⁹*The Marriage Contract in Islamic Law in the Shar’iyyah* El-Alami, Dawood S. P: 49. (London: Graham & Trotman. 1992)

³³⁰“*The Status of women under Islamic Law and Modern Islamic Legislation*”. Jamil J. Ahmad Nasr. VOL. 1. P. 50

without the consent or acceptance of the ward".According to Maliki school of law, it is applicable for every the woman that guardian exercise the role of the guardianship in marriage.

Ibn Juzzi Al-Maliki, who is the proponent of this view said,

“A woman may not contract her own marriage nor can she contract the marriage of another woman, be she biker, thayyib, despicable, rational, shameless, free, or slave whether with permission or not. If she does, then, the marriage should be void and annulled before the consummation of the marriage or after it. Annulment of the marriage in this case may take place even after the woman got married and had children”³³¹.

As for Hanbali jurists they defined “marriage will not be valid unless it is blessed by a guardian and that the woman has no right to marry herself or another woman to a proposing husband. Nor has she the possibility of having as a legal representative anyone other than her guardian for the purpose of agreeing the marriage contract. However, if she does, marriage will become void”³³².

Nevertheless, Al-Shafi‘i jurists doesnot approve that the woman to contract her marriage by her ownself or initiating the process of marriage without taking consultation of the guardian, whether the guardian agreed to the marriage or not ³³³. It is therefore valid to restrain her in the contract of marriage, although not in any other contract. Imam Al-Shafi‘i, Malik and Ahmad ibn Hanbal hold this point of view that guardianship is dependent upon the virginity of a girl. If the girl is virgin till the time of her attaining puberty the guardianship will also remain intact however, if the girl is no more a virgin that is she is married and has consummated before attaining maturity stage the guardianship will, also automatically cease

³³¹*Qawanin al-ahkam al-shariah*, IbnJuzzi Al-Maliki (Cairo: Alem Al-Fikr, 1985), p. 197.

³³²*Al-Mughni*. Muhammad Al-Sharbini . (Egypt: Matbaat Mustafa Al-Babi, 1985), vol 3. P. 337

³³³*Ibid.* p. 347.

to exist. However, if the girl gets divorce before she has achieved adulthood then she is not permitted to remarry till the time she will attain maturity. Subsequently, she can then marry a person of her choice with the participation of her guardian.³³⁴

Al-Sh fi' i jurists upheld their view concerning insane woman as far as an insane woman is concerned the guardian has no legal obligation such as her status, being minor or adult, virgin or previously married to give her into marriage. The only condition for the guardian is to keep in view the interest of an insane woman; if giving her into marriage will cure her illness then it is permissible. Moreover, any mature woman who is insane and is given in marriage with the intention of preserving her honor then it is also permissible. As far as the case of any minor is concerned this is not required but if it is pertaining to her interest she could be given into marriage by her father or grandfather.³³⁵

The jurists who consider compulsory guardianship as essential element in marriage consider it "a duty rather than a right of the guardian", or "at least a synthesis of both". While "the guardian has the right to conclude a marriage on his ward's behalf and to give his consent or object to what he considers to be her unwise choice, it is his duty to exercise this right in her best interests and he is enjoined to take her wishes into consideration. To fulfill this duty, he must have the right to participate in the decision-making processes and make use of his experience in helping her".

Ab Zahrah indicated that the wisdom of declaring guardianship as a need for a marital contract. The wisdom behind marrying a girl by her guardian was rightly upheld by Ab Zahrah as prerequisite condition for a marriage contract. The rationale behind this is that, as marriage contract is different from all sorts of contract because under Islamic values it is

³³⁴ *Al-Sharh al-Saghir-Imam Malik*, Ahmad ibn Muhammad ibn Ahmad.vol 3, pp.414

³³⁵ *Ibid.* p. 418.

considered a bond between two families apart from a bond going to be created between the spouses. A girl is more likely to be confined in the house with little or no exposure of outside world therefore she is not very well-aware of knowing men and deliberately picking one for her marriage. Therefore this choice is also devolved upon the guardian to consult him before entering into a marriage as he is well-aware of outside world and any decision he will take will also affect the whole household. If husband turns out a bad person the whole family will get involved and if he turns out to be a good man in favor of his spouse then whole family will be proud of the husband. Marriage in the form of contract is very sacred therefore if this fails it will eventually effect the emotions of both partners because of the involvement of feelings and not money or business.³³⁶

To exercise the right of guardianship, it must be in the best of the interest of woman. *Shar'iah* prescribes certain moral and personal requisites from him that is stipulated to ensure he may neither neglect his duty nor Abuse his right. Following are the Compulsory Guardianship and Juristic views on legal Consent of Virgin Mature Woman. In Shariah, adult and sane man and woman have the same rights to enter into financial contract pertaining property, but according to jurists they do not have equal capacities when it discussed under a marriage contract. "The primary element of the marriage contract is offer and its acceptance of marriage. A man who has attained his legal majority may act independently and on his own behalf in the proposal of marriage which is a necessary part of the contract. A woman in her legal majority, however, may not always act independently or on her own behalf in her acceptance of this proposal. Unlike other types of contractual relationships (buying, selling,

³³⁶*Al-Ahwal al-shakhsyah* AbuZahrah, Muhammad, (Beirut: Dar Al- Kitab Al-'Arabi, 1984), p. 129:

lending, borrowing, etc.), there are special rules for the marriage contract that vary among legal schools”.³³⁷

1. There is difference of agreement among Muslim jurists regarding father as a marriage guardian in case of an adult, sane and virgin daughter. They cannot agree on whether the guardianship in this matter would be *wilayat al-ijbar* or *wilayat al-ikhtiyar*.

Majority of the jurists argue that “the father has *wilayat al-ijbar* over his adult sane virgin daughter. Therefore jurists of Maliki, Al-Sh fi‘ , and Hanbali school of law give father the authority to contract her marriage without her prior permission or consent”.

2. Muslim Jurists have difference of opinion regarding the adult, sane and virgin daughter whether she has right to independently decide about the her marriage contract without a consultation of father or marriage guardian or he can annulled marriage contract in case consultation is not taken. Majority of jurists consider the marriage guardian as crucial and mandatory element of marriage contract, without which marriage is void based on the dith of prophet as mentioned above in Chapter 2 for this reason the follows evidences are presented in support of their opinion and reasons behind it.

1. First, the guardian either the woman's father or her grandfather both are normally do their best in protection of his daughter’s interests as custodian of the family. Therefore due to physical vulnerability and lack of social experienthe virgin woman may not married to the wrong person or the it may not be a decite contract. Guardian in the marriage contract, provided the best consultantion her daughter to safeguard her interest which is the sole duty of the guardian.

³³⁷*Women, Family and Gender in Islamic Law.* Judia Tucker. (UK: Cambridge University Press)

2. Secondly The Hadith of the Prophet (ﷺ) presented above, explain that the woman has to consent which shows a guardian is required for the marriage contract. Prophet ﷺ emphasized the role of the guardian and declared marriage void. In his absence therefore the presence of marriage guardian is mandatory element in marriage contract, the other Hadith in which the prophet ﷺ prohibited to define the role of guardian who must not forbid the women to marry or who wished to marry woman for his own interest not of the woman.

3. Moreover, the presence of a guardian is an advantage for the woman in marriage contract, for mutual consideration and agreement between the guardian and the woman on accepting a prospective husband and to support the woman the guardian plays a role of arbitrator to find solutions to any difference arise between wife and her husband in the marriage contract or after marriage. According to the thoughts and views of Imam Abū an-Nafī himself did not go against the doctrine of guardianship in general. Anafi jurists argued about the legal capacity of woman which established her complete right to arrange her marriage contract without consultation of guardian. However, according to Imam Abū an-Nafī, forceful guardianship is forbidden completely, otherwise it is preferred to have guardian present at the contraction of woman marriage. He said, “it is preferable for the woman to have a guardian for the marriage contract. And he wanted the guardianship to be based on acceptance, respect, representation, rather than on obligation. That is, he would not accept a guardianship that is imposed forcibly on the woman”.³³⁸

For the reasons presented above, it is more convenient for Muslim virgin woman and her guardian to agree on marriage contract. Such an agreement guarantees both i. e. the woman and her guardian harmony by exercising their responsibilities in the sense that the guardian

³³⁸*Kitāb al-Mabās* Muḥammad b. Aḥmad al-Sarakhsī (Beirut: Dār al-Ḥadīth al-‘Arabīyah 2002) vol:6, p. 179.

protect her daughter's interest as custodian in contracting the marriage on her behalf and the woman exercise her right of choice under her complete legal capacity.³³⁹

However, the guardian should be restrain himself from preventing the woman to marry from her social status and a pious man, if it is so, then according to Qur'an and traditions of the Prophet he has lost his right and woman has option to release her self from marriage contract from court. Bin Baz had something to say about guardians. "Although Islam has urged people to get married, yet at the same time it warned guardians against treating women under their guardianship unfairly by preventing them from marriage or by confining them to their bedrooms in accordance with Allah's statement",³⁴⁰

1. Juristic views of Maliki school of law

However, the Maliki jurists argue that father of an adult virgin daughter have the legal competence of *wilayat al-ijbar* over the girl. It is stated in this regard the Maliki jurists had argued that father of an adult virgin daughter has the legal ability of *wilayat al-ijbar* over that girl. It is maintained that a father who has the legal capacity can ask his daughter to enter into a marriage of his choice without asking for her permission. However, Maliki provides an exception to this that if a girl is no longer under the guidance of her father and is sane and mature then father cannot give her into marriage without getting her explicit permission. The principle for an adult sane virgin daughter who is under her father's custody he can ask her to marry to a man he desires to without considering the fact whether that particular man is an appropriate match for her or not or whether she would receive *mahr al-mithl* or not.³⁴¹

³³⁹ *Bada' I Sanai* Imam Kasani., vol: 3, p.238

³⁴⁰ *Majallah al-buhuth Al-Islami*, Bin Baz Abdullah, (Riyadh), vol:8,p, 49

³⁴¹ , *Al-Lughat al-salik ila Aqrabal Masalik*, Ahmad Al-Sawi Ahmad vol. 1, (Cairo: Matbaat Mustafa 1952), p. 381

2. Juristic views of Al-Sh fi' school of law

Al-Sh fi' jurists have the same view as Maliki Jurist. Al-Sh fi' has the opinion about father as marriage guardian acts as *wilayat al-ijbar* on his mature, bkr daughter and he manage marriage contracts without her consent. Their argue based on the evidence given in the following tradition:

«³⁴² لَا تُنكَحُ الْأَيْمُ حَتَّى تُسْتَأْمَرَ، وَلَا تُنكَحُ الْبِكْرُ حَتَّى تُسْتَأْذَنَ، قَالُوا: يَا رَسُولَ اللَّهِ، وَكَيْفَ إِذْنُهَا؟ قَالَ:

“A woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought. They asked the Prophet of Allah (ﷺ): How her (virgin's) consent can be solicited? He (the Holy Prophet) said: That she keeps silence..”

«³⁴³ فَذَلِكَ إِذْنُهَا، إِذَا هِيَ سَكَتَتْ»

Jurist specify this *ijbar* for the compulsory guardianship of the virgin girl and guardianship is not implies for previously married. Jurists of Al-Sh fi' school of law draws some conditions for compulsory guardianship over adult sane virgin woman. These requirements are:

1. There is no apparent enmity between the father and his daughter,
2. He marries her to a competent man,
3. He guarantee her *mahr al-mithl* in the local currency,
4. The dower does not pose a problem for the marriage
5. He does not drive her to marry a man who makes her life miserable due to a problem in this man such as being blind or insane.

Al-Sh fi' jurists believe that if these requirements are satisfied, then it is possible for the father to oblige his adult sane virgin daughter to get married even without her permission or

³⁴² *Sahih Muslim* . The Book of Marriage. Chapter. *ijbar* 1419.

³⁴³ *Sahih Muslim* book of Marriage. Chapter 'Seeking permission of a previously-married woman in words, and of a virgin by silence '. *ijbar* 1422

consent. For them *wilayat al-ijbar* is possible only in cases where the guardian is either the father or the grandfather.³⁴⁴

3. Juristic views of Hanbali school of law

Hanbali jurists have two opinions in this case:

a. Majority of the jurists give guardianship authority to only father as stated, “it is possible for the father to force his daughter to get married without getting her agreement or even consulting her in this matter. *Wilayat al-ijbar*, in this case, can be used only by the father”.³⁴⁵

b. Some jurists Hanbali School of law have another view regarding the woman's full capacity. These jurists argue: An adult sane *bikr* daughter's father when he is not willing may not approve his daughter's marriage with any particular man. In this regard anafi's jurists provide that that guardianship of father is 'wilayat al istihbab' rather than 'wilayat al ijbar' Therefore father or guardian of a girl is not permitted to force an adult and sane woman to enter into a marital contract with a man she is not inclined to marry. The only justification provided by them behind making a girl to get marry according to the will of the guardian is her young age. Where the subject woman is adult, sane and mature in other words physically and mentally able and qualified to utilize her right to enter into a marital contact then forcing or pushing her towards marriage against her will and only to fulfill the wish of her guardian is completely unjustifiable and not permitted³⁴⁶.

4. Juristic views of anafi school of law

anafi jurist discussed evidence to support their view point as follows:

First, they refer to what Ab Bakr and Ab Musa Al-Ashari narrated about the Prophet making void the marriage of a virgin girl whose father forced her to get married but she did

³⁴⁴*Al-Umm*. Muhammad Al-Shafi'i, (Beirut: Dar Al-Marifah, 1987) vol. 5. pp. 17-18.

³⁴⁵*Al-Mughni*, Ibn Qudamah (Beirut: Dar al-Kitab Al-Arabi, 1972) vol. 3, p. 380.

³⁴⁶*Al-Mabsut*. Al-Sarkhasi (Beirut: Dar Al-Marifah, 1987). vol.5. p. 2.

not like it . Second, “they also use evidence from Khansa, who once came to the Prophet (ﷺ) and complained to him that her father made her marry his nephew and she told the Prophet(ﷺ) that she did not like this marriage. The Prophet (ﷺ) advised her to accept what her father did, but she replied that she did not like it. Then, the Prophet (ﷺ) asked her to leave and get married to whoever she wanted. She said after this, that she would accept what her father decided for her and added that she did this because she wanted other women to know that fathers do not have the right to force their daughters in to marriage”.³⁴⁷

anafi Jurists explained this with the hadith by stating “the Prophet did not deny or disagree with what she said about fathers, nor did he ask her whether she was virgin (bikr) or previously married (*thayyib*)”. Third, anafi jurists arguments that “since an adult woman has the right to do whatever she wants with her property it is worth pointing out that there is no discrimination between a virgin and a previously married (*thayyib*)”.³⁴⁸

Based on the above mentioned evidences by anafi jurists it is clearly defined that an adult sane Virgin muslim woman has complete legal capacity to exercise her right to independently contracting her marriage without consulting any person.

However, because a virgin woman is typically introverted and desist from expressing her consent or requirements for her marriage, anafi jurists maintained that “there is no need for a woman's explicit consent in this case, as it is enough for her to indicate in some way that she accepts the marriage But if she indicates in some way that she is not comfortable with the marriage then this does not count as consent”.³⁴⁹

³⁴⁷*Kit b al-Mabsut* Muh ammad b. A mad al-Sarakhsi (Beirut:, D r I y ' alTur th al-'Arab 2002) vol:6, p. 169.

³⁴⁸*Badai Sanai*, kanasi. vol. 2, p 283

³⁴⁹*Al-Mabsut*, Sarakhsi. vol. 5, p. 3.

Similar opinion was supported by Ibn Al-Qayyim Al-Juwzi, who argued that: the father of a rational mature bibr woman may not interfere in what she owns unless she permits him to do so. Nor can he force her to give anything of what she has without her approval.³⁵⁰

From these viewpoints given by Muslim jurists of different school of law, it is concluded that the opinion of Ibn Qayyim alJuzz is clear based on the evidences, support the opinion of anafi Jurists. anafi jurists concluded their opinion by saying that the guardian, whether a father or someone else, under any condition cannot force an adult sane virgin girl to get married to someone, if she does not want because of the legal capacity of the virgin girl. The guardian has to consult the woman under his guardianship either directly through asking her about her opinion, or indirectly, through asking the mother to approach her daughter and consult her.

«أَمَرُوا النِّسَاءَ فِي بَنَاتِهِنَّ»³⁵¹

This is in accordance with what “the Prophet was reported to have said: narrated Abdullah ibn Umar Messenger of Allah () said: Consult women about (the marriage of) their daughters”

Therefore it is concluded that although jurists from Maliki, Al-Sh fi‘ , and Hanbali supported *wilayat al-ijbar* in the case of adult sane virgin girl, this support was not absolute. Evidence for this comes from what Maliki jurists said regarding the unacceptability of compulsory guardianship if the bibr woman has been declared as legally competent by her father. The father of such a woman may not contract her marriage without her prior consent.

Al-Sh fi‘ jurists suggested some conditions for *wilayat al ijbar* for the father. For the application of *wilay al ijbar*, the guardianship is restricted to father or grandfather only. No school of law forbids guardian to consult her daughter before settlement of marriage contract.

³⁵⁰ *Zad al-mayad*, Ibn Al-Qayyim Al-Jawzi (Cairo: Dār-al-turath, 2000) vol.4. p. 43.

³⁵¹ *Sunan Abu Dawud*, dith1974.

All jurists have consensus on the issue of consultation of woman either in case of wilayat al ijabr or else based on the above mentioned dith. anafi jurist Imam Al-Sarkhasi, argued on granting woman capacity to make her own marriage contract by saying “because it is the woman who will live and associate with the husband, she will lead a good life with the husband that she chooses rather than the one who her father chooses for her”.

Muslim jurists have opinion that the woman has capacity to choose her prospective husband. Imam Ibn Al-Qayyim second the opinion of anafi jurists in respect of giving the woman the right to decide about her conditions in marriage contract and choose prospective husband of her status without consultation of male guardian. To present his view point he writes:

“The father of an adult, mature, and virgin woman is not permitted to act on her behalf in any matter of her possessions regardless of how trivial this matter could be”.³⁵²

Therefore in marital contract an adult, sane and virgin woman has complete capacity to decide for herself. This opinion is also viewed by Abdullah Bin Baz, a contemporary muslim scholar, who writes: “It is neither reasonable, nor conventional that one may not be allowed to initiate a contract by himself/herself, although his/her agreement to the contract is required. What guarantees the correctness of what one does is his/her qualification. Thus, if the virgin woman is mature and rational just like any matron, it is difficult to understand why she may be forced to get married to a man she does not want, or why a marriage contract which she initiates should be void”.³⁵³

³⁵² *Zad al-maad*, IbnQayyim, ,vol.4. p. 41.

³⁵³ *Majallah al-buhuth Al-Islami*, Bin Baz Abdullah, (Riyadh), p.47. vol:8.

3.6.2 *Wilayat al-Sharikah* (guardianship based on partnership)

The anafi jurists referred this another type of guardianship “*wilayat al-istihbab*”. “Guardianship without the right of compulsion is exercised where the woman, whether a virgin or previously married, possesses full legal capacity, but in deference to social customs and traditions, delegates the conclusion of her marriage to a guardian. Some Islamic jurists call it ‘joint guardianship’ when the woman has been previously married”.³⁵⁴

«إِذَا خَظَبَ إِلَيْكُمْ مَنْ تَرْضَوْنَ دِينَهُ وَخُلُقَهُ فَرَوْجُوهُ، إِلَّا تَفْعَلُوا تَكُنْ فِتْنَةٌ فِي الْأَرْضِ، وَفَسَادٌ عَرِيضٌ»

“Ab Hurairah narrated that: The Messenger of Allah said: ‘When someone whose religion and character you are pleased with proposes to (someone under the care) of one of you, then marry to him. If you do not do so, then there will be turmoil (Fitnah) in the land and abounding discord (Fasad).’³⁵⁵

Co-partners guardianship is applied when a woman whether virgin or formerly married even though carrying complete legal capacity further delegates the right regarding decision of her marital contract to a guardian showing respect for her prevailing social practice or tradition. In this situation, the guardian is considered to be as an agent (*wakil*) of woman rather than a guardian (*wali*) of woman. When a woman is previously married (widow or divorced) some Islamic jurists titled such guardianship a joint guardianship *wilayat as sharaka* (i.e. consensus between the woman and her guardian).

The consensus amongst Muslim jurists is that “the woman, even of full legal capacity, and whether previously married or not, should not conduct her own marriage contract. Only the anafi differ, requiring a guardian to conduct a marriage contract only if the woman is of no or limited legal capacity. The Maliki Jurists argued that father is regarded as entitled, at his discretion, to conclude marriage on behalf of his minor sons, or his virgin daughters up to any

³⁵⁴*The Status of Women under Islamic Law*, Nasir, Jamal J., (London: Graham and Trotman, 1990), p. 9.

³⁵⁵*Sunan At-Tirmadhi*. Book of marriage. Chapter: What Has Been Related About: dith 1084.

age”.³⁵⁶ Imam Abū an-fah has argued in opposite to the majority has agreed upon. In his opinion the adult rational woman the right to marry herself or other women to proposing men with no need to go back to the guardian or asking for his permission, the guardian's role in the marriage contract is desirable but not compulsory. Imam Abū Abū an-fah explained that even though it is not desirable but an adult woman may initiate her personal marital contract or of any other woman. An adult woman may enter into her marital contract whether she is *bikr* or a *thayyib*. However the marital contract must be a reasonable where the agreed dower is *mahr al-mithal* or more than that and that marital contract would be valid one. However the followers of Imam Abū an-fah are of the opinion that it is more recommended when the woman enters into a marital contract led by her guardian.³⁵⁷

In fact, anafi jurists give some conditions to the prospective husband. According to jurists, following of the conditions must be fulfilled by the man before entering into marriage contract for the safeguard of the interest of woman.

1. The person must be firm faith and muslim.
2. The prospective husband has to be competent and qualified.
3. He should offer *mahr al- mithl* according to the social status of the woman.

Incase, the man could not fulfilled these prerequisites and marriage contract is final, guardian has the right to annulled the contract by approaching the court. According to anafi jurists in another way woman conclude marriage to a man who is not a suitable match for her social class, or religion (including sects) , or she receives less dower than taken by females brides of her father's family, the guardian has the right to terminate the marriage contract and ask the

³⁵⁶ *Al-Badai. Imam Kasani. Vol II p67.*

³⁵⁷ *Fath al-Qadir, Ibn Al-Humam , vol. 2, p. 2.*

court for *fisk-un-Nikkah*.³⁵⁸ When the above two conditions satisfied the guardian, the woman has complete legal capacity to give consent to the man who propose her for valid marriage without consent of the guardian. In evidence to their view to entitle the woman with complete legal capacity to contract her own marriage, anafi Jurists take evidences from the Qur'an and the traditions of the Prophet mentioned below:

Based on the verses of Qur'an, anafi jurists allowed the a woman to conclude by herself marriage contract and declared the contract legelimate as it ligitimates the woman to present herself for marriage contract by drawing conditions . Allah addresses the Prophet in Surah Al-Ahzab, by saying that

359. *يَأْتِيهَا النَّبِيُّ إِنَّا أَحْلَلْنَا لَكَ أَزْوَاجَكَ الَّتِي ءَاتَيْتَ أَجُورَهُنَّ وَمَا مَلَكَتْ أَيْمِينُكَ ...*

“O Prophet! we have made lawful to Thee Thy wives to whom Thou hast paid their dowers”

Allah almighty has made lawful for Prophet to get married to any believing woman who dedicates herself to the Prophet if the Prophet wishes to wed her. In this verse, ‘dedicates herself’ which literally means ‘she gave herself in marriage’ and this is interpreted woman contract marriage by herself. Furthermore, anafi Jurists used evidence from the Qur'an:

360 *فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّىٰ تَنْكِحَ زَوْجًا غَيْرَهُ ۗ فَإِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا*

“so if a husband divorces His wife (irrevocably), He cannot, after that, re-marry Her until after she has married another husband and He has Divorced her. In that case there is no blame on either of them if They re-unite”.

³⁵⁸ *Badai -Sinai*, Al-Kasani, vol. 2. P.241.

³⁵⁹ Surah Ahzab 33:50

³⁶⁰ Surah Al-Baqarah 2:230

Jurists of Hanafi school of law based on this verse gave their opinion that the guardian is not a requirement in marriage contract³⁶¹.

Allah's Messenger says that an 'aym' enjoys more right regarding her marriage than her guardian. As per Hanafi jurist Ibn Qayyim the word 'aym' means a woman who has currently no husband so a woman could either be a virgin or formerly married but now she is a divorcee or widow such a woman irrespective of her previous marital status enjoys more right regarding her marriage than her guardian. This provides that she carries the right to decide regarding affairs of her marital contract independently of her guardian.³⁶² Further evidence regarding the right of a woman as guardian of herself is reported by Khansa who approached the Allah's Messenger and said to him that I desire women to be aware of that their fathers have nothing to do with affairs relating to their daughters.

Imam Sarkhasi argued that "This was said by a woman in front of the Prophet, who did not show any objection to it. Therefore, according to the Hanafi School, this constitutes a clear indication that a woman may be the guardian of herself or of another woman with no interference from men whatever so"³⁶³.

A distinctive feature of Imam Abū Hanīfah's contribution in Islamic law is to define individual autonomy and remove unjustified restrictions on legal capacity. Muhammad Hashim Kamali argues that Imam Abū Hanīfah declares that the community or the government has no authority to interfere in the personal liberty of the individual unless the person has breached the law. Hanafi school of law therefore entitled an adult girl to enter into her marriage contract without the presence of her legal guardian (*wali*), a declaration that distinguishes it from majority school of laws. Guardianship is in accordance to the needs of the

³⁶¹ *Badai Sanai* . al-Kisani. Vol 2. P. 45

³⁶² *Zad al-maad*, Ibn Qayyim, ,vol.4. p. 43.

³⁶³ *Al-Mabsut*, Al-Sarkhasi, vol.5, p. 10.

ward and once the minor has attained the age of majority there seems to be no such need. Moreover, as the Qur'an grants an adult woman complete authority to manage her property there seems to be no issue that such authority cannot be exercised by her while entering into marriage contract. The Imam Abū Abīn al-Fah has in addition provided for equality (*kaf'*) in marriage along with the provision of a fair dower (*mahr al-mithl*) to wife.³⁶⁴

3.6.3 Guardianship and legal capacity of previously married woman (*Thayyib*)

The consensus of Muslim jurists established on doctrine of guardianship in marriage contract of previously married woman. This kind of guardianship is titled as *walayat al-istihbab* the guardian is the father or someone besides him.³⁶⁵ This is viewed by Ibn Qudamah, who argues “If a matron is an adult she has to be consulted and she has to say that she is convinced, and there seems to be a consensus among jurists in this regard”.³⁶⁶

« النَّبِيُّ حَتَّى تُسْتَأْمَرَ فَقِيلَ: يَا رَسُولَ اللَّهِ، كَيْفَ إِذْنُهَا؟ قَالَ »

“A virgin should not be married till she is asked for her consent; and the *thayyib* should not be married till she is asked whether she agrees to marry or not. It was asked, O Allah's Apostle! How will she (the virgin) express her consent? He said, By keeping silent.”³⁶⁷

On the basis of this clear evidence, consensus of Muslim Jurists on this issue that the guardian can't force previously married adult woman to marry again without her consent based on a

dith narrated by Sunan Nasai and Sunan Abū Dawūd: “A guardian has no concern with a woman previously married and has no husband”. Only disagreement amongst the juristic opinion is presented by Hasan Al-Basri who argues that

“the father may have *wilayat ijbar* over his mature *thayyib* daughter and father may force his adult *thayyib* daughter to get married. Ibn Qudama states: he had never heard anybody say

³⁶⁴ *Shari'ah Law An Introduction*. Mohammad Hashim Kamali. (Oxford: One world Book) 2009.p. 71.

³⁶⁵ *Al-Mabsut*. Shams Al-Din Al-Sarkhasi, vol 5 p. 9

³⁶⁶ *Al-badai as sanai*. Imam kasani. P. 178.

³⁶⁷ *Sahih al-Bukhari* Book of Tricks Chapter: (Tricks) in marriage dith 6968

something like what Hasan Al-Basri said. Therefore, Al-Basri's statement about permitting the father to behave in this way is a deviation from the mainstream as well as a violation of the *Ijma* and general consensus among the followers of the Prophet's sunnah.”³⁶⁸ Muslim jurists based their views on the evidence taken from the traditions of Prophet :

« لَا تُنْكَحُ الْأَيْمُ حَتَّى تُسْتَأْمَرَ، وَلَا تُنْكَحُ : يَا رَسُولَ اللَّهِ، وَكَيْفَ إِذْنُهَا؟ قَالَ: «
 “An *aym* has more right to her person than her guardian. And a virgin should also be consulted, and her silence implies her consent”.³⁶⁹

The jurists unanimously argued that as previously married woman experience the married contract before and she knows what it is, therefore she cannot be forced to conclude her marriage contract. This is not the case with the virgin woman.³⁷⁰ The explanation and interpretation of the *idh* is that the previously married woman has full legal capacity to contract her own marriage therefore guardian must consult her and the woman must show her explicit acceptance or rejection in words. The woman must explicitly declare her conditions of the contract and she may specify her dower by herself. Imam Kasani, Hanafi jurist, argued “If the woman is a *thayyib*, then her consent on the marriage could be expressed verbally sometimes or in deeds at other times. Her consent is verbal if she states in some way that she agrees to marry and so on. As for her consent to the marriage in deed, and not in words, this could be case when she gives him access to herself and then asks for *mahrand nafaqah*”.³⁷¹ This declared her consent and willingness in marriage practically rather than in words. Maliki jurists also consider the previously married woman the right to consult and her opinion in her marriage. *thayyib* woman might not be pushed into a marital contract by her father or guardian. She is required to be consulted by in her marriage and must have granted her

³⁶⁸ *Al-Mughni* Ibn Qudamah vol. 7, p. 385.

³⁶⁹ *Sahih al-Bukhari* Book of Marriage *idh* 5136

³⁷⁰ *Mughni al-muhtaj* Al-Sharbini, vol. 3, p. 150.

³⁷¹ *Badai al-sanai*, imam Kasani. vol. 3, p. 383

consent in this regard. Along the same lines, Al-Sh fi' jurists also argued that "there should be an explicit permission by *thayyib* in order for the marriage to proceed. The reason they insisted on her permission is that she is no longer shy, as she had been married before".³⁷² In case of the guardian of *thayyib* force her to marry there are two stances about such marital contract: If *thayyib* is agreed regarding the marital contract after the conclusion of the contract the marriage contract will be considered valid, but if she is not agreed regarding the marital contract such contract will be considered void. The second stance is that the marital contract that is concluded without the consent of woman will be considered void whether she later agrees to contract or not. This stance provides that the consent of *thayyib* must be obtained at the time of contract not after the conclusion of contract.³⁷³ Ibn Taimiyah showed his agreement with the jurists of Hanafi, Maliki, Al-Sh fi' , and Hanbali jurists, he writes:

"An Adult previously married woman (*thayyib*) cannot be forced in marriage by her father or by anybody else without her permission, and there is an (ijma) consensus among Muslims on this matter".³⁷⁴ It is concluded that Muslim jurists are unanimously acknowledge the legal capacity of previously married adult woman to make her new marriage contract without consultation of her guardian. This opinion is based on the clear evidences derived from the Qur'an and Hadith.

This is discussed by Zakariya Nadvee, who writes: Similar to it is the matter of a future bride and her guardian. Woman is informed that her guardian has a authority regarding her marital contract and without his permission her nikkah would not be effective. The guardian is informed that a woman has a right to manage her affairs to an extent that he has no right to intervene in her marital contract. However, the basic theme of all the relevant traditions in this

³⁷²Ibid. p. 385.

³⁷³*Majmaal fatawa*, Ibn Taimiyah vol. 32 p 29.

³⁷⁴Ibn Taimiyah, *ibid*, p. 39.

regard is that both of them has a role to play and there should be mutual consultation between them. The guardian don't have unlimited powers to preclude the girl from exercising her legitimate right in this regard. On the other hand the woman is also not permitted to consider and exercise her independence in this regards to an extent that might result in disgrace of her family. The guardian cannot compel an adult woman in the matter of her marriage but can advise her regarding this significant decision of her life. Guardian has certain preferred rights regarding minor girl but in the matter of an adult woman when there are conflicting approaches regarding marital contract between the guardian and an adult woman going to be married, the approach of an adult woman will have preference over that of a guardian and this is endorsed by the Qur'an and the traditions.³⁷⁵ Preventing a previously married Muslim adult woman from re-marriage may cause her interests damage and it is unjust for the guardian to deprive the woman of something that Shar'iah has granted her legal capacity to perform and it made a source of chastity, tranquility for Muslim woman. Such unjust behavior by the marriage guardian, can lead the woman into a lot of distress and denial of her complete legal capacity.

3.7 *Shari'ah* rulings regarding Dower (*Mahr*) in marriage contract

The dower is another important element of marriage contract without which marriage cannot be solemnized. It is legitimize by The Qur' n and the adith of Prophet Muhammad . It is consider as the legal right of the wife to pay her by her husband during his lifetime and in case of his death, it is paid from his inherence amount. The wife is the exclusive owner of dower. No one, not even her guardian may take any of it unless she consents to such taking out of her own free will.

³⁷⁵*Modesty and Chastity in Islam*. Mohammad Zakriya Nadvi (Kuwait: Islamic Book Publishers, 1982), p. 102.

وَأَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا³⁷⁶

“and give the women (on marriage) their dower As a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer”.

The Qur'an and literature on Islamic jurisprudence defines *mahr* in different terms, including:

“An *ni lah*: unconditional donation (not expecting anything in return), *Al fari ah*: obligation or prescribed amount, *Al Hibah*: gift or present , *Al Ajr*: payment or compensation, *As aduqah*: sincere gift or charity”³⁷⁷ Legal definition of dower (*Mahr*) according to anafi school of Law is “the property which is incumbent on a husband either by reason of its being named in the contract of marriage, or by virtue of the contract it-self”.³⁷⁸

It is obvious from the definition that husband is indebted to give dower to his wife even if it is specified or not in contract. Al-Hedaya defines: “the payment of dower is enjoyed by the law, merely as token of respect for its object (a man) wherefore the mention of it is not absolutely essential to the validity of a marriage and for the same reason a marriage is also valid although the man were to engage in the contract on the special condition that there should be no dower.”³⁷⁹

Nevertheless, “this definition and others introduce the importance of dower in the marriage contract. It is not the price of the women to enjoy her body but it is an honour for the wife, which expresses the real desire of the husband to become his partner”³⁸⁰. Imam Malik goes with an additional feature of dower for valid matrimonial contract. “A marriage contract

³⁷⁶ Surah An Nisa 4:4

³⁷⁷ “al-nihla, al farida, al-hiba', al-ajr, al-uqr, al-`ala'iq, al-sadaq, al-tawl, al-nikah”.

³⁷⁸ *BidayatulMujtahid*, IbnRushd.vol 2. P. 18

³⁷⁹ *Al-Hedaya*.vol 1, P. 81.

³⁸⁰ *The family laws of Islam*. Muhammad Iqbal Siddique (New Delhi, International Islamic Publishers, 1988) p 79.

posses guardian, dower, contracting parties and offer and acceptance are essentials for valid marital contract”³⁸¹.

The dower (*Mahr*) is an exclusive right of wife and the Qur’an made it mandatory on husband to give it willingly with pleasure and in good manner to his wife.³⁸² Legal right of wife towards significance of dower will be discussed later in the chapter.

“Anas (may Allah be pleased with him) narrated that the Prophet (ﷺ) saw 'Abdur-Rahmánibn 'Awf wearing dyed clothing. He asked him, ‘What is this?’ He answered, I married a woman with a nawáh amount of gold³⁸³ (as the dower). The Messenger of Allah told him, ‘Give a wedding party, even if with just a sheep.’³⁸⁴

The dower is divine commandment and it is approved by Allah Almighty. Dower is the mandatory on the husband to give it to his wife at the time of marriage contract. It represents husband’s affection, reverence, and solemn assurance to his relationship with wife. It is the only right of the woman to use it as she wishes. There are six verses in the The Qur’ n³⁸⁵ which refers to the dower and which argues that the dower is a condition for the validity of marriage contract. The Qur’an and the adith consider it imperative for husband to give his prospective wife dower on contracting the marriage.

« سَأَلْتُ عَائِشَةَ زَوْجَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: كَمْ كَانَ صَدَاقَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ قَالَتْ: كَانَ صَدَاقَهُ وَاجِهِ ثِنْتَيْ عَشْرَةَ أَوْقِيَّةً وَنَشَاءُ، قَالَتْ: : : : نِصْفُ أَوْقِيَّةٍ، فَبَلَكَ خَمْسِمِائَةَ دِرْهَمٍ، فَهَذَا صَدَاقُ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِأَزْوَاجِهِ»

“I asked Aisha how much had Allah's Messenger given as Sadaq. she replied his sadaq to his wives was twelve *uqiyyah* and *nash*. she asked, ‘Do you know what a *nash* was. I replied: no. she said it was half an *uqiyyah*; so the total was five hundred dirhams and that was the Allah's Messenger's *sadaq* to his wives”³⁸⁶.

³⁸¹ *Al- Shar’iah al-Kabir*, Dardiri. vol. 2, p. 222.

³⁸² See Surah al-Baqara 2:236

³⁸³ This amount is equivalent to five dirhams or five gold pieces at that time

³⁸⁴ *Sahih al-Bukhari* Book of Wedlock, Marriage (Nikaah) dith 5072 see index serial 30

³⁸⁵ Surah al-Baqara 2:229, Surah An-Nisa 4: 20, 24, 25, Surah al-Maida 5: 5 and At-Talaq 60: 10.

³⁸⁶ *Sahih Muslim* . dith 3318

Islamic Law has neither set a minimum nor a maximum for the dower. However, it has appreciated if an avoidance of extravagance and unjust for both parties of the contract that it will be convenient for marriage to happened. Allah Almighty says:

387 وَإِنْ أَرَدْتُمْ أَنْ سَبِّدَ لَ زَوْجٍ مِّمَّا كَانَتْ زَوْجٍ وَءَاتَيْتُمْ إِحْدَهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ مِثْيَانًا

“but if ye decide to take one wife In place of another, Even if ye had given the latter a whole treasure for dower, take not the least bit of it back: would ye take it by slander and Manifest wrong?”.

It is permissible to pay the entire dower in advance or to delay all of its payment or to pay in advance (*Muajjal*) and to rest after marriage (*mujjal*). It is permitted for the husband to consummate the marriage without given dower to the wife but later on he has to give it to her.. It is obligatory upon husband to give her a dower that is usually given to women similar to her if the husband and wife had not agreed upon a particular amount for the dower. Narrated Aisha, (r.a.) Messenger of Allah () said:

«أَيُّمَا امْرَأَةٍ نَكَحْتُ بِغَيْرِ إِذْنِ مَوَالِيهَا، فَزَكَاحُهَا بَاطِلٌ» «فَإِنْ دَخَلَ بِهَا فَالْمَهْرُ لَهَا بِمَا أَصَابَ مِنْهَا، فَإِنْ تَسَاجَرُوا فَالسُّلْطَانُ وَلِيُّ مَنْ لَا وَلِيَّ لَهُ».

“The marriage of a woman who marries without the consent of her guardians is void. (He said these words) three times. If there is cohabitation, she gets her dower for the intercourse her husband has had. If there is a dispute, the sultan (man in authority) is the guardian of one who has none”.³⁸⁸

If the parties agreed on a specific amount, then husband must give specific amount to his wife. One should be very cautious and must beware of not fulfilling this important condition, if the husband does not pay dower after the marriage contract and before consummating the marriage, the woman is entitled to her complete dower. Alqamah said, Abdullah Ibn Masood was brought the issue of a woman who was married to a man and then he died before consummation and before agreeing upon a dower. Abdullah said, ‘In my view, she should receive the dower of women who are similar to her, she inherits from him and she enters the

³⁸⁷ Surah An Nisa 4: 20

³⁸⁸ Sunan Abi Daud. Book of Marriage. Chapter *Regarding The Guardian.* dith 2083.

waiting period. Ma'qil ibn Sinán al-Ashjaee then bore witness that the Prophet (ﷺ) gave the same decision as 'Abdulláh did in the similar case of Birwa' bint Washiq.³⁸⁹ The traditions of the Prophet (ﷺ) are used to further support what had been revealed in the Qur'an regarding a woman's legal right to her dower. Ab Salama b. 'Abd al-Rahman reported

«كَمْ كَانَ صَدَاقُ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ قَالَتْ: كَانَ صَدَاقَهُ لِأَزْوَاجِهِ ثِنْتِي عَشْرَةَ أُوقِيَّةً وَنَشًا» :
 : : نِصْفُ أُوقِيَّةٍ، فَتِلْكَ خَمْسُمِائَةَ دِرْهَمٍ، فَهَذَا صَدَاقُ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
 لِأَزْوَاجِهِ»

“I asked 'A'isha, the wife of Allah's Messenger (ﷺ): What is the amount of dower of Allah's Messenger (ﷺ)? She said: It was twelve 'uqiyas and one nash. She said: Do you know what is al-nash? I said: No. She said: It is half of uqiya, and it amounts to five hundred dirhams, and that was the dower given by Allah's Messenger (ﷺ) to his wives”³⁹⁰.

This dith is evident to establish the rule that dower giving is mandatory on husband even it may have little value. It is symbol of affection towards wife to make her blissful.

وَالْمُحْصَنَاتُ مِنَ الْمُؤْمِنَاتِ وَالْمُحْصَنَاتُ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ مِنْ قَبْلِكُمْ إِذَا آتَيْتُمُوهُنَّ أُجُورَهُنَّ
 مُحْصِنِينَ غَيْرَ مُسْلِفِينَ وَلَا مُتَّخِذِي أَخْدَانٍ...³⁹¹

“...*(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 ye give them their due dowers, and desire chastity, not lewdness, nor secret ...*”.

These examples are provided the legitimacy to the payment of dower evident from the verses of the Qur'an and practices of the Prophet while giving dower to his wives and ordered to give other woman's of his times Majority of the jurists of legal school of Islamic Law considered dower not a basic requirement for the validity of the marital contract.³⁹² However, if it is not fixed in the marital contract and settled the amount and nature of dower (*mahr*), then the

³⁸⁹ This narration is saheeh.

³⁹⁰ Sahih Muslim . The Book of Marriage. dith 1426

³⁹¹ Surah al-Maida 5: 5

³⁹² *Fath al-Qadir*. Ibn Humam. Vol. 3, p. 205.

dower has to be later on becomes obligatory on the husband to pay during life time after the marital contract is completed except when the wife in her own will intends to waive it.³⁹³

³⁹⁴ يَتَأْتِيهَا النَّبِيُّ إِنَّا أَحْلَلْنَا لَكَ أَزْوَاجَكَ الَّتِي آتَيْتَ أُجُورَهُنَّ

“O Prophet! we have made lawful to Thee Thy wives to whom Thou hast paid their dowers”

In the view of Maliki and Al-Sh fi‘ jurists the marriage contract is like a sale contract. “a dower is like the contract of sale. A dower in a marriage is like the contract of sale. A dower in marriage is price in sale. If it is stipulated in a sale that there is no price, the sale cannot be held valid because it will not be a sale and so the marriage contracted without a dower.”³⁹⁵

anafi, Al-Sh fi‘ ’i and Hanbali jurists agreed that “dower (mahr) is a provision in a marital contract not a condition for the legitimacy of the marital contract”. In case the marital contract does not include a provision for dower (mahr), the contract is still considered to be valid. They argued that dower (mahr) is an obligation upon the husband regardless of whether it is stipulated in the marriage contract or not. Islamic law divides dower into two types:

1. The first is called ‘prompt dower’ (*Mahr muqaddam*) and is due immediately at the completing of the marriage contract.
2. The second is ‘deferred’, (*Mahr mu’ak ar*), and is due at either divorce or death of the husband. Dower can be paid totally at the time of the marriage contract or deferred it totally or in part to a later time or times depending on the agreement between the prospective spouses.³⁹⁶

³⁹³Ibid, *Fath al Qadir*. P. 206.

³⁹⁴ Surah ahzab 33: 50

³⁹⁵ *Al-Mughni*. Ibn Qudama. Vol. 6, p. 722.

³⁹⁶ *Al Hedaya*.vol. 2. P. 38

Incase at the conclusion of marriage contract has no provision for dower (mahr) has made and both the parties agree on a dower (mahr) or parties agree not to include a mahr provision, in all these cases the contract is valid and the husband must give his wife a dower (mahr), which is called *mahr al mi hl*, (proportionate to her social status and qualities) meaning a mahr similar to that of her female member of her family. If the man stipulates not paying dower as a condition for the marriage, the condition is null and void and the contract valid. The man has to pay *mahr al mi hl* to his wife.³⁹⁷ However, the Jurists of Maliki School of law view differs from these views discussed above and considers “the dower (mahr) provision in the contract necessary. However, if the marriage was consummated, Maliki jurists consider it valid and the husband has to give his wife *mahr al mi hl*. If the marriage was not consummated yet, they consider the marriage to be null and void”.³⁹⁸

There is a consensus among all school of thoughts that if the man does not pay a dower (mahr) to his wife at the time of contracting the marriage, whether the dower (*mahr*) was stipulated in the contract or not, it shall be considered a debt of the husband to his wife, unless she unambiguously waives it. If the husband dies before the payment of dower to his wife, the unpaid mahr becomes a debt at priority against the estate of deceased husband. According to Hedaya:“marriage is valid although no dower has been mentioned because *nikkah* signifies a contract of union which is fully accomplished by the performance of the marital rites. Dower is obligatory as a mark of respect for the subject”.³⁹⁹ Fatawa-e-Qazi Khan is one of the collections of *fatwa* of the anafi laws:

³⁹⁷ Ibid. p. 42

³⁹⁸ Ibid

³⁹⁹ Al-Hidaya vol 2. P. 56

"Dower is so essential to marriage that even if it was not mentioned at the time of the marriage or marriage contract, the law will presume by the virtue of contract itself. It is so fundamental a feature of the Islamic Law of Marriage that even if the woman agrees to forego all her right to dower before marriage or agrees to marry without any dower, such agreement would be invalid, but the marriage would be valid".⁴⁰⁰

Dower (Mahr) is a distinctive advantage given to the wife by the *Shar'iah* at the time of marriage contract to decide according to her own wish. *Dower (Mahr)* is an amount or any other material goods which the wife is entitled to received from the husband in consideration of marriage.

The dower (*Mahr*) is wife's exclusive right and it cannot presented to her family nor to her guardian⁴⁰¹. Muslim jurists are unanimously agreed upon woman's right of dower and considered it an essential part of the marriage contract. There is a consensus jurist regarding the women's rights to their dower and it should be part of marriage contract before offer and acceptance. In fact, this is an essential requirement of marriage contract, the Islamic jurists argue that those who failed to obey with this obligation by *Shar'iah* they would be ruthlessly punished on the Day of Resurrection.⁴⁰²

It is considered as one of the woman basic rights in case of entering into marriage which is given to repay woman for taking care of a baby, make amends for a feeling of discomfort in relation to leaving her family home, and the fear of starting a new life. As to nature of dower (*Mahr*) it can be a portion of jewelry, substantial amount of money or as even modest as

⁴⁰⁰ *Fatawa I Qazi Khan*. Imam Fakhruddin Hasan Bin Mansoor al-Farghani d.592AH (commonly known as Qazi Khan, A Classical Hanafi Mufti & Scholar) New Delhi: Kitab Bhavan, vol. 1 p.10002

⁴⁰¹ Imam Qurtubi. "The mahr should be given to the women directly, not to the family. Mahr should further not be used on wedding expenses or for basic necessitates, but rather should be left to the discretion of the wife". *Al-Jami' Ahkam al-Qur'an*. vol 2. p. 23

⁴⁰² dith explains the sevier punishment for husband in this regard.

teaching the wife a portion of the Qur'an. There is consensus among Muslim jurists that no upper limit can be declared upon dower (*Mahr*) by anyone not even by the state but they agreed upon that minimum limit can be fixed. There is no maximum amount that it can be set at, and the wife determines the amount herself the dower (*Mahr*) can come to constitute a means of financial independence during the marriage or as a widow and a means of financial security for the marriage. As regards the lowest value of a marriage gift, scholars from anafi School claim that “a martial present cannot be lower than 10 silver dirhams”. “The anafi School set the minimum limit and provides that mahr should not be less than ten Dirhams. The Maliki jurists set the minimum *Mahr* limit to three *Dirhams*. These minimum amounts provide the symbolic, as against the monetary worth of the marital present”. Allah Almighty says:

وَأِنْ أَرَدْتُمْ أَسْتَبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَءَاتَيْتُمْ إِحْدَهُنَّ قِنْطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا أَتَأْخُذُونَهُ
بِهَتِّنَا وَإِنَّمَا مِثْلُهَا⁴⁰³

This verse from Surat Al-Nisa' unequivocally commands that dower must be given to wife with contentment, It abandon the un-Islamic practice regarding dower and this word “give” in verse is used in the imperative form. Jurists expressed their views about this verse “that those who should give are either the husbands or the guardians. In the case of the husbands, they are obliged to give women their dowers, which means out of their own good pleasure or willingly”⁴⁰⁴. The amount of the dower (*mahr*) should not be symbolic but rather should be decided by the two parties and should reflect the women's social status, expectations and needs. *Shar'iah* defines Dower (*Mahr*) in two forms: “*mahr musamma* and *mahr al-misal*”.⁴⁰⁵

⁴⁰³ Surah An Nisa 4:20

⁴⁰⁴ *Tafsir al-Qur'an al-Azim*, Ibn Kathir, Ismail, vol. 2, p. 202.

The former relates to a gift that worth is arranged and accepted by both sides, and included in a legal marriage contract. Moreover, the specified *Mahr* cannot be lower than the basic dower (*mahr*). As far as the latter is concerned, it is a gift which price depends on the woman social status. However, according to the Hanafi school of law, not only is the woman social status perceived, but it also depends on relatives status on bride's side. It is worth mentioning that remuneration of dower (*mahr*) can be extremely high and it is connected with age, beauty, wealth, Allah swtliness, and bride's virginity. However, other schools claim that the price can be determined by factors such as: wisdom, cleverness, and generosity.

According to the Islamic law, dower (*mahr*) can be everything which present material value and which is not forbidden in Islam. therefore, it is not permitted to give *haram* prohibited items. On the other hand, some claim that *mahr* can be teaching of the prosperous wife a passage from Qur'an . However, there are many opponents that say it is merely a privilege of the Prophet. As it is discussed about it is sole right of woman to receive dower wholly, therefore, if it is allowed by the wife then guardian can take it otherwise it is totally forbidden in Shar'iah for the guardians to keep woman's dower. It is discretion of wife give her dower to her husband or her guardian. However, her husband or guardian has no choice to take the dower with deception or anything of the kind of deceit, in which case the woman apparently seems to voluntarily give something from her dower. Al-Qurtubi argues that "this verse provides proof for the existence of dower, in any marriage contract, Further support for this also is found in the Prophet's .Ibn Abbas quotes the Prophet as saying: 'Give them their dowers.' If a man gets married to a woman and has a sexual relationship with her, he has to pay her a full dower because enjoying the woman means marrying her".⁴⁰⁶

⁴⁰⁶ *Al-Jami' li Ahkam al-Qur'an*. Abu 'Abdullah Muhammad ibn Ahmad ibn Abu Bakr al-Qurtubi Vol 2. p. 29.

It is also significant to mention that the husband may not ask for the return of the dower (*mahr*) if he decides to divorce his wife. The Quran says:

الطَّلُقُ مَرَّتَانٍ ۖ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا تَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا⁴⁰⁷

“ a divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. it is not lawful for you, (Men), to take back any of your gifts (from your wives)”

3.7.1 Juristic views on Dower (*Mahr*) as bride money

The Muslim Jurists of different schools of law define different purposes of dower due to their cultural practices and understanding of the Qur’ nic verdict on dower. This appears in their definitions of the purpose of dower in ways that are to woman. Dower has been erroneously described by some early Muslim Jurists as a price and consideration that a husband pays for exclusive rights to the sexual and reproductive faculties of the woman analogous to the price paid in the contract of sale.⁴⁰⁸

The Hanafi School of law defines “*Mahr* as the amount of money given by the husband to his future wife in return for her staying home.”⁴⁰⁹ Another Hanafi jurist defines “*Mahr* is the obligatory amount of money that the husband pays to his prospective wife in return for benefiting from her reproductive parts”.⁴¹⁰ Other schools of law including Maliki and Al-Shafi’i, view “*mahr* as part of an exchange due to the prospective wife in return for sexual enjoyment”⁴¹¹. Traditional Muslim jurists discuss dower as “a woman’s right to sexual activity

⁴⁰⁷ Surah Al-Baqara2:229

⁴⁰⁸ *Family Law in Islam*. Mansoori.. P. 71

⁴⁰⁹ *Kitab al-Mabrut*. Ab Bakr Al Saras, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon. 5:62-63

⁴¹⁰ *Sharh Fatwa al-Qadiri* Ibn al-Humam Muhammad Ibn Abdelwaid, 3:304.

⁴¹¹ *Mawhib al-jalili-Šar Mukhtasar Khalil*, Muhammad ibn Muhammad Ibn Abderrahman al-Ma'rifi. Vol 5:p. 172 and Shafi’i fiqh. Al-Nawaw, *Kitab al-Majma’*. Vol: 8, p.605.

within marriage. Jurists consider dower as the husband's right and not his duty," Hanbali jurists define "Mahr is the money paid by the husband for the purpose of nikah (marriage)".⁴¹²

Classical Muslim jurists make a corresponding link between a husband's duty to grant dower (*mahr*) at the beginning of a marital relation and his duty to provide for fundamental support *nafaqa* during the marital relation and both are linked to legitimate marriage relationship.

As the jurists, the dower (*mahr*) makes a wife available to a husband, and the maintenance (*nafaqa*) enables continued access to her during the marriage. Maintenance and sexual access thus become inextricably linked defined in Islamic marriage law by the jurists. That's why, if husband grants his wife with enough food, shelter and clothing, she has no right to refuse him sexual access whenever he needs. If he is not able to supply such maintenance and care, she is not under responsibility to be available to him for satisfaction of his sexual needs. According to Kessia Ali, "for Muslim jurists sex is a husband's right and support is a wife's right".⁴¹³

Asifa Qureshi writes that a husband's marital maintenance duty is not measured as compensation for a wife's household performance but it is measured as compensation for making herself available for satisfaction of sexual needs of her husband. That significant caution is not favorable to the view of mutual marital respect that modern Muslim women activists inclined to represent. However, without completely accepting it such advocacy stance emerges to be incomplete and eventually weak.⁴¹⁴ In this regard, the Qur'anic spirit in considering dower as an obligatory unconditional marital gift. Modern jurist discard the thoughts about dower as a price of sexual gratification, because they viewed sexual gratification is mutual between the spouses. This view is adopted by as-San'aani who explains

⁴¹² *alMu n . IbnQud mah* , p. 679

⁴¹³ *Marriage and Slavery in Early Islam*. Kecia Ali (New York: 2010) p. 94.

⁴¹⁴ *A Meditation on Mahr, Modernity, and Muslim Marriage Contract Law*. Asifa Quraishi-Landes

“ *adaq*, another term for mahr comes from the word *idq* or truthfulness because it indicates the sincerity of the husband’s desire for his wife.”⁴¹⁵

Kecia Ali stated in this regard that if we start with the presumption that marriage and slavery both declare sexual relations with a woman legal then the question arises that what is common in these two scenarios. One obvious similarity is that both demand a kind of payment as in the case of slavery the purchase price, and in the case of marriage mahr for the wife. Therefore juristic debate about mahr creates the conceptual linkage between marriage and sale.⁴¹⁶

Mahr is considered as a price of getting access to a woman’s private parts which after marriage are owned by the husband. “Moreover, this ‘ownership’ is specifically gendered—only males may own this sort of property. This provides an explanation for the juristic belief that women who owned male slaves do not likewise gain sexual access to them by virtue of the purchase price of the male slave”. In this regard the classical jurist imam Al-Shafi‘i said that “the man is the one who marries and the one who takes a concubine and the woman is the one who is married, who is taken as a concubine. It is not permissible to make analogies between things that are different”. That means even though woman can own property under Islamic law however this kind of ownership that declares sexual relations licit is not permitted to women and is specifically held by men with exclusivity.⁴¹⁷ According to Abu Al-Nur, “the dower is what a husband willingly offers to his wife in order to accept him as a husband and partner”. the dower honor the woman in different ways, provided that the woman is not only for enjoyment and that marriage is not looked upon as sex”.⁴¹⁸

⁴¹⁵ *Sharh Bul al Mar m As-San n*, Subul as-Sal m. Vol: 3. p147. (1960)

⁴¹⁶ *Marriage and Slavery in Early Islam* Kecia Ali. p. 49.

⁴¹⁷ *Ibid.* Kecia Ali p.178.

⁴¹⁸ *Manhaj al-sunnah fi al-zawaj* Abu Al-Nur, Al-Ahmadi, (Cairo: Dar Al-Salaam, 1992), p. 40.

The dower uplifts the status of wife according to *Shar'iah* principles. Imam Muhammad Abduh writes: “One should look at the dower as something superior to what Islamic scholars had referred to. The dower, or *saddq*, is not an exchange of, or the price for the body”⁴¹⁹ Ab l Ala Maududi defines dower as “The fact is that dower is an expression of a woman’s worth which can also give her economic security”.⁴²⁰ According to Aziz Yahya Al-Hibri: “Dower signifies the willingness of the man to understand the responsibilities of marriage”⁴²¹

The dower is not a price for right of a husband on his wife. The rules regulating dower in *Shar'iah* confirms this fact. The Qur’an provides that is a husband dissociate with his wife without establishing martial relationship, he is under obligation to pay her half of specified dower (*Mahr*).

لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفَرَّضُوا لَهُنَّ فَرِيضَةً وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ قَدَرُهُ وَعَلَى الْمُقْتِرِ قَدَرُهُ مَتَّعًا بِالْمَعْرُوفِ حَقًّا عَلَى الْمُحْسِنِينَ⁴²²

“ there is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (A suitable gift), the wealthy according to His means, and the poor according to His means;- a gift of a reasonable amount is due from those who wish to do the right thing”.

The verse established that dower become obligatory by mere marriage contract, if the dower has been price of sexual rights and consummation it would have not been admissible on divorcing wife without consummation of marriage. Maulana Wahid ud Din, a renowned modern scholar, does not agree to the statement that “dower is price of a right which husband acquires over the sexual and productive faculties of his wife”. He discussed his views in ‘*Woman in Islamic Shar'iah*’ as “conjugal rights cannot be equated with dower *mahr*. The

⁴¹⁹ Ibid p. 48

⁴²⁰ *The Law of Marriage and Divorce in Islam*. Maududi, Abdul Ala. (Karachi: Islamic Books Publishers) 1983.

⁴²¹ *Muslim Women’s Rights in Global Village: Challenges and opportunities* Aziz Yahya Al-Hibri. Journal of Law and Religion. VolXV . 2000-2001 p. 48.

⁴²² Surah Al-Baqara 2:236

amount of dower is a token sum of money which symbolizes in material form the responsibility that a man has to fulfill in regard to his wife till his last breath. His responsibility towards his wife is maintained and protect. this is a responsibility by the husband who make pledge symbolically at the beginning of material life, by giving the woman a sum of money in the form of *mahr*’⁴²³.

In this regard, the provision of dower indicates an intention of commitment of partner to the relationship and incase the marriage is ended, husband is still supposed to provide dower. Hence, the dower giving in Shar’iah indicates that husband’s initial intention to provide maintenance to his wife with respect and responsibility and absence of ghastly intention towards his partner.

3.7.2 Dower (*Mahr*) as right of wife

The jurists have difference of opinion regarding payment of dower on the basis of consummation of marriage and valid withdrawal of dower after specifying dower in the marriage contract.

Jurists from anafi and Hanabli school of law argued that valid retirement is cause of requirement for giving complete dower to woman provided if no impediment is applied on of them to consummation such as in state of Ihram or observing fasting, or being in her state of menstruation or the husband being impotent that it may prove impediment in having private affiliation.⁴²⁴ Maliki and Al-Sh fi‘ jurists differs from the above by arguing that Mahr becomes obligatory only by consummation of marriage. Therefore if husband retired with her

⁴²³*Women in Islamic Shariah.* Maulana Wahid ud Din Khan. . (India: The Islamic Center 2001. P. 83.

⁴²⁴*Al-Mughni.* Vol. 6. P. 720.

wife and did not establish private relation with her, he will only pay half mahr.⁴²⁵ Majority of Jurists define the legal ways to give dower in different scenarios are as following:

1. The dower is clearly stipulated in the marriage contract and agreed by both parties then it is the sole right of the wife to take it and spend it as she wishes.

2. If the marital contract provides that no dower is to be specified then there are two stances in this regard:

(i) The contract is valid, but the stipulation is invalid, and she is entitled to *mahr-ul-mithl*.

(ii) The stipulation is invalid and it invalidates the contract. This is the view of Ibn Taymeeyah .

3. At the time of marriage contract, if the dower is not stipulated in the contract then the wife is entitled to what is general dower obtained by the brides of her family. The regard will be given to the female members of her father's sisters and her own sisters. It is termed as *mahr ul mithl* (the marital gift received by brides of her family)⁴²⁶.

4. The wife is not entitled to any of the dower if the separation happens before consummation due to demand of separation from wife. If wife demands khul‘ she is obliged to return the dower to her husband.

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا⁴²⁷

“ there is no blame on either of them if she give something for Her freedom. these are the limits ordained by Allah. so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong (Themselves As well As others)”.

5. If the separation happens before consummation of marriage due to a cause by the husband and wife is entitled to half of the dower *mahr*. As Qur'an commands the husband who

⁴²⁵ *Al-fiqh al-islami*. Zuhayli. vol.7. p. 292.

⁴²⁶ *Al-Kasani*. Vol:2, p. 274.

⁴²⁷ Surah Al-Baqara 2:229

divorces his wife before the consummation of the marriage, he is still required to pay half the dower.

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ⁴²⁸

“and if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (Is due to them), unless They remit it or (the man's half) is remitted by Him In whose hands is the marriage tie”.

As the verse explains, the women may forgive the half that he is mandated or the man may pay full amount in order to mend relations. The wife is entitled for full dower (*mahr*) in the following cases: Owing to the death of the husband the wife is entitled to dower either stipulated or *mahrulmithl* whether death occurs before or after consummation of marriage. There is difference of opinion amongst jurists on the issue of death of husband without consummation and fixation of dower in marriage contract. According to anafi jurists, “in this case the wife will get full dower. If the husband did not pay dower, and passes away before paying his dower (*mahr*), the amount should be paid from the wealth of the husband before his inheritance is distributed since the dower (*mahr*) is considered as a debt”.

⁴²⁹“Masruq said on the authority of Abdullah ibn Mas'ud: Abdullah (ibn Mas'ud) was asked about a man who had married a woman without cohabiting with her or fixing any dower for her till he died. Ibn Mas'ud said: She should receive the full dower (as given to women of her class), observe the waiting period ('Iddah), and have her share of inheritance. Thereupon Ma'qil ibn Sinan said: I heard the Messenger of Allah () giving the same decision regarding Birwa' daughter of *Washiq* (as the decision you have given)”.⁴³⁰

According to Maliki and Al-Sh fi‘ jurists: “in case of husband’s death, before consummation and fixation of dower, the wife will not eligible to receive dower. However in case of

⁴²⁸ Surah Al-Baqara 2:237

⁴²⁹ *Badai Sanai*. Imam Kasani. Vol 2, p. 274.

⁴³⁰ *Sunan ibi Dawud*. dith: 2114

consummation, she is entitled to proper dower to all jurists”.⁴³¹ In terms of divorce (*talaq*), the full dower (*mahr*) is required to be paid to the wife.

“لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفَرَّضُوا لَهُنَّ فَرِيضَةً وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ

قَدَرُهُ

“ there is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (A suitable gift), the wealthy according to His means, and the poor according to His means;”

In addition, dower, one initial and another deferred in case of divorce, must be specified and should be of paid by the husband due to the legal capacity of wife to enjoys it.

The dower *Mahr* is a vital component of the Islamic marriage and is tied in with numerous other aspects of the marital arrangement. It can be defined as “a gift, which the husband must give to the wife”. The dower (*Mahr*) is compulsory and without it the marriage cannot take place. The only wife has the legal capacity to decides its amount, although some form of negotiation can be made, and its value that be announced to the witnesses present at the event of marriage and possessed it.

3.8 *Shari'ah* rulings regarding prohibited women for marriage

In *Shari'ah*, marriage is consider as a contract between man and a woman with the aim of legal relationship to achieve the objectives of marriage defined in light of the The Qur' n and traditions of the Prophet , Therefore, Islamic law allows a Muslim man or woman to marry with whom marital relation is allowed under *Shari'ah*. For a valid marriage contract there must be lack of impediments which the Islamic law prohibits. The legitimacy of impediments of women with whom Muslim man is prohibited to marry established from the verses of the Qur' n and the traditions of the Prophet . It could be defined as that “impediment to a valid

⁴³¹ *Al-Umm*. Imam Shafii.vol V, p. 61.

⁴³² Surah al-Baqara 2:236

marriage means to stop a person to marry a woman or a woman to marry a man on the grounds of consanguinity, affinity, or fosterage”.⁴³³ It is permanently *haram* for a Muslim to marry a woman who belongs to one of the following categories. Allah Almighty declared most of the categories of women to whom Muslim Man is not allowed to marry in the following verses:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ فَحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا ...
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“and marry not women whom your fathers married, - except what is past: it was shameful and odious, - an abominable custom indeed”.

- The father’s wife, whether divorced or widowed.
- The mother, including the grandmothers on both sides.
- The daughter, including the granddaughters from the son or daughter.
- The sister, including the half, and step-sisters.
- The paternal aunt, whether she is the real, half, or step-sister of the father.
- The maternal aunt, whether she is the real, half, or step-sister of the father.
- The brother’s daughter, i.e., his niece.
- The sister’s daughter i.e. niece .

In *Shari’ah*., all the mentioned female blood-relatives are a man’s *muharramat* and a man is also *mahrem* to his corresponding female relatives. A marital contract, to any of the *mahrem* whosoever is completely forbidden in Islam. Prophet Muhammad said: “What is haram by reason of genealogy is haram by reason of fosterage”.⁴³⁵ Accordingly, the foster-sisters, foster-aunts, and foster-nieces are all *muharramat* and marriage to them is completely forbidden in Islam. In-Laws relationships created by entering into marital contract including relationship

⁴³³ *Family laws in Islam*. Mansoori. P. 83

⁴³⁴ Surah An-Nisa 4:22-23

⁴³⁵ Sahih Muslim .The Book of Suckling. dith. 3395

of mother-in-law a wife's mother and marriage to the wife's mother is completely forbidden. Another prohibited relation for marriage is the relation of step-daughter that means a wife's daughter from her previous marriage a man cannot marry his step-daughter as well. Furthermore, a daughter-in-law that means the wife of the real son is also a prohibited relation for marriage. These three kinds of female relations are forbidden for marriage in Islam to maintain peaceful relationships with the in-laws. Islam also completely prohibits marrying two sisters as co-wives during the same period of time. Marrying a woman who is non-believer *mushrik* is also prohibited. A woman who is married as long as she is in marital contract her further marriage to any other man is completely forbidden. Practice of polyandry is severely condemned and declared illegal in Shariah. However, a woman may marry another man only if two conditions are satisfied. Firstly, the woman's marriage contract is refrained either because of the death of her husband or because of divorce. Secondly, the wife has completed the period of waiting (*'iddah*) ordained by *Shari'ah*.⁴³⁶

3.8.1 Impediments in inter-religious marriages

According to Islamic Law, marriage is a socio-religious relationship between man and a woman,. For this reason, the concept of *kafu* (equality is significant in marriage contract which includes equality in religion, race, caste, and economic status, Allah has mentioned in the Qur'an:

وَلَا تَنْكِحُوا الْمُشْرِكَةَ حَتَّىٰ تُؤْمِنَ ۚ وَلَا أُمَةٌ مُّؤْمِنَةٌ خَيْرٌ مِّنْ مُّشْرِكَةٍ وَلَوْ أَعْجَبَتْكُمْ ۗ وَلَا تَنْكِحُوا
 الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا⁴³⁷

“do not marry unbelieving women (idolaters), until They believe: a slave woman who believes is better than an unbelieving woman, Even though she allures you. nor marry (your girls) to unbelievers until They believe:...”

⁴³⁶,*The Lawful and Prohibited in Islam*. al-Qaradawi Yusuf. Pp. 93-95.

⁴³⁷ Surah Al Baqarah:221

According to the verse mentioned above interfaith marriage is divided into two types. First type of marriage between a Muslim man and non-Muslim woman. Second type of marriage is between a Muslim woman and non-Muslim man. There is consensus of the jurists that second type of marriage between a Muslim woman and non-Muslim man is *haram* totality prohibited despite the man is from the people of the book or unbeliever. The prohibition is clearly established from the verse mentioned above.

Yusuf al-Qaradawi, a contemporary Muslim scholar has confirmed that it is completely prohibited *haram* for a Muslim woman to marry a non-Muslim man irrespective of fact that a man is from the people of the Book or not. The motive and rationale behind this prohibition is very well plain and explicit linked with the prime objective of *Shar'iah* that is to guard the religion. If Islam would allow such marriages, it will absolutely endanger the faith of a Muslim woman. As a Muslim woman would not only be influenced by the faith and life pattern of her non-Muslim husband but it can also be precisely expected that the husband might preclude his Muslim wife from offering her religious obligations and fulfilling her religious commandments. That is merely owing to the fact that the husband is the head of family and he is generally more dominant as compared to the wife. This proof specifying the prohibition is very strong and unequivocal.⁴³⁸

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِذَا جَاءَكُمْ الْمُؤْمِنَاتُ مَهْجِرَاتٍ فَامْتَحِنُوهُنَّ ۗ اللَّهُ أَعْلَمُ بِإِيمَانِهِنَّ ۗ فَإِنْ عَلِمْتُمُوهُنَّ
 مُؤْمِنَاتٍ فَلَا تَرْجِعُوهُنَّ إِلَى الْكُفَّارِ لَا هُنَّ حِلٌّ لَهُمْ وَلَا هُمْ يَحِلُّونَ لَهُنَّ ۗ وَءَاتُوهُنَّ مَّا أَنفَقُوا ۗ وَلَا جُنَاحَ
 عَلَيْكُمْ أَنْ تَنْكِحُوهُنَّ إِذَا ءَاتَيْتُمُوهُنَّ أَجْرَهُنَّ ۗ ۝٤٣٩

“O ye who believe! when there come to you believing women refugees, examine (and test) them: Allah knows best As to their faith: if ye ascertain that They are believers, then send

⁴³⁸ *The lawful and prohibited in Islam.* Yousuf Qardawi. P. 96.

⁴³⁹ Al-Mumtahinah 60:10

them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them. but pay the unbelievers what They have spent (on their dower), ...”.

Regardless of the reasoning for the prohibition, Khaled Ab Al Fadl, notes, “I am not aware of a single dissenting opinion on this, which is rather unusual for Islamic jurisprudence because Muslim jurists often disagreed on many issues, but this is not one of them”.⁴⁴⁰ Ab Al Fadl’s observation is significant because “the Qur’an is explicitly clear on this issue. Each verse that prohibits interfaith marriage specifically refers to *mushrik* includes the class of unbelievers like polytheists, idolaters, and atheists”.⁴⁴¹

3.9 Conclusion of the chapter

Jurists of Islamic law have not provided in their interpretations at any place that the legal capacity can be defective only because of the gender. Jurists unanimously agreed upon the fact that mature woman whether married or unmarried enjoys complete legal capacity to manage their civil and financial affairs. Compulsory guardianship (*wilayat al-ijbar*) is permitted to provide adolescent man and woman a right to enter into a marriage contract at a stage prior to maturity. The guardian who can be the natural father or grandfather may conclude the marital contract on behalf of his children either son or daughter prior to the stage of maturity and such contract would be considered completely valid. As under aged men and women do not enjoy complete legal capacity and their consent even though required to be obtained has no legal status. anafi jurists support this approach and consider such marital contract as legally valid for the both under-aged genders. However, they may exercise puberty choice (*khayar al bulugh*) and may rescind the marital contract at time of reaching the stage of

⁴⁴⁰ *On Christian Men Marrying Muslim Women*, Khaled Abu Al-Fadl.
<http://www.scholarofthehouse.com/oninma.htm>

⁴⁴¹ “*Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Position*”. Alex B. Leeman. *Indiana Law Journal* Vol. 84. P. 756

puberty. There are two kinds of guardianships known as choice guardianship and shared consent guardianship. A mature woman entering into a marriage contract is subject to a shared consent guardianship. It provides that a mature woman has a full legal capacity and her consent is a decisive condition of a marital contract and if her consent would not be obtained a marital contract would be considered defective and void ab initio. The choice guardianship concept provides that the mature woman has a full capacity to enter into a marriage contract and she should only consult her legal guardian at the event of entering into a marital contract. However in shared consent guardianship a mature woman is required to get the consent of her guardian. In guardianship concept it is viewed that mature woman enjoys complete legal capacity and her consent carries decisive significance for her marital contract to be legally valid. The guardian acts on behalf of a young male or female he should bear a good moral character, should be just in his approaches and must carry a complete legal capacity. These prerequisites must be ensured in a guardian as he is going to perform a significant function that has a serious impact upon the life of a female. Therefore, he should exercise his discretion in an appropriate and sensible manner considering the best interests of a female. As far as the way the consent to marriage is expressed by a female jurists of Islamic law unanimously agreed that a woman who has an experience of prior marriage must provide her consent in a clear and explicit manner. However, for a virgin woman getting married for the first time it is provided that her consent could either be clearly expressive or could be deduced from her conduct at that time as some girls at the time of marriage feel shy to clearly express their consent. Guardian may ask a woman to provide her clear consent prior to the conclusion of marriage but in presence of two witnesses to marital contract. There are parallels in a woman's capacity to conduct her own marriage and manage her own property.

Where the opinion of the school supports a woman's capacity to conduct her own marriage, it also supports, to varying degrees, her capacity over her property. Majority School of law prevents an adult woman from contracting her own marriage and also assigns her guardian her dower, by contrast in Hanafi school an mature woman can contract her own marriage with no guardian and Shar'iah assigns her dower since her capacities for marriage and property are the same. The degree to which a guardian may compel a mature i.e. post-pubescent woman, virgin or otherwise, to accept a marriage appears in and to parallel the extent to which she may manage her own property. The *Maliki* school places an adult women under the marital guardianship of her guardian since she lacks experience with marriage and with property. Other schools presume that woman entails not knowing or lack of awareness about the contract of marriage and property. Consequently, the Hanafi school is unique in granting women legal capacity for marriage. The difference between the schools of law explains how marriage and the matter of women's consent is understood by the jurists. In Hanafi school she is considered an independent individual directly addressed by Allah almighty and therefore obligated to Allah almighty. These points define the nature of the legal capacity a woman who acquires complete capacity and may enter the contract independently.

CHAPTER 4:

LEGAL CAPACITY OF WOMAN REGARDING MARRIAGE OBLIGATIONS

4.1 Introduction of the Chapter

In Islam marriage is considered an important institution that is evident from the fact that Islam guides for maintenance of pleasant relations and mutual love between husband and wife. Marriage assists man and woman to develop mutual understanding which is the basis of contentment of the family. The significance of the role that the woman has in her family is discussed by Naseema Hasan, she writes that “family is the basis of Islamic society. A wife deprived of her proper rights can't play her proper role to form an ideal family. The society will lose its balance if the foundation of the family is weak and not rightly constructed. An Islamic family, more precisely an Islamic wife, provides prosperity, balance and care for coming generations. So if we can ensure the status of the wife and free her from all forms of persecution, we can hope for a better future of a sound and well- disciplined generation”⁴⁴².

Allah almighty has given significance to the family structure in Islam, because it is the unit of human development. Therefore Allah swt assigned each member of the family certain rights and responsibilities. Especially woman as mother and wife is responsible to build a generation who established commandments of *Shari'ah* in life. This is what can be conceived from the adith by Allah's Messenger in which it is stated that: “everyone of you is a guardian and is responsible for his charge; the ruler is a guardian and is responsible for his subjects; the man is a guardian in his family and is responsible for his charges; a woman is a guardian for her husband's house and is responsible for her charges; and the servant is a guardian for his

⁴⁴² “Wife: Her Status and Rights in Islam”. Nasima Hassan . p.3.

master's property and is responsible for his charge”.⁴⁴³ The present chapter describes the legal capacity of Muslim woman regarding marriage obligations and following issues are discussed in detail:

1. Obligations and rights of husband and wife after marriage contract
2. Legal Capacity of woman regarding maintenance
3. Polygamy and legal capacity of Muslim Woman
4. Legal requirements of *iddah* for women,
5. Responsibilities and Legal obligations on woman regarding marriage

This chapter discusses the legal capacity of woman regarding her role as a spouse after marriage contract.

4.2 Obligations and rights of husband and wife after marriage contract

Allah swt has ordered us to treat our wives with goodness and kindness. Therefore, it is essential for a husband to treat his wife with courtesy and respect and as a husband it is his duty and responsibility to feed, clothe and provide accommodation for his wife and children.

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا سِحْلٌ لَكُمْ أَن تَرْتُوا النِّسَاءَ كَرِهًا ^ط وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا ءَاتَيْتُمُوهُنَّ إِلَّا
أَن يَأْتِيَنَّ بِفَحِشَةٍ مُّبِينَةٍ ^ع وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ^ف.

“...on the contrary live with them on a footing of kindness and equity. if ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great Deal of good”

Islam is a religion of equality and fairness. Just as Islam has granted husband certain rights over his wife, it has also granted similar rights to wife over their husbands. Islam has given rights to husband over wife it has also ordered husband to respect and fulfill the rights of wife.

⁴⁴³ *Fath al-bari*. Hajr Asqalani. vol 2. p441

⁴⁴⁴ Surah An-Nisa 4:19

This is high status and rank that *Shar'iah* has granted wife and grant her capacity to enjoy these rights.

4.2.1 Right of husband

The other part of the obedience of wife for her husband is that she should get permission of husband before doing certain acts which are provided here. A wife should not let any person come into her marital house without obtaining the permission of her husband. A wife should not spend the finances provided to her by her husband without obtaining his permission but if she spends finances in his absence after having his consent she is permitted to do so in the light of *Shari'ah*. According to a hadith recorded by Imam Muslim, Messenger of Allah said:

« أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: لَا يَجِلُّ لِلْمَرْأَةِ أَنْ تَصُومَ وَرَوْجُهَا شَاهِدٌ إِلَّا بِإِذْنِهِ، وَلَا تَأْتِي فِي بَيْتِهِ إِلَّا بِإِذْنِهِ، يُرْأَمِرُهُ فَإِنَّهُ يُؤَدِّي إِلَيْهِ شَطْرَهُ»⁴⁴⁵

“Allah's Messenger () said, It is not lawful for a lady to fast (Nawafil) without the permission of her husband when he is at home; and she should not allow anyone to enter his house except with his permission; and if she spends of his wealth (on charitable purposes) without being ordered by him, she will get half of the reward”.

Furthermore, if she has not obtained the permission of her husband before spending but confident that he would not object later or permit her then she is also allowed to perform such function. The husband's authorization is also needed when the wife is inclined to spend the money in voluntary charity and she would not be able to do so without his consent. There might be situations where the husband is miser and accumulator and do not spend on his family that includes wife and children. Then a wife is permitted to spend as much as she considers suitable in any particular situation from the financial assets of her husband without his permission but while staying in moderation in this regard. It is also provided that a wife

⁴⁴⁵*Sahih Al-Bukhari* Book 67 Book of Marriage, Chapter:87 hadith 129

should not have fasting without the consent of her husband except in the month of Ramadan. Mutual affection and harmony between a wife and husband in marriage can be acquired when there is consensus between them regarding such affairs. As any kind of disagreement regarding these affairs, may bring the marital life into distress. Islam has always endeavor through its commandments and teachings that relation in marital life should be based on affection, care and mercy to preserve purity and harmony in this social as well as sacred relation. The Messenger of Allah ﷺ permitted Hind bint ‘Utbah to take wealth of her husband without his permission.

“the wife of Ab Sufyan, when she came to him and said, O Messenger of Allah, Ab Sufyan is a stingy man. What he gives me is not enough for me and my child, unless I take from him without his knowledge. He told her, Take what is enough for you and your child, in moderation.”⁴⁴⁶

Islam declared wives to be responsible for a fine conduct in marital affairs and responsible while conducting the domestic affairs. The wife should conceive the obligation that religion of Islam has granted her such as to take good care of her husband and children by declaring her as a shepherd over the house of her husband. A woman has been precisely indicated of her responsibility considering the nature of her role in this regard in a hadith where the prophet has declared that every person in Islamic social life is responsible for all those who come under his power or umbrella of authority and should not avoid his or her responsibility.

“Each of you is a shepherd, and each is responsible for those under his care. A ruler is a shepherd; a man is the shepherd of his family; a woman is the shepherd of her husband’s house and children. For each of you is a shepherd and each of you is responsible for those under his care.”⁴⁴⁷

In Islam there are two basic features that a Muslim wife should always possess. She is always considered and declared as a creature who should always be affectionate towards her children

⁴⁴⁶ al-Bukhari. Book of Judgments (Ahkaam) Hadith 7180

⁴⁴⁷ Al-Bukhari. Book of Responsibility Chapter: Al-Adab Al-Mufrad Hadith 6719

and gentle towards her husband. The Prophet admired these two features which were present in the women of Quraish and were considered as best women in Arab with regards to being affectionate with their children, gentle and caring with their husbands and honoring their rights,taking good care regarding the affairs of their financial assets in a wise and honest manner:

“The best women who ride camels are the women of Quraysh. They are the most compassionate towards their children when they are small, and the most careful with regard to their husbands’ wealth”.⁴⁴⁸

It is a one lesson of Islamic religion that a wife should take good care of her looks and beauty for the comfort of her husband so that her husband would like her whenever he looks and that would bring joy into his life. It is prohibited for a woman to dress a sad attire for more than three days but only at the event of her husband death when she is commanded to mourn for four months and ten days. “Ibn ‘Umar narrates that Messenger of Allah ﷺ said, A man’s rights over a woman (his wife) is that she should not refuse his advances and she should not Fast (other than compulsory Fasts) without his permission. If she does then she is a sinner and none of her (voluntary) worship is accepted if she does not have permission from her husband. If she does Fast without permission then the husband will be rewarded and the woman will have sins recorded in her book of deeds. And she should not leave the house without permission. If she does then until she does not repent Allah and the angels curse her. He was asked, ‘What if the husband is a tyrant?’ he replied, Even if he is a tyrant.”

Messenger of Allah ﷺ said:

«وَالَّذِي نَفْسُ مُحَمَّدٍ بِيَدِهِ، لَا تُؤَدِّي الْمَرْأَةُ حَقَّ رَبِّهَا حَتَّى تُؤَدِّيَ حَقَّ زَوْجِهَا، وَلَوْ سَأَلَهَا نَفْسَهَا وَهِيَ عَلَى قَتَبٍ لَمْ تَمْنَعَهُ»

“I swear by the Lord in whose control is my life a woman cannot fulfil the rights of Allah until she fulfils the rights of her husband.”⁴⁴⁹

⁴⁴⁸*Sahih Muslim*,Book of merits of companion.

⁴⁴⁹*Sunan Ibn Majah* dith 133

4.2.2 Rights of wife according to *Shari'ah* Injunctions

Islamic *Shar'iah* has made obligatory on husband to fulfill four duties rights towards his wife

« يَا رَسُولَ اللَّهِ، مَا حَقُّ زَوْجَةٍ أَحَدِنَا عَلَيْهِ؟، قَالَ: أَنْ تُطْعَمَهَا إِذَا طَعِمْتَ، وَتَكْسُوَهَا إِذَا اكْتَسَيْتَ، أَوْ اكْتَسَبْتَ، وَلَا تُضْرَبَ

الْوَجْهَ، وَلَا تُفَيِّحَ، وَلَا تُهْجَرَ إِلَّا فِي الْبَيْتِ»

“Muawiya Qasheeri narrates that he asked Messenger of Allah : What do you order us to do in relation to our women? He replied, ‘Feed them what you eat, clothe them with what you wear and neither hit them nor Abuse them verbally’.⁴⁵⁰

(1) Feed her the same foods that he eats.

(2) Clothe her in the same manner that he clothes himself.

(3) Provide her with suitable dwelling according to his means, and

(4) Sexual relations. It is necessary for a husband to seek medical aid for his wife if she is sick

and allow her to meet with her family. People heard the last advice of Messenger of Allah

warned them about the following three things ‘Perform *Salah* punctually, treat your slaves

well, and fear Allah in relation to your women. They are entrusted to you and therefore treat

them well.⁴⁵¹ Abdullah bin ‘Abbas states: In order to please my wife I always wear nice

clothes. When I do not find her attractive in dirty clothes, how is it possible that she would

find me attractive in them

4.3 Provision of maintenance- a requirement of Marriage contract

A wife is entitled to obtain maintenance from her husband as stipulated in a marriage contract

between the husband and wife or their guardians and agreed upon by both parties. Therefore, a

stipulation by the husband to provide maintenance to his wife at the event of any dispute or

separation between the couple is completely enforceable by the Shariah. The wife may

demand from her husband in marital contract to provide her a separate maintenance if the

⁴⁵⁰ Sunan *Abi Dawood* . dith 2146

⁴⁵¹ *Keemya-e-Sa'aadat* P. 262

husband mistreats her or marries another woman. Such agreement would result in the entitlement of wife to claim maintenance till her lifetime and more over such right cannot be taken away from the wife by divorcing her⁴⁵². Husband according to his resources and social class provides maintenance.

لِيُنْفِقَ ذُو سَعَةٍ مِّن سَعَتِهِ ۗ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ...^ط

“let the man of means spend according to His means: and the man whose resources are restricted, let Him spend according to what Allah has given Him.”⁴⁵³

4.3.1. Woman’s right of maintenance during marriage

Shar’iah makes maintenance of the wife obligatory on the husband to give her as its husband’s legal responsibility to provide maintenance to the wife. Legitimacy of maintenance is established by a number of the The Qur’ nic verses and dith of the messenger of Allah.

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ ۗ لِمَن أَرَادَ أَن يُتِمَّ الرَّضَاعَةَ ۗ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ^ط

“He shall bear the cost of their food and clothing on equitable terms.”⁴⁵⁴

According to muslim jurists maintenance in Islamic law is define as the provision of necessities of life which the husband obliged to provide to his wife or wives justifiably according to the resources of the husband and needs of the wives.⁴⁵⁵ It is husband’s mandatory duty of the provision of maintenance to his wife regardless of his financial situation. anafi jurist al-kisani defines:“maintenance includes everything that is indispensable for sustenance i.e. dwelling, clothing, etc. according to social standing of the giver.”⁴⁵⁶ The wife is entitled to

⁴⁵² *Badai Sanai*. Imam Kasani. Vol 4. P. 25

⁴⁵³ Surah at talaq 65:7

⁴⁵⁴ Surah al-Baqarah 2:233

⁴⁵⁵ *Family laws in Islam*. Mansoori. P. 97.

⁴⁵⁶ *Badai Sanai*. Vol. 4. P. 16.

be maintained by her husband even the wife might has resources to retain herself in life. Ab Masud informed that Allah's Messenger (may) said:

«إِنَّ الْمُسْلِمَ إِذَا أَنْفَقَ عَلَى أَهْلِهِ نَفَقَةً، وَهُوَ يَحْتَسِبُهَا، كَانَتْ لَهُ صَدَقَةً»

“When a Muslim spends on his family seeking reward for it from Allah, it counts for him as *sadaqa*”⁴⁵⁷.

As a result of marriage contract, in *Shari'ah*, the husband becomes obliged to support his wife. However, this obligation arises when the wife surrenders her person to her husband and allows him association. A Muslim husband is legally bound to maintain his wife. In this connection Syed Ameer Ali says: "It is incumbent on the man to maintain his wife, says, the *fatawa-i-kazi* Khan, whether she is Muslim or non Muslim, poor or rich, whether there has been copula or not; whether grown-up (adult) or young, so that intercourse with her is possible."⁴⁵⁸

It is the obligation of the husband to provide maintenance of his wife. The obligation arises from the validly contracted marriage. If the marital contract is void or irregular, the husband has no such obligation to give maintenance to his wife. However, where the marriage is irregular only owing to non-presence of witnesses, the wife is still entitled to maintenance. In this regard it is not essential that the wife must be Muslim she may belong to any religion to be eligible to enjoy maintenance. It is primary obligation of wife to provide access to her husband to cohabit with her and the denial of wife in this regard without any rational justification may deprives her of right of maintenance. A wife can only demand maintenance from husband only during the existence of marriage. Fatawa-i-Qazi Khan states that “there is no difference in the right of a wife to maintenance whether she be a Muslim or non Muslim,

⁴⁵⁷ *Sahih Muslim*. Book of Zakat. Chapter: The virtue of spending and giving charity to relatives, spouses, children and parents, even if they are *idolaters*. dith 2192

⁴⁵⁸ *Mohammedan Law*, Syed Ameer Ali P. 448

free and bound. The husband's duty to maintain commences only from the date when the wife attains puberty and not before it. Where a wife is too young for sexual intercourse and lives with her parents, she has no right to claim maintenance.”⁴⁵⁹ Although a Muslim wife's right to be maintained by her husband is an absolute right, but she must be faithful and obedient to him in respect of matrimonial affairs. Similarly, if she refuses to obey the reasonable orders of the husband or lives separately without any reasonable justification, she forfeits her right of maintenance against her husband. A Muslim wife cannot claim maintenance from the husband if her own conduct is violation of her matrimonial obligation. According to A. Fayzee: “a wife does not lose her right to maintenance in the following cases: (i) Where she refuses access to her husband on some lawful ground; (ii) Where the marriage cannot be consummated owing to (1) the husband's missing due to war or (2) due to her absence from him with his permission; or (3) because of her illness, or (4) due to malformation”⁴⁶⁰.

However, in the following situations wife was considered to be justified in refusing access to her husband when “a wife, whose marriage has not been consummated, may lawfully leave the husband's house or may refuse cohabitation with him if her prompt dower is not paid by the husband on demand as non-payment of the prompt dower is a lawful ground to live separate from the society of the husband and in such situations her right of maintenance is not lost and the husband is bound to maintain her”.⁴⁶¹ Similarly, when a wife lives unconnectedly because of the cruel attitude of her husband, she has a right to be maintained by him.⁴⁶² *Shar'iah* does not recognize any responsibility on the part of husband to provide maintenance to his wife when marriage has dissolved either by death or divorce.

⁴⁵⁹ *Fatawa-i-QaziKhan*. Vol 5, p. 147

⁴⁶⁰ *Outlines of Mohammedan Law*, A.A.A. Fayzee. P.212.

⁴⁶¹ *Mughni Al-Muhtaj*. Vol 3, p. 437

⁴⁶² *Al-Durr al Mukhtar*. Vol 3, p. 576.

4.3.2 Maintenance after dissolution of marriage contract

As mentioned above the wife has a right to be maintained during the continuation of marital relations. A marital relation in Shar'iah might be dissolved either on the event of death or divorce. Following are the situations in which wife has legal capacity to own maintenance in case of dissolution of marriage contract: At the event of divorce Muslim husband is obligated to maintain his wife during the period of iddah and after iddah period he has no such liability. The period of Iddah at the event of divorce is three menstrual courses or otherwise three lunar months.

ذُو سَعَةٍ مِّن سَعَتِهِمْ^ط وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا^ع
سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا⁴⁶³ ...

“let the women live (in 'iddat) In the same style As ye live, according to your means: annoy them not, so As to restrict them. and if They carry (life In their wombs),”

However, the period of the Iddah of a woman after the death of her husband is four months and ten days. In this regard not only the type of Iddah period determines the right of wife to be maintained the type of repudiation is also observed. According to jurists of Hanafi School of law, “a woman who has been divorced by a revocable talaq or by an irrevocable talaq, has a right to be maintained during the period of Iddah”. However, according to the jurists of Al-Shafi‘i school of law, “a wife who has been irrevocably divorced has no right of maintenance”. Therefore in case of separation because of khul, the wife is not entitled to maintenance. Muslim Jurists differ among themselves on the issue of irrevocable divorce (talaq bain). Hanafi jurists have a opinion that the wife is entitled to dwelling and maintenance. They say that such woman is included in the generality of Allah’s words about the divorce woman. According to this verse “every divorced woman has the right to dwelling

⁴⁶³ Surah At-Talaq 65:6

and declared her staying in the house obligatory on her and she who withholds herself from going out is entitled to maintenance”. Al-Sh fi‘ and Maliki jurists have that opinion that “the wife is entitled to dwelling only.”⁴⁶⁴ Hanbali jurists “donot admit for her a right to maintenance on the authority of a tradition related by Fatima Bint Qais that her husband divorced her twice and Allah’s messenger did not provide for her maintenance⁴⁶⁵,”

4.3.3 Right of maintenance after divorce during pregnancy

In case a wife is expecting baby the period of iddah would spread up to the time of delivery or abortion even if it spreads beyond the period of Iddah that is three months. However, if the wife delivers baby before that period the Iddah period will come to an end with that event. Once Iddah period comes to an end, the wife has no right to claim maintenance from husband under any situations”⁴⁶⁶. Based on their evidence from the Qur’an which says:

وَإِنْ كُنَّ أُولَاتٍ حَمَلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ

“ and if They carry (life In their wombs), then spend (your substance) on them until They deliver their burden: and if They suckle your (offspring), give them their recompense:”⁴⁶⁷

Both anafi and Al-Sh fi‘ schools of law provides that a pregnant divorced wife is has right to be maintained by her husband. Woman right to be maintained by her husband establishes at the event of marriage and the wife is first in line of priorities to the entitlements of husband even prior to their children. As long as the woman stays to be wife the husband is obligated to provide maintenance to his wife. Once divorce occurs the wife is entitled to be maintained only during the period of iddah a period that is prescribed by *Shari’ah*.

⁴⁶⁴ *Nihaya al-Muhtaj*. Vol 7, p, 144.

⁴⁶⁵ Ibid. *Al madkhal li dirasat al fiqh al-islami*. Hussain Hamid. P. 50.

⁴⁶⁶ *Al madkhal li dirasat al fiqh al-islami*. Hussain Hamid. P. 49.

⁴⁶⁷ Surah at Talaq 65:6

4.3.4 Right of maintenance after death

When the marital relation is terminated by the demise of the husband, there is no liability of maintenance on husband. Maintenance is not due to a wife after her husband death because her subsequent confinement is not on account of the right of her husband. according to the anafi Law as provided in the *Hedaya*, “the widow does not has right of maintenance, even if expecting at the time of the demise of her husband. Moreover, after the death of husband her widow has no right to be maintained while her period of *Iddah*. As it is the personal liability of husband to maintain his wife during his life and his personal liability come to an end upon his death”⁴⁶⁸.

4.4 Polygamy and legal rights of wives

The practice of polygamy existed before Islam without restrictions⁴⁶⁹ however, the polygamy seems to be a misconstrued concept in Islam. Islam has restricted the number of wives to four and has clearly prescribed principles in this regard to ensure just and balanced conduct towards the existing wives. Syeda Aisha, a wife of the Prophet Muhammad , was reported as saying:

“Allah’s Messenger (peace and blessings of Allah be upon him) distributed everything justly amongst his wives; yet after all, he used to say: O Allah! This is the fair way of dividing what I possess amongst my wives. O Allah! Blame me not for what You alone possess while I do not, i.e., the heart, feelings and emotions of a man”⁴⁷⁰.

The saying clearly provides a firm condition that a husband who has more than one wife must treat each wife fairly and equally. This fair and equal treatment is expected to be delivered regarding finance, sentiments and even carnal relationships. In this regard the The Qur’ n unequivocally provides that if a husband is not able to treat his wives equally he should

⁴⁶⁸ *Al-Hidaya*. Imam Marghinani. Vol 2, p. 145

⁴⁶⁹ *Family Structure in Islam*. Abd al Ati. p. 98.

⁴⁷⁰ Sahih Al-Bukhari.

refrain from having more than single wife. In Islam polygamy is only an option or relaxation owing to certain valid reasons and not a requirement. The reason of revelation of the following verse in the favour of polygamy was revealed after battle of Uhud where many Muslims were martyred. For widows due care and protection, it is obligatory upon the Muslims men to secure their dignity by marry them⁴⁷¹

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبْعًا ۚ فَإِنْ خِفْتُمْ
أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَٰلِكَ أَدْنَىٰ ۖ أَلَّا تَعُولُوا⁴⁷²

“ if ye fear that ye shall not be able to Deal justly with the orphans, marry women of your choice, two or three or four..”.

A number of facts are evident from this verse of the Qur'an which are mentioned below:

- (i) That polygamy is neither obligatory nor encouraged but it is merely allowed.
- (ii) That the approval to have more than one wife is not only because of fulfillment of carnal desires of man but linked with kindness and sympathies toward widows and orphans, as evident from the circumstances in which the verse was revealed at that time.
- (iii) That even in such serious circumstances the approval was restricted to four wives which is far less restricted than the prevailing practice which existed among the Arabs and others at that time of history of having ten or more wives.
- (iv) The verse provides that marriage in Islam is a civil contract, which is not valid unless both contracting parties give complete consent to it. Therefore, woman cannot be pushed to marry a man who is already having a wife as a free consent of both parties is a requirement of marital contract. In this regard the first wife may also demand fair and equal treatment and may go for a divorce if unfair and unequal behavior against her is evident in the marital relation. A

⁴⁷¹, *Islam in Focus*. Abd Al-Ati, Hammuda p.103

⁴⁷² Surah An Nisa 4:3

person who desires to have children and legal heirs and interested in reproduction found during the marriage that his wife is infertile and not able to have children. In this scenario the man has two options left behind either (i) to live a life without children and with the deficiency of parenthood for the rest of his life or (ii) divorce his infertile wife and enter into a marital relation with another woman who is fertile. In real life often neither of these above two solutions can be an ideal option for a man. In such situations the option of polygamy would carry the benefit of keeping the existing marital relationship preserved without depriving the husband of his wish of parenthood.

Secondly, when a wife suffered with a serious disease the husband would have the following alternatives available such as (i) he has to control his carnal desires for the rest of his life. (ii) he may divorce his ill wife and marry to another woman to satisfy his carnal needs at the time of life when the sick wife is in great need of the love and care of her husband (iii) he may compromise with the situation by living his life with his ill wife but keep secret illegal relations with other woman to satisfy his carnal desires.⁴⁷³ From Islamic perspective it is evident that the first option is in contradiction with human nature. Islam recognizes fulfillment of carnal desires and asks for legitimate measures for their fulfillment like entering into marital relations. The second option is simply less empathetic especially when there is a love between the two partners. Moreover, divorce is described by Prophet Muhammad () as the “permitted thing which is hated most by Allah swt”. The third option is basically against the teachings of Islamic that prohibit the carnal relations between a man and woman in any form without entering into marital contract. Islamic teachings are against immorality as well as against divorce. Divorce is discouraged unless no other healthier option is available.

⁴⁷³Polygamy in Islam, Jamal Badawi http://www.irfi.org/articles/articles_251_300/polygamy_in_islamic_law

Polygamy in this regard, offers a better option, which is in coherence with human nature, and provide a way to maintain a pure and legitimate carnal relationships in life. In abovementioned scenarios the polygamy would be a preferred choice but also an optional choice and not compulsory. It is obligatory upon a husband to treat his wife justly and fairly. Obligation regarding just and fair treatment of husband towards his wife applied to the provision of dwelling place, food, attire and kind conduct of husband for which the husband is fully accountable. If a person is not confident of being able to deal his wives fairly and justly the Holy The Qur' n says: "then (marry) only one".⁴⁷⁴

This verse, when studied with another verse of the The Qur' n provides some deterrence towards plural marriages. That verse plainly provides that:

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ ۗ فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ ۗ

"ye are never able to be fair and just As between women, Even if it is your ardent desire: but turn not away (from a woman) altogether, so As to leave Her (as it were) hanging (in the air). if ye come to a friendly understanding, and practise self-restraint,..."

The obligation of just and fair treatment discourages the notion that a man can "own as many as he pleases". Such obligation rules out the idea of a "secondary wife" as all wives have equal rank and they have similar rights and entitlements over their husband. It also suggests that according to the teaching of Islamic law when the husband fails to treat his wives fairly and equally any wife may demand divorce from husband. Therefore Islam has given right to wife if her husband doesnot provide her due maintence she can approach court for justice for her self and for her children. This is how shariah protects the interests of wife in due respect and justice. If the provsion is not in accordance to the social requiremnts shariah allows wife to take separation through court.

⁴⁷⁴ Surah An-Nisa 4: 3

⁴⁷⁵ Surah An-Nisa 4: 129

4.5 Legal obligations on wife regarding *Iddah* (waiting period)

Shar'iah has specified a prescribed waiting period for the woman after divorce from the husband and after the husband's death during which she cannot marry any other man. There are of three kinds of waiting period:

1. Waiting period by calculation of menstruation

A mature woman whose marriage has been dissolve after the consummation of her marriage, she has to wait three monthly courses for the expiration of her waiting period.

⁴⁷⁶ وَالْمُطَلَّقاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

“Divorced women shall wait concerning themselves for three monthly periods”

If the woman is not pregnant and her menstrual cycles are going on, then she will spend three periods of menses as waiting period after the period of cleanliness in which she was divorced.

If, contrary to the preferred method of Islamic tradition, she has been divorced in a period of menses, then she will have to spend three periods of menses other than that. This is the opinion of imam Abū Abī an-fah and imam Ahmad that ‘*qur*’ means menstruation⁴⁷⁷. According to Al-Shafi‘ and Maliki jurists the word *qur* means *tuhr* means post menstrual purity. The divorced wife has to wait three periods of purity. Thus the wife has to complete three periods of purity accordingly, then she is allowed to enter into another contract of marriage.⁴⁷⁸

2. Waiting period by calculation of months

This waiting period differs for different capacities of wives. If the divorced wife is of immature age because her menses have not started, or her menstrual cycle has stopped because of old age, then her waiting period is three months. The Qur’ān concerning these women says:

⁴⁷⁶ Surah Al-Baqara 2: 228

⁴⁷⁷ *Badai Sanai*. Imam Kasani. Vol 3, p. 193.

⁴⁷⁸ *Mughni Al-Muhtaj*. Vol. 3, p. 385.

وَأَلَّتِي يَيْسَّرْنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ آرْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَالَّتِي لَمْ تَحِيضْنَ⁴⁷⁹ ...

“such of your women As have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three Months, and for those who have no courses (it is the same)”.

If the divorce was carried out on the first day of a lunar month, then three months’ waiting period will be spent according to the lunar calendar. If the divorce has been carried out at any other time of the lunar month, then the waiting period will be ninety days. The second category consists of widow whose waiting period is four months and ten days. The Qur’ n says:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذُرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا⁴⁸⁰.

“ if any of you die and leave widows behind, They shall wait concerning themselves four months and ten days”

There is two opinions regarding pregnant widow on the issue of observing waiting period. According to ibn Abbas the widow should observe her *iddah* four months and ten days or until the delivery of her child, whichever is longer but according to ibn Masud the period of *iddah* for the widow will continuous till delivery of her child.

2. Waiting period by delivery of child

When the wife is pregnant at the time of dissolution of her marriage, then her waiting period will be terminated with the delivery of her baby. Allah says in the The Qur’ n:

وَإِنْ كُنَّ أُولَاتٍ حَمَلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ⁴⁸¹.

“and if They carry (life In their wombs), then spend (your substance) on them until They deliver their burden”

⁴⁷⁹ Surah At-Talaq 65:4

⁴⁸⁰ Surah al-Baqara 2:234

⁴⁸¹ Surah At Talaq65:6

Divorced woman who has not got together with her husband in solitude does not need to spend any waiting period for the divorce. Technically it refers to the prescribed waiting period a wife must observe after the dissolution of her marriage by divorce, death of her husband or any other form of separation under Islamic law. She is required to observe this period before she can marry again. This period is called waiting period (*Iddah*)⁴⁸². This period is observe by wife after divorce or after husband's death. Waiting period is an expression of grief and sorrow upon separation from her husband or mourning her husband's death. Secondly, the major objective is to ascertain that there is no seminal fluid in the woman's uterus from her former husband. So if she now remarries, there is no fear of mix up of lineage of the to-be-born and of confusion in determining the father of this baby. Thirdly, in case of irrevocable divorce, it provides husband to revoke his divorce and take his wife back into wedlock.⁴⁸³

4.5.1 *Shar'iah* rulings on *Iddah* of missing person's wife

Muslim jurists are divided into two groups regarding the separation of missing husband when his whereabouts are not known and wife. Imam Abū Abī an fah and Imam Al-Shāfi' has the view that the wife would not allowed to remarry until the death of contemporaries of the missing person. Hakim ibn Utaibah has narrated that if husband of the wife is missing person she cannot remarry till he comes back or dies"⁴⁸⁴. Imam malik has the view that the wife should wait for four years after she contacts the court, qadi invalids her marriage contract , after spending the time of iddah of death she will be allowed to remarry⁴⁸⁵. According to some jurists the verdict on divorce is based on the preemption of dead husband and they declared

⁴⁸² *Code of Muslim Personal Law* . justice tanzeel ur Rahman. vol. 1. P. 681.

⁴⁸³ *Al-Fiqh al-Islami*. Wahbah Zuhaily.vol. 7. P. 627.

⁴⁸⁴ *Al-Muhallah*. Ibn Hazm. (Eygpt 1356). Vol. 10 p. 134.

⁴⁸⁵ *Al-Mudawwannah al-kubra*. Sahnun. (Eygpt: 1324).vol 2, p. 92.

divorce as revocable (*raji'i*) divorce.⁴⁸⁶ Two situations are there to take place: First is if the missing husband come during *iddah* period, and

the second is that if missing husband returned after *iddah* period.

Therefore, in first situation if the missing husband returns during the *Iddah* period, he can resume marriage with his wife without any formalities. However, if he return after the expiry of the *Iddah* period it is necessary to differentiate between two situations. "If the wife is still single the new marriage contract is established for the resumption of marriage. If wife has married to another person then the second marriage contract is valid whether it is consummated or not, and the missing husband's return does not has any effect on it".⁴⁸⁷ In the light of one juristic view the divorce that is established on the affirmation of assumed death of husband is irrevocable like the actual death of the husband.⁴⁸⁸ The affirmation of the death of the person is merely based on an assumption that the missing person is presumed to be deceased. However, if the husband reappeared after he is assumed to be deceased such assumption would be proved wrong and the related affirmation would also become invalid. In such situation, the divorce declared on the basis of this assumption would also become null and void. Afterwards a husband and wife can resume their marriage irrespective of the fact that there appearance of the husband was during or after the period of *Iddah*.⁴⁸⁹ In this regard, it is pertinent to mention that if the reappearance of the missing husband is after the marriage of wife to another man then such second marriage of wife would be considered as valid but in three situations.⁴⁹⁰ These are:

⁴⁸⁶ *Kitab Al-Mubsut*. Al-Sarkhasi, vol. 11, p. 38.

⁴⁸⁷ *Al-Modawwanah Al-Kubra*. Malik Ibn Anas A1-Ashbahi, vol. 2, pp. 91-93

⁴⁸⁸ *Kitab al Mubsut*. Imam Al-Sarkhasi, op. cit., vol. 11, p. 37

⁴⁸⁹ *Ibid*

⁴⁹⁰ *Kitab al Mubsut*., vol. 11, p. 37

- (1) If the second marriage has not been consummated;⁴⁹¹
- (2) If the second marriage has a legal defect that makes it invalid and void
- (3) If the second husband was aware, before getting married, that the missing person was alive, as this knowledge constitutes a sufficient ground to make his marriage null and void .

The second and third conditions are more likely to belong to the general rules and principle of the marriage contract annulment⁴⁹². Therefore, in the situation of missing husband during war or some other disaster the wife has the legal capacity to redefine her marriage contract after observing her *iddah* period.

4.5.2 Rights of wife during Iddah (waiting period)

Till the completion of this period, she can neither remarry nor leave her present house to visit some other place. The permission to mourn for four months and ten days is applicable only to the husband's death. During waiting period of revocable divorce, husband has legal right to take his wife back without any consent. It is called *ruju*. The Qur' n says:

وَيُعُولَهُنَّ أَحَقُّ بِرَدِّهِنَّ فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا⁴⁹³

. “and their husbands have the better right to take them back In that period”

Husband has right to continue conjugal relations with his wife without her consent after the pronouncement of one or two divorces.⁴⁹⁴ In case of revocable divorce, on the death of either spouse, during waiting period, the surviving spouse shall inherit from the other. A wife is entitled to maintenance from her husband in a valid marriage in case of revocable divorce as discussed earlier. This is because for certain purposes she retains the status of being his wife

⁴⁹¹ *Al-Modawwanah Al-Kubra*, vol. 2, p. 91

⁴⁹² *ibid.*, p. 178.

⁴⁹³ Surah Al-Baqarh 2:228

⁴⁹⁴ *Al-Fiqh al-islami*. Zuhayli. Vol. 7, p. 627

and the husband is entitled to reinstate the marriage relationship with his wife in specific period.

Muslim jurists differ about giving maintenance in case of irrevocable divorce. Hanafi jurists argued that woman is entitled to house and maintenance. Al-Shafi'i and Maliki observed that woman is entitled to dwelling only. Al-Shafi'i jurists considered that woman is entitled to maintenance in case of pregnancy. In case she voluntarily leaves her home, then maintenance is not a responsibility on husband. According to *Shari'ah*, a divorcee or widow who observes her waiting period is required to stay in the home and not leaving during day or night. A widow can leave during day time but should not spend her night in other home.

4.6 Restricted woman capacity as *Wife*: An evaluation

The effect of the various limitations on a woman's marital capacities, the proscription on her movement, the requirement for sexual availability and sexual exclusivity fashion a set of criteria that apply only to women when they are wives. Restrictions in marriage on wife in the following situations: Religious restriction:

1. Congregational prayer.
2. The wife does not fast supererogatory fasts without his permission.
3. The wife does not charity without his permission from his money.
4. In terms for leaving the home, for her travel and for pilgrimage without his permission and consent⁴⁹⁵.

⁴⁹⁵*Sahih Al-Bukhari* Book 67 Book of Marriage, Chapter: 87. Hadith 129. Vol VI.

Restrictions on a woman's sociality includes:

1. Husband may not restrict interaction with certain members of her family but her confinement in the home allows him the capacity to decide who she may receive in the home,⁴⁹⁶
2. Husband is assumed to have the capacity to impose a punishment upon his wife but required to maintain the limits of safety.⁴⁹⁷
3. A wife does not participate in battle without the permission of her husband⁴⁹⁸
4. Husband may control her financial transaction.

The capacity for control over another independent adults' sociality, mobility, exercise of religious obligation and sexuality applies uniquely to husbands over wives. Narrated Ab Huraira: Allah's Messenger () said,

«لَا يَحِلُّ لِلْمَرْأَةِ أَنْ تَصُومَ وَرَوْجُهَا شَاهِدٌ إِلَّا بِإِذْنِهِ، وَلَا تَأْتِيَ فِي بَيْتِهِ إِلَّا بِإِذْنِهِ، وَمَا أَنْفَقَتْ مِنْ نَفَقَةٍ عَنْ غَيْرِ أَمْرِهِ فَإِنَّهُ يُؤَدَّى إِلَيْهِ شَطْرُهُ»

“It is not lawful for a lady to fast (Nawafil) without the permission of her husband when he is at home; and she should not allow anyone to enter his house except with his permission; and if she spends of his wealth (on charitable purposes) without being ordered by him, he will get half of the reward.”⁴⁹⁹

The contract in marriage through which it is established that the wife's confinement in the marital home so to be available to the husband. Her availability may earn her maintenance and her absence may cause her to lose maintenance⁵⁰⁰ but his failure to pay maintenance does not result in her capacity to claim maintenance, borrow against his liability to her or to terminate the contract except through a court. The *Hedaya* explains that legally maintenance is a kind of gift or grant and not counter value by husband for confinement of wife in home. It is not

⁴⁹⁶Ibid., 87. .

⁴⁹⁷ Ibid., vol. 2,p. 243

⁴⁹⁸ Ibid. p. 293

⁴⁹⁹ *Sahih Al-Bukhari* Book 67 Book of Marriage, Chapter: 87 A woman should not allow anyone to enter the house except husband's consent. dith 129. Vol VI.

⁵⁰⁰ Al-Hedaya.p. 87.

obligatory upon husband and would be paid only when settled or adjudicated by a prevailing system.⁵⁰¹ This explains the possibility that marriage functions as full legal capacity for a husband and a legal incapacity for woman being a wife. The incapacity demise from the effect of *kuhl'* on wife's *ahliyyaht al- ada* (legal capacity to act), is apparent in the *Shar'iah* that determine how a wife may exit from marriage contract. The rulings on divorce (*alaq*), which form the most substantive aspect of laws on divorce (dissolution of marriage divorce is exercised naturally by husband) through delegation by wives.⁵⁰²

4.6.1 Grade of man over woman

Wadud states that the words *qawwamunaala* are usually misinterpreted to means men are incharge of women. First of all the *qiwamah* here is dependent on satisfying two conditions:

- (1) what Allah has preferred (*faddala*) some over others, and
- (2) what they (men) spend of their property to support women.

The first condition is usually misinterpreted as: Allah preferred men over women; however, Allah states in this verse: 'some over others' meaning, some women over other men, some men over other women, some men over other men, and some men over other men. This verse does not mean 'they (masculine plural) are preferred over them (feminine plural)'.⁵⁰³ Keeping this in view, it is not possible to deduce that the status of women has been reduced by making them dependent on men in the matter of her expenses. There is no value judgement being made here. This is no more than a functional distribution of duties, except that, the interacting precedence between duties, which exists elsewhere, exists here too. In short, the two reasons

⁵⁰¹Ibid., Al-Hedaya. p. 89

⁵⁰²*Al-Hidaya*. al-Margh n n vol. 1, Book of divorce. p. 167

⁵⁰³*Quran and Woman*. Amina Wadud. (Oxford: Oxford University Press) 1999.

show that the precedence of men does not lower the status of women.⁵⁰⁴ Muslim scholars have interpreted that Allah has made men trustees of women and on the other hand, women are supposed to be obedient of men and need to guard themselves. However, there is a confusion exists in this context among the Islamic scholars those who have interpreted it in a way that caused a controversy owing to their approaches. Muslim and even western have asserted that men are declared superior to women. However, looking closely the commands of *Shari'ah* it can be safely stated that there is no superiority of men over women. As man and women, carry different responsibilities towards one another and life. Moreover, in true sense it was provided that men and women are not identical but different. Some men and women are granted and enjoy what other men and women do not have. If men are declared better trustees it does not mean that men are better than women and women are not capable of it or good in that but it is only divine division of rights and duties. Women are granted certain rights towards men which are the duties of men to perform and men have certain rights towards women which are the corresponding duties that women need to perform. These division of rights and duties is in no sense a matter of superiority but only a matter of division of equally significant rights and duties. In the light of commands of The Qur' n and Sunnah it can be stated that men are asked to treat woman with kindness and provide her the necessities of life. It shows that a man needs to perform his duty of providing maintenance to wife with a kind and open heart without inflicting any mental and physical injury upon her. As it is a unanimous agreement among jurists of Islamic law in the light of The Qur' n and Sunnah that a woman has a right to be maintained by her husband whether the wife is able to maintained herself or not or she is a Muslim or not. Maintenance includes the undisputed right of woman that includes provision

⁵⁰⁴*Ma'ariful Qur' n*. trans. Maulana Mufti Muhammad Shafi (trans. Maulana Mufti Taqi Usmani (Karachi: Maktaba-e-Darul-'Uloom) 2011. Vol. 2, p. 418

of living, clothing, food and care in daily life. The rule of maintenance must be observed in an equitable and moderate manner while considering all the related facts. For instance a man must maintained his wife in accordance with his financial means and a woman must expect from a man in accordance with their evident life pattern. However maintenance must be enough to an extent that must ensure the comfort and privacy of wife in personal as well as social life.

4.6.2 An *nashuz* and violence against wife

Islamic teachings command all the Muslim men to consider their moral duty to address and manage their affairs with their wives in kind and equitable manner. Especially at the event when men have more than one wives each wife has right to be treated by her husband equally and while considering carefully the matters relating to her emotional well-being and security. A wife must not be subject to antipathy or dislike from her husband that may create commotion or mental disturbance in her married life. She must be granted full freedom to live her life within the boundaries set by divine authority. If husband has failed to perform her duties towards wife or he is not providing her the love and affection she deserves as wife, a wife has may get freedom from such marital relationship. She has a right to do so and such right is provided to her under *shariah* after which she may start her new life the way she desires.

«لَا يَفْرَكُ مُؤْمِنٌ مُؤْمِنَةً، إِنْ كَرِهَ مِنْهَا خُلُقًا رَضِيَ مِنْهَا آخَرَ»

“Messenger of Allah also said A believing man should never hate a believing woman. If he dislikes one of her characteristics, he will be pleased with another of her characteristics.”⁵⁰⁵

In *Shari'ah* where there are rights there are corresponding duties. In marital relationship wife enjoys certain rights and there are corresponding duties upon wife as well. Such as wife is under duty to make her contribution in the marriage in the best possible manner to not only

⁵⁰⁵Sahih Al Muslim dith 7741.

make the life of husband comfortable but also to make marriage successful. She should not commit an act that may result in any kind of injury to her husband such as social, financial or reputational injury. As while expanding the righteous people it was mentioned that while praying to Allah it is asked that O' Allah grant us the wives and children those who would bring comfort and happiness to our lives and pious examples for others.

وَالَّتِي تُخَافُونَ دُسُوزَهُنَّ فَعِظُوهُنَّ وَأَهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ^ط فَإِنْ أَطَعَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا^ع 506 ...

“As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly);”

Explaining the verse Sayyid Qutb writes: “قَنِيتٌ Qanitat i.e. devoutedly means that the wife

is willingly obedient, she chooses to be obedient, she loves to be obedient, and she wishes to succeed in being so; she doesnot obey because she is forced and obliged to do so. Because of this Allah has describe her a devoutedly obedient rather than simply obedient. This is the one befitting the mutual affection, love, protection and care which exists between two halves of a single soul.”⁵⁰⁷ Giving the right of custodianship to man does not mean that woman merges her personality in man’s entity. As mentioned that according to Islahi, “woman is not to be considered as personal property; rather she is an independent entity. The view of Islahi is important, as there exist some societies including Muslim societies which do not give due status to women and continue to exploit them in the name of religion. The issue got much attention after the emancipation of woman in the Western industrialized societies. Islahi

⁵⁰⁶ Surah An-Nisa 4:34

⁵⁰⁷ *Fi Zil l al- Qur’ n.* (in the Shade of the Qur’ n) Sayyid Qutb. Trans. M.A. Salahi and A.A. Shamis. (UK: The Islamic Foundation) 1999.vol: 1, p. 658

considered woman a fully independent member of society and asked man to honour this independent status of woman”.⁵⁰⁸

It is evident that Prophet Muhammad () never touched his wives with intention to hit them although they happened to argue with the Prophet () and held diverse stances from the Prophet (). The Prophet () severely admonished men who initially hit their wives and afterwards proceed to have intimate relations with their wives. As narrated by Abdullah bin Zam`a The Prophet () said that,

« لَا يَجْلِدُ أَحَدُكُمْ امْرَأَتَهُ جَلْدَ الْعَبْدِ، ثُمَّ يُجَامِعُهَا فِي آخِرِ الْيَوْمِ »

“None of you should flog his wife as he flogs a slave and then have sexual intercourse with her in the last part of the day.”⁵⁰⁹

« يَا رَسُولَ اللَّهِ، مَا حَقُّ زَوْجَةٍ أَحَدِنَا عَلَيْهِ؟، قَالَ: أَنْ تُطْعَمَهَا إِذَا طَعِمْتَ، وَتَكْسُوَهَا إِذَا كَتَسَيْتَ، أَوْ اكْتَسَبْتَ، وَلَا الْوَجْهَ، وَلَا تُفَبِّحَ، وَلَا تَهْجُرَ إِلَّا فِي الْبَيْتِ »

“I went to the Messenger of Allah () and asked him: What do you say (command) about our wives? He replied: Give them food what you have for yourself, and clothe them by which you clothe yourself, and do not beat them, and do not revile them.”⁵¹⁰

Based on such legal texts, classical and contemporary Muslim scholars view all forms of violence against women as oppression.⁵¹¹ Prohibition of oppression and injustice is premised on and derived from the Qur’ n:

⁵¹² قُلْ إِنَّمَا حَرَّمَ رَبِّي الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَّنَ وَأَلَّا تَمَّ وَالْبَغْيَ بِغَيْرِ الْحَقِّ

“ say: the things that My Lord hath indeed forbidden are: shameful deeds, whether open or secret; sins and trespasses against truth or reason.”

Prophet Muhammad’s dith including his statements at the time of last sermon: “Verily, your blood, property, and reputations are as inviolable to one another as the inviolability of this day, this month, and this city of yours”⁵¹³. In Islam the exploitation of wives is considered as unfair and prejudice to them therefore forbidden both in form of words as well as actions.

⁵⁰⁸ Tadabbar Al-Quran ,islahi. Vol 2, p. 294

⁵⁰⁹ Sahih Al-Bukhari, Book Marriage. Chapter: 94 The beating of women is disapproved, dith: 138

⁵¹⁰ Sunan Abu-Dawud, Book Marriage, dith: 99

⁵¹¹ Abd al Ati, 2005.

⁵¹² Surah Araaf 7:33

⁵¹³ Sahih al-Bukhari. Book of Knowledge. dith 67.

As any such cruelty and harsh behavior, by anyone in the family may cause physical or mental damage to woman therefore strictly prohibited. Such attitude is against the divine way and basic objectives of shariah that endorses and endeavor to implement in the society a compassionate and affectionate environment to promote the human values and respect for rational behavior in the social lives. Islamic law declares violence and force under the notion of *darar* (harm) that not only include physical exploitations but also encompass within itself various other types of mistreatments against wife. Such as husband's omission to grant obligatory funding, known as *nafaqa* to his wife to manage food, lodging and clothing or to provide such necessities in form to his wife.

«مَا ضَرَبَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خَادِمًا لَهُ، وَلَا امْرَأَةً، وَلَا ضَرَبَ بِيَدِهِ شَيْئًا»⁵¹⁴

“The Messenger of Allah never beat any of his servants, or wives, and his hand never hit anything.”

The scholar of classical Qur'anic tafseer (exegeses), Ibn Jarir al-Tabari provided the rationale behind the revelation of this verse is presented by al-Tabari who states that the once a person slapped his wife and when she asked for relief in front of Prophet Muhammad , he asked her to slap him back to retaliate for what her husband did to her. Allah has ordained men to take care of their women, to provide them with all necessities, to take care of their rights as they are in charge over them and their rights. To fulfill their obligations towards their wives they should give their wives mahr in the form of payment and ordained to spend their wealth and belongings over their wives after marriage. Men are in charge and caretakers of women; therefore, they should fulfill this authority with full responsibility.⁵¹⁵ The Qur' n states very clearly:

⁵¹⁴ *Sunan Ibn Majah*. Chapter 9 Good treatment of women. dith no. 1984

⁵¹⁵ *Jamia Al-Bayan un Taweel al-Quran*. Tafseer At-Tabari . Ibe Jafar Muhammad bin Jarir At-Tabari. (Hijr Attabah NASHER At tuzih al-Illam.)VOL.6 P. 689.

أَلْطَّلِقُ مَرَّتَانِ ط فِيمَا سَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَنِ ط وَلَا سِحْلٌ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ تَخَافَا إِلَّا يُقِيمَا حُدُودَ اللَّهِ ط⁵¹⁶

“ a divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. it is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that They would be unable to keep the limits ordained by Allah”.

The parties should either hold together on equitable terms or separate with kindness. It is obligatory upon the husband to treat his wife well and to try to please her concerning matters that Allah has made permissible “The Prophet emphasises on the good behaviour and said, a believer with the most complete faith is the one with best behavior. And the best of you is the one who treats his wives with the best manners.”⁵¹⁷ specially if she is still young in age. On this point, there are numerous dith.

: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: خَيْرُكُمْ خَيْرُكُمْ لِأَهْلِهِ وَأَنَا خَيْرُكُمْ لِأَهْلِي.

“Ayesha (r.a.) narrates the Prophet said, The best of you is the one who is best to his family (wife) and I am the best of you to my family.”⁵¹⁸

During his speech of his farewell pilgrimage, the Prophet () said,

«اسْتَوْصُوا بِالنِّسَاءِ خَيْرًا، فَإِنَّهُنَّ عِنْدَكُمْ عَوَانٌ، لَيْسَ تَمْلِكُونَ مِنْهُنَّ شَيْئًا غَيْرَ ذَلِكَ، إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبِينَةٍ، فَإِنْ فَعَلْنَ فَأَهْجُرُوهُنَّ فِي الْمَضَاجِعِ، وَاضْرِبُوهُنَّ ضَرْبًا غَيْرَ مُبْرَحٍ، فَإِنْ أَطَعْتَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا، إِنَّ لَكُمْ مِنْ وَلِيِّاتِكُمْ عَلَيْكُمْ حَقًّا، فَأَمَّا حَقُّكُمْ عَلَى نِسَائِكُمْ، فَلَا يُؤْتِنَنَّ فُرُوسَكُمْ مِنْ تَكْرَهُونَ، وَلَا يَأْذَنَنَّ فِي بُيُوتِكُمْ لِمَنْ تَكْرَهُونَ، إِلَّا وَحَقُّهُنَّ عَلَيْكُمْ أَنْ تُحْسِنُوا إِلَيْهِنَّ فِي كِسْوَتِهِنَّ وَطَعَامِهِنَّ»

"Verily, I advise you to treat women well. They are like prisoners under your authority. You have no rights over them other than that unless they come with a clear illicit act. If they do that, then avoid them in their beds and beat them in a non-violent manner. If they then obey you, do not seek any means of regress against them Truly, you have rights over your wives and your wives have rights over you. As for your rights over your wives, they are that they do not allow anyone to come to your seating that you dislike and that they do not allow anyone into your houses that you dislike. And their rights over you are that you treat them kindly with respect to their clothing and food.”⁵¹⁹

⁵¹⁶ Surah Al-Baqarah 2: 229

⁵¹⁷ Jami Tirmidhi. dith, no. 3265.

⁵¹⁸ Jami Tirmidhi. dith. 3266. This dith is saheeh.

⁵¹⁹ Sunan Ibn Majah, no. 1501. This dith is hasan. Shaykh al-Albani

If a man has more than one wife it is obligatory upon him to be just and equitable to them with respect to food, housing, clothing, spending nights with them and any other material issues.

If he shows favour to one over the others, he will be falling under the warning set out by the Prophet in the following *hadith*:

«مَنْ كَانَتْ لَهُ امْرَأَتَانِ، يَمِيلُ مَعَ إِحْدَاهُمَا عَلَى الْأُخْرَى، جَاءَ يَوْمَ الْقِيَامَةِ وَأَحَدُ شِقَائِهِ سَاقٍ»⁵²⁰

“Whoever has two wives and shows favouritism to one of them will come on the Day of Judgment with one of his sides hanging down”.

The Messenger of Allah used to be just and equitable to his wives concerning material matters, not preferring anyone over the others; however, even though 'A'ishah was still his most beloved wife. However, there is no sin if he inclines to one in his heart only. This is something that he cannot control. Thus, Allah has said: “You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provision) so as to leave the other hanging i.e. neither divorced nor married...”⁵²¹

« خَطَبَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، ثُمَّ ذَكَرَ النِّسَاءَ، فَوَعظَهُمْ فِيهِنَّ، ثُمَّ قَالَ: إلامَ يَجْلِدُ أَحَدُكُمْ امْرَأَتَهُ جَلْدَ الْأُمَةِ؟ وَلَعَلَّهُ أَنْ يُضَاجِعَهَا مِنْ آخِرِ يَوْمِهِ»

“The Prophet delivered a sermon then he made mention of women, and exhorted (the men) concerning them. Then he said: 'How long will one of you whip his wife like a slave, then lie with her at the end of the day?'”⁵²²

It is evident that Prophet Muhammad consulted women when required and considered their standpoints in true manner. A woman named Umm Waraqah was chosen as imam regarding her domestic life by the Prophet. Women contributed considerably to the process of compilation of the Qur'an. A woman became prominent to have modified the influential ruling of Caliph Umar on the matter of dowry. Furthermore, women also prayed in the mosques unisolated from men, have played their role in the matter of *hadith* transmission,

⁵²⁰ Sunan Ibn Majah . *hadith* no. 1603. This *hadith* is saheeh..

⁵²¹ Surah AnNisa 4: 129

⁵²² Sunan Ibn Majah The chapters on marriage. Chapter 9 Good treatment of women. *hadith* no. 1983.

provided refuge or asylum to men, were historically involved in commercial kind of transactions, were encouraged to acquire knowledge and further enjoyed the status of the both learner as well as of instructor in the early period of Islam.⁵²³ Imam Abū anifa argues that her access into the marriage emanates from the action that pertains solely to her person and being an adult of sound reason she may not be constrained, yet the jurists do not apply a similar reasoning to her exit from the contract. At this point in the marriage the law directs itself instead to matters of authority and control over the bond of marriage which it constructs as a male prerogative. These restrictions does not arise out of the theoretical matters of legal capacity, namely, sufficiency in body and sufficiency in reason, yet they constitute a significant impediment on a woman's legal capacity.

4.7 Conclusion of the Chapter

Islamic law discuss rights and responsibilities of human beings in family, especially being the subject of Islamic family law, it explicitly define the rights and responsibilities of woman as wife. The Qur'ān discusses the role of wife as equally responsible as husband. Therefore, it has defined the rights over one another. For the social requirement, husband has given a superior degree because he is the custodian of the family who mandatory provide his wife and children maintenance, dwelling and safeguard their interests. At the same time woman is responsible for his gratification to keep him away from adopting illegal measures for his satisfaction, upbringing of his children according to Shar'iah principles and safeguard his secrets of private and personal life. *Shar'iah* has given Legal Capacity of woman regarding ownership of maintenance and dwelling during her marriage contract and during her waiting period (*iddah*) from her husband. Husband is liable to provide her according to his social

⁵²³*fi Zilal Al-Quran . Sayyid Qutb's Tafsir.*

status and provisions. In case of *Nashuz* disrespect of the relation from wife, she may not be entitled to maintenance from husband. *Shar'iah* grants wife legal capacity to own dower and maintenance and in case of failure in provision of maintenance by husband in any situation, woman has right to request the court to order accordingly. *Shar'iah* has not prohibited to have multiple wives limited upto four but with some conditions in favor of interest of wife. The very impressive condition mentioned in Qur' n is 'justice' amongst wives. In case husnad is repugnant to fulfills the conditions, he is restricted by the *Shar'iah* to have one wife only. Islamic Law is rational and according to the nature of human beings. It doesnot restrict Muslim woman to remarry after divorce or after the death of her husband. *Shar'iah* has assigned Legal requirements of *iddah* for women, and restrict her as subject of the Islamic Family Law for a specific time period to determine whether the woman is pregnant or console her for her grief. During *iddah* waiting period, she is privilidge to stay in her husband's home and he has to provide her maintenance during waiting period, and in case the woman is pragnant till the delivery of child, she is entitled to take maintenance from her husband. Therefore *Shari'ah* has granted her legal capacity to accure her rights and demands from her husband during waiting period. Finally, as husband and wife, there are certain reposnsibilities on both spouses during marriage and amongst them Allah swt ordain both to do respect to one another sentiments and in case of responsibilities and legal obligations on woman regarding marriage, woman is treated with equality in *Shari'ah* has husband. In any situation , if the wife is disloyal to husband, the very last step before divorce is suggested by lawgiver is to punish her slightly. This concept of *Nushuz* is misinterpretative by muslim jurists as well as femininst on the opinion of these jurists. This concept is mixed and wrong interprestred with the term of *Qawwam*, social grade of husband as provider of the family. The bond of marriage

is owned by a husband; it entails exclusive sexual access, control over her domicile and mobility and finally over her exit from the contract making the legal subject 'wife' a particularly proscribed, if not significantly interdicted, legal subject while she continues to have legal capacity over her property, her legal capacity over her personal marital state which is curtailed and the impediment being a 'wife' in the nature of the marriage contract. Therefore, it is significant that husband and wife as equal subject in front of *Shari'ah*. Husband is responsible of the wife's maintenance, gratification and every comfort and same as *Shar'iah* expected from the wife and in case of failure to maintain marital relation on these grounds, as the final resort, it give legal capacity to both spouses for dissolution of marriage contract, to spend their relation with respect and kindness to release from the marital relation.

Chapter 5:

WOMAN'S LEGAL CAPACITY REGARDING DISSOLUTION OF MARRIAGE IN ISLAMIC FAMILY LAW

5.1 Introduction of the Chapter

Marriage is highly respectable institution in Islam and dealt in good detail in both the Qur' n and the Sunnah of the Prophet Muhammad () as discussed above in chapter 2. Islam considers marriage a significant association with certain precise rights and duties assigned to each spouse. A marriage in Islamic Law is a kind of a social contract between two independent individuals with complete legal capacity. Even though Islam greatly emphasized the significance and preservation of marriage however Islam does not exclude the possibility of dissolution of marriage of couples who failed to maintain their healthy relationship but only as a last resort. The doctrine of divorce is considered by Islam as the most undesirable act among the all the permissible actions. When the husband and wife could not accomplish the key objectives of marriage, then Islam grants them a right and capacity to bring their marital contract to an end. In the matter of divorce, Qur' n indicates in its multiple verses that initially divorce must be prevented to happen as far as possible by placing arbitration and taking certain measures of mediation in this regard. However, when in this relationship there is no option left behind but divorce in such inevitable situation Islam endeavors to protect the interests of woman and makes the life of the divorced woman as easy as possible by being kind upon her.

This chapter discusses the ways of dissolution of marriage in the context of Islamic teachings and women legal capacity in dissolution of marriage contract. It also analyse the juristic opinion regarding woman legal capacity in this regard. The scope of this chapter cannot cover

all the conceivable grounds for divorce however it seeks to address the basic requirements for dissolution of marriage contract and legal capacity of women in this regard.

5.2 Dissolution of marriage contract in *Shar'iah*

Divorce was present in pre-Islamic era but Islam has made the event of divorce far more favorable to spouses than pre-Islamic era. In *Shar'iah* the marital contract might be ended in three possible manners: firstly, the death of any of the spouses; secondly, by action of the husband or the wife or both of them and thirdly, by the process of law or by court. Different types of divorce are mentioned below.

1. Divorce by a Muslim Man (*Talaq*)
2. Divorce by Muslim Woman (*Khul*) and
3. Divorce by decree of court (*Fashk*).

A husband and wife are advised to attempt for reconciliation during misunderstanding in their relationship and after divorce during the waiting period a husband and wife are also permitted to endeavor resolution of their dispute as divorce is a disliked act in the eyes of Allah swt. Narrated Muharib the Prophet () said:

«مَا أَحَلَّ اللَّهُ شَيْئًا أَبْغَضَ إِلَيْهِ مِنَ الطَّلَاقِ»

“Allah did not make anything lawful more abominable to Him than divorce”⁵²⁴

Dependent on the certain circumstances, divorce might be divided into different categories such as (i) obligatory (ii) highly recommended or almost obligatory (iii) forbidden (iv) strongly undesirable or almost forbidden and (v) lawful or permitted. Each of these categories and their surrounding conditions are well-established in Islamic law. However, in Islam husbands are explicitly provided not to bring their wives back to them to take unfair benefit or to harm their interests. The Qur' n emphasizes

⁵²⁴ *Sunan Abi Dawud*. Book of Divorce Chapter: Regarding The Disliked Nature Of divorce dith 2172

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَلْيُغْنِ أَجْلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ ۚ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۚ وَمَنْ يَفْعَلْ ذَلِكَ فَقَدْ ظَلَمَ.⁵²⁵

Divorce in the literal term refers to the right of husband to give divorce to his wife. Man can divorce his wife and dissolve marriage contract by announcement. According to Islamic Law, wife's dower is not returned to husband due to separation between the spouses. Whatever a wife received as dower (*Mahr*) or is given before and during the course of the marriage remains her property if the marriage ends. The Qur'an says:

وَإِنْ أَرَدْتُمْ أَنْ تَبْدُلُوا زَوْجَ مَكَاتٍ زَوْجٍ وَءَاتَيْتُمْ إِحْدَهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا...⁵²⁶

It precludes a man from taking any gain of women's belongings, wealth or property through a marital relation. Moreover, when divorce occurs the property of husband is divided in accordance with the terms of their marital contract.

Syed Ameer Ali stated that the permission of divorce in the Qur'an gives sanction to the ancient customs of the time should be considered in the light of Allah's commandments by keeping in mind how intimately law and religion are linked in the Islamic system, it would be convenient to comprehend the bearing of his words in the matter of divorce.⁵²⁷

A wife is allowed if she is in need of, to take financial care and maintenance from her former husband. In Islam there are specific provisions at the event of dissolution of marriage considering the particular circumstances such as when divorce occurs prior to consummation of marital relation and prior to or after the dower is fixed.

⁵²⁵ Surah Al-Baqarah 2:231.

⁵²⁶ Surah An-Nisa 4:20

⁵²⁷ *Muhammadden Law*. Syed Amir Ali (Lahore: Law publishing Company) 1979. P. 18

لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ
 قَدْرُهُ وَعَلَى الْمُقْتِرِ قَدْرُهُ مَتَّعًا بِالْمَعْرُوفِ حَقًّا عَلَى الْمُحْسِنِينَ⁵²⁸

“There is no sin on you, if You divorce women while yet You have not touch them, nor appointed unto them their Mahr but bestow on them, the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good”.

The property and belongings of woman are not shared at the event of a divorce. A woman’s earnings or whatever is granted to her at or during the marital relationship remains with her as her own property at the time of dissolution of marriage.

During the pronouncement of divorce, Qur’an gives instruction to woman to wait for three months and she is not supposed to leave her home. The base of this rule is to identify whether the wife was pregnant before she re-married, therefore the father of the unborn child could be determined. This principle ensures the child’s identity and lineage can be accurately ascertained. It is a general perception that Muslim men has an undue advantage over wife as man has right to dissolve marriage contract but it is important to understand the *Shari’ah* rulings that right of divorce only favors a man is a not correct, wife can divorce to her husband and wife has certain rights towards husband at the time of divorce.

5.3. Legal authority to dissolution of marriage

The word talaq literally means to “snap off” or to separate. In principle, it is defined as: “termination with explicit or implied words by the husband the bond created by marriage contract”⁵²⁹. It is also defined as “dissolution of a marriage or the annulment of its legality by the certain words”.⁵³⁰ The Qur’ n defines divorce as

⁵²⁸ Surah Al-Baqarah 2:236

⁵²⁹ *Fath al-Qadir*, Ibn Humam, vol 3, p. 22

⁵³⁰ *Al-Bahr al-Raiq*. Ibn Nujaym Vol 3, p. 21

يَأْتِيَا النَّبِيَّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ ۖ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا تَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُبَيِّنَةٍ⁵³¹

“O Prophet! when You divorce women, divorce them at their 'Iddah, and count their 'Iddah. and fear Allâh Your Lord, and turn them not out of their homes, nor shall they leave, except In case they are guilty of some open illegal sexual intercourse.”

A number of ways dissolves marriage contract, when the husband dissolves it by express or implied words used for the purpose of dissolution of marriage contract, in Islamic law the husband calls this *Talaq* (divorce) through repudiation. Another way is that the wife this is termed as *Khul'* in Islamic law seeks the separation. Lastly, dissolution comes into effect by the decree of the court. Such dissolution is termed as *faskh*. *Shar'iah* has given legal capacity for dissolution of marriage contract to muslim man to give divorce through *Talaq* and woman to exercise her capacity through *Talaq e Tafweez*, *Khul'* and *Mubarat*.

5.4. Divorce (*Talaq*) by husband and Divorced woman's legal capacity

5.4.1 Capacity of Husband for dissolution of marriage contract

According to the *Shari'ah*, the definition of dissolution of marriage contract is “the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorized by him to do so, using the word *talaq* or a derivative or a synonym thereof.” A person who is pronouncing divorce needs to be an adult (baligh), sane (aqil), independent from any coercion, have complete clarity and hold good intentions (qasid) at the time of declaring divorce for the divorce or the dissolution of the marital contract to be valid and effective. Moreover, a witness if any needs be reliable and of good character.⁵³² A divorce

⁵³¹ Surah At Talaq 65:1

⁵³² *The Rights of women in Islam. An Authentic Approach*. HaifaaA. Jawad.(United States of America 1998 ST. MARTIN'S PRESS)p.78

is considered valid only when it fulfills the following conditions relating to the legal capacity of repudiating husband:

1. The husband must possess legal capacity to pronounce divorce, i.e. he should be adult and sane. Thus a divorce pronounced by the insane or lunatic or by the minor is not effective even if the minor is approaching age of puberty⁵³³.

«لَيْسَ لِمَجْنُونٍ وَلَا لِسَكَرَانَ طَلُقٌ» : « قَدْ السَّكَرَانَ وَالْمُسْتَكْرَهَ لَيْسَ بِجَائِزٍ » :

“every divorce is valid and effective except the divorce by a minor and insane”.⁵³⁴

2. Repudiation should be with his free will and not by compulsion. A divorce given under coercion or duress is not effective. This is majority view. anafi jurists hold thus as a divorce is effective by jest and joke, it is , likewise effective under coercion. In both cases the repudiating person does not have intention to divorce his wife. They argue that though coercion suppress his intention yet he had an option not to pronounce it.”⁵³⁵

3. While pronouncing divorce he should not be in state of intoxication. The majority is of the view that a divorce under influence of liquor is not effective if it is involuntary intoxication. But if it is voluntary or self-induced, then the divorce in such state will be effective. The hanbali jurists disagree with this point of view. In their view that the divorce pronounced under intoxication is not effective regardless of whether it is self induced or otherwise.⁵³⁶

4. A divorce by way of joke is effective.⁵³⁷

5. The divorce pronounced by *Safih* (weak of intellect) is effective because he is prevented only from transactions and not from pronouncing divorce. A *Safih* is a person who does not possess sound judgment.⁵³⁸

⁵³³ *Hedaya*. Imam Marghinani. vol 2, p. 337.

⁵³⁴ *Sahih Bukhari*. book of divorce Hadith 5269

⁵³⁵ *Fath alQadir*, Ibn Humam vol 3, p. 39.

⁵³⁶ *Al-Umm*, Shafi. vol 5, p 234, *Badai Sanai*, Kasani, p 159.

⁵³⁷ *Sunan Ibn Dawud*. Book of Divorce. dith 2194.

6. A divorce by a person on deathbed is effective, but if a person on deathbed gives an irrevocable divorce, the wife is entitled for inherence as long as she is in her iddah. The rationale behind this is presumed that he has divorced her to deprive her from inheritance.⁵³⁹

7. A divorce pronounced in state of anger is also effective.⁵⁴⁰

8. A physical or Mental Defect in Either Party

There is a difference of opinion among the Islamic jurists regarding the availability of the option of divorce to husband or wife on the basis of any shortcoming or flaw in the opposite partner. As Zahiris School of thought has restricted divorce on the basis of either physical or mental deficiency in husband or wife. As provided by Al-Zahiri “No marriage shall be nullified once it is duly celebrated, by any leprosy, insanity, nor any other defect on the part of the wife, nor by impotence nor by a vaginal defect, nor by any defect whatsoever”⁵⁴¹. On the other hand ibn Qayyim al Jouzia, the Hanbali jurist provides that any deficiency in any either husband or wife entitles the other to file a divorce petition as they entered into marital contract while assuming that their future partner is clear of all deficiencies that may result in future divorce. This is presumed by parties impliedly and must be understood in the relevant culture and result in divorce. However, if not understood and happened by itself then on this basis divorce can be obtained by initiating legal proceedings. It is not provided in clear manner that what kind of deficiencies may become the basis of divorce but only provide that any deficiency that may result in partners in any kind of ill feeling or antipathy to an extent that it would not be possible for them to live a happy life together. Imam Ab Ab an fah is of the opinion that a court cannot order divorce on the basis of any deficiency in wife as husband

⁵³⁸ As discussed in chapter 3 under impediments of the legal capacity.

⁵³⁹ *Bidayat al-Mujtahid*, Ibn Rushd vol 2. P. 82-83.

⁵⁴⁰ *Al-Mughni*, vol 8, pp. 267-268.

⁵⁴¹ *Al-Muhalla*, al-Zahiri, (The Decorated Book), Cairo. vol. 7. p. 109

always has right to divorce her however, he provides that the court may order divorce if the husband has any kind of deficiency that wife fails to cope with in married life. In this regard Imam Abū Abī an fah and his pupil Imam Yusuf provides certain types of deficiencies in husband that may cause harm to wife and she may ask for divorce. Such deficiencies include impotency, mutilation and castration as these can be seriously damaging for psychological, physical and social comfort of woman in life. In such situation, a husband can free her to be independent but if the husband is not inclined to do so and wife had no advance knowledge of such deficiency, she may get divorce by applying for it to court. The court has power to dissolve the marriage in this scenario. Imam Muhammad has included two other deficiencies in this list that might be basis of such divorce and that are leprosy and insanity. Imam Abū Abī an fah, Imam Yusuf and Imam Muhammad clearly provide that divorce on the basis of these deficiencies can only be secured by wife when it is proved that she had no knowledge of such deficiencies prior to entering into marital contract and when proved she would be granted divorce immediately. Malik, Al-Shāfi‘ī and Hanbali schools of thoughts permitted divorce on the basis of these deficiencies to both man and woman. Maliki provides that divorce can only be irrevocable. However, if the wife remains silent on the issue of husband's defect it would be considered her implied acceptance of the deficiency of her husband and she further has no right to go to the court to obtain divorce.

Furthermore in situation of insanity of husband it was provided that divorce would not be granted at least for a year to confirm the mental condition of insanity. Imam Al-Shāfi‘ī provides to which Imam ibn Hanbal agreed that obtaining divorce on the basis of defect of husband to be considered as annulment of marriage and not divorce because he has not given the divorce. However, Imam ibn Hanbal does not endorse the view that silence regarding the

deficiency should be considered as her acceptance of deficiency unless she agreed to consummate having knowledge of such deficiency.

5.4.2 *Shari'ah* rulings regarding divorce (*Talaq*) and triple divorce at once

True interpretation of divorce is absolutely different from general perception of *Talaq*. The basis of Islamic law of divorce is the opportunity for the reconciliation. Every marriage deserves a second chance before its dissolution. It is possible that a husband may pronounce divorce in anger or due to any dispute among husband and wife. This is where reconciliation is important.

(a) *Acceptable mode of Talaq by Shariah rulings*

The most approved form of divorce declared by Muslim man is *Talaq ul Ahsan*. In this divorce, the husband has full legal capacity to single pronouncement of divorce to his wife during the *Tuhr* period (Purity period during menstruation cycles).

الطَّلُقُ مَرَّتَانِ فَإِمْسَاكُ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَنِ⁵⁴²

After the pronouncement of divorce, wife goes for *Iddat* (waiting period) of three months. In this *Iddat* period, the man can revoke divorce expressly or impliedly by having sexual intercourse with his wife. According to *Shari'ah* witness is not obligatory and even divorce pronounced by mistake is acceptable.

“It was narrated from 'Abdullah that he said: The Sunnah divorce is a divorce issued when she is pure (not menstruating) without having had intercourse with her. If she menstruates and becomes pure again, give her another divorce, and if she menstruates and becomes pure again,

⁵⁴² Surah al-Baqarah 2:229

give her another divorce, then after that, she should wait for another menstrual cycle. (One of the narrators) Al-A'mash said: I asked Ibrahim, and he said something similar."⁵⁴³

Talaq Ahasan which is considered as the most appropriate form of divorce, husband does have a period of three months to reconcile with his wife. After observing three month *Iddat*, woman is free to remarry⁵⁴⁴. *Talaq Hasan* (laudable divorce) is a type of divorce in which husband pronounce divorce successively during three *Tuhr* period of wife. There must be clear intention on the part of the husband. Husband is abstained to have sexual intercourse with wife during *Iddah* period, practiced by wife during the *talaq* period⁵⁴⁵. Similarly, in *talaq ul Hasan*, husband makes three clear pronouncement of divorce at three successive *Tuhr* menstruation periods. Making three pronouncements in three successive months shows that marriage is unable to work properly. Husband does have an opportunity to revoke even before the third pronouncement, but if chooses not to do so, this indicates his clear intention that he does not want to continue this marriage. Both the approved form of *talaq* do not show any unjustified power to Muslim Man, it only gives a right to a husband to dissolve the marriage also for the dissolution of marriage, he is provided with the reconciliation period. Both partners of the marriage contract have legal capacity to the dissolution of the Marriage. *Shar'iah* provided legal capacity to husband with these two forms of divorce whereas *Shar'iah* grants wife the right of *Khul, Tafweez-e-Talaq and Mubarat*.

anafi jurists provide that this command of *Shari'ah* is applicable on a woman who has already consummated her marriage and is having regular periods. However, on the basis of the *hadith* of the Prophet () for a woman whose marriage has not been consummated yet a divorce can be declared while in tenure of purity as well as in tenure of menstruation. If a

⁵⁴³ *Sunan An-Nisai*. Book of Divoce Chapter: The Sunnah Divoce . *hadith* 3394

⁵⁴⁴ *Al-Hidayah*. book of Divoce. Vol.1. P. 72.

⁵⁴⁵ *Ibid*. p. 72

marriage has been consummated with woman who is not having periods or whose periods have not started yet she can be divorced after the sexual interaction as she is not going to catch pregnancy after the intercourse. In situation where the woman is pregnant while having intercourse, divorce can be declared after intercourse as her pregnancy was established at the time of intercourse. However in the light of *Sunnah* the approved method of declaring divorce to these women is that after declaring one divorce woman should be left for completing her waiting period of divorce and the three divorces must be declared at the interval of a month or one menstruation period each between them.⁵⁴⁶ According to hanabli jurists based on the opinion of Imam Ibn Hanbal: “The approved method (i.e. the one according to the Sunnah) of divorcing a wife marriage with whom has been consummated and who menstruates is that a single divorce be pronounced on her in her period of purity without having had sexual intercourse with her, and then she be left to complete her waiting-period. But if she is given three divorces, one each in three separate periods of purity or three divorces in one and the same period of purity, or divorced thrice at once, or divorced during the courses, or divorced in the period of purity during which the husband has had sexual intercourse and her being pregnant is not known, all these would be disapproved and forbidden forms of divorce.”⁵⁴⁷

(b) Triple divorce At Once (*Talaq ul Biddah*)

Triple divorce is also known as *Talaq ul Biddat*. It must be noted that this form of divorce was never approved by the Prophet (). Muslims always believe in the concept of reconciliation, however *Talaq ul Biddah* is irrevocable and hence there is no chance of reconciliation. The entire three pronouncements are given at a single time and marriage comes

⁵⁴⁶ Ibid. *Hedayah*. vol. 1, p. 73

⁵⁴⁷ Ibid

to an end without any period of Iddah. It is the reason that *Triple* divorce was always condemned. It is recognized under Sunni law and under which it is considered to be a sin.

« أَحْبِرَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ رَجُلٍ طَلَّقَ امْرَأَتَهُ ثَلَاثَ تَطْلِيقَاتٍ جَمِيعًا، فَقَامَ غَضَبَانًا ثُمَّ قَالَ: أَيْلَعَبُ بِكِتَابِ اللَّهِ وَأَنَا نَبِيٌّ أَظْهَرَكُمْ؟ حَتَّى قَامَ رَجُلٌ وَقَالَ: يَا رَسُولَ اللَّهِ، أَلَا أَقْتُلُهُ »⁵⁴⁸

“The Messenger of Allah was told about a man who had divorced his wife with three simultaneous divorces. He stood up angrily and said: Is the Book of Allah being toyed with while I am still among you? Then a man stood up and said: O Messenger of Allah, shall I kill him”⁵⁴⁹

It is disapproved form and condemned by every Muslim Jurist because the reason and time for every decision is very important, however *Triple Talaq* lacks both. The triple divorce was introduced in the time of Umar bin Khatab as mentioned :

« لَاتَّقِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَأَبِي بَكْرٍ، وَسَنَتَيْنِ مِنْ خِلَافَةِ عُمَرَ، طَلَاقٌ : إِنَّ النَّاسَ قَدْ اسْتَعْجَلُوا فِي أَمْرٍ قَدْ كَانَتْ لَهُمْ فِيهِ أُنَاةٌ، فَلَوْ أَمْضَيْنَاهُ عَلَيْهِمْ، فَأَمْضَاهُ عَلَيْهِمْ »⁵⁵⁰

“Ibn 'Abbas reported that the (pronouncement) of three divorces during the lifetime of Allah's Messenger () and that of Ab Bakr and two years of the caliphate of Umar (was treated) as one. But Umar b. Khattab said: Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed this upon them, and he imposed it upon them”

After a single declaration of divorce and that is further followed by restraining oneself from physical relations till the end of the period of wife's *iddah* is called '*talaq ahsan*' the approved form of divorce. Second mode '*talaq hasan*' that results by three declarations of divorce one during the each of three consecutive tenures of 'purity' which is interval between menstruation and restraining oneself from sexual performance during this period. Third mode declarations of *talaq* one after the other in instant sequence or with little intervals during one period of purity. Fourth one is single pronouncement of *talaq* during the period of menstruation of wife providing a clear sign that a *talaq* is fully irrevocable. The first two kinds

⁵⁴⁸ Sunan Nisai. Book of Divorce. Chapter (6) *Three Simultaneous Divorces And A Stern Warning Against That*. dith: 3401.

⁵⁴⁹ Sunan an-Nasa'i. The Book of Divorce. Hadith 3401

⁵⁵⁰ Sahih Muslim. Book of Divorce. Chapter *Three Fold Divorce*. dith. 1472

of divorce explained above known are *Sunnah* these are sanctioned by the *haddith* of the Prophet Muhammad (ﷺ). The Companions of the prophet (رضي الله عنهم) hold the opinion and practice in complete agreement with the injunctions of the Qur'an and Sunnah of Prophet (ﷺ). According to a narration mentioned in *Muwatta*: "a man came to Abdullah ibn Masud and said, I have divorced my wife by saying I divorce you eight times. Ibn Masud said to him, What have people told you? He replied, I have been told that I have to part absolutely from her. Ibn Masud said, They have spoken the truth. A person who divorces as Allah has commanded, Allah makes it clear for him, and a person who obscures himself in error, we make stay by his error. So do not confuse yourselves and pull us into your confusion. It is as they have said."⁵⁵¹

The third and fourth kinds of divorce are known as *Talaq-ul-biddah*. *Talaq-ul-biddah* is a further type of *talaq* even though that is effective in law but is considered as irregular and sinful. *Talaq-ul-biddah* is accomplished and irrevocable that is 'bain' instantly at the event of declaration. The '*ahsan*' way of divorce is accomplished and becomes 'bain' on the conclusion of the period of Iddah after the declaration of *talaq*. The '*hasan*' way of divorce is accomplished and becomes 'bain' at the happening of third declaration. However, at the occasion when marital relation is not consummated by husband and wife *talaq* can become effective in law through a single declaration of *talaq*⁵⁵².

5.4.3 Juristic opinions regarding divorce on the basis of its effects

The jurists agreed that the husband divorcing his wife, with whom he has consumed the marriage, through *talaq Sunnah* is one who divorces her through a single pronouncement during a period of her purity in which he has not had intercourse with her. The husband divorcing in a period of menstruation or in a period of purity during which he had intercourse

⁵⁵¹ *Muwatta*. Imam Malik. Book 29 Book of Divorce. *haddith*. 1154.

⁵⁵² *Al-Hidayah*. book of Divorce. Vol.1. p 75

with her is not abiding by the Sunnah form of divorce. The jurists agreed unanimously agreed about this because of the established tradition of Ibn Umar mentioned above.

The Hanafi jurists regard divorce as of three kinds: Ahsan, hasan, and bid'i. as discussed above. But Jurists of Imam Malik discuss three kinds of divorce: *Sunnah*, *bid'i makruh* and *bid'i haram*.

As explained above the Hanafi jurists provides that divorce is of three types that includes; (i) ahsan (ii) hasan and (iii) bidi. However Maliki jurists provides three types of divorce; (i) sunnah (ii) bidimakruh and (iii) bidi haram. In accordance to them the proper Sunnah mode of declaring divorce is that it is declared on the woman with whom the marriage has already been consummated and who goes through her menstruation cycle and a first single divorce is declared upon her during the period of her purity without having recourse to sexual interaction or intercourse during this period and finally the wife is left alone to spend her period of *iddah*. The *bidimakruh* is a divorce that (i) is declared while going through the tenure of purity in which a sexual intercourse has also been performed and (ii) more than one divorces are declared in same tenure of purity but no sexual performance has been performed by husband and wife (iii) three divorces are declared in different tenures of purity in the waiting time (iv) three divorces are declared all at the same time. In addition divorce declared during the time of menstruation is *bidi haram*. Imam Al-Shafi' provided that in the affair of divorce the contradiction between the permitted in the light of Sunnah and unacceptable as it is against Sunnah kinds of divorce is only in terms of time and not in terms of number.⁵⁵³

⁵⁵³*Ahkam al-Qur'an*. Imam Jassas. Vol 4. P. 235

According to Imam Al-Shafi‘i, in the matter of divorce the difference between the approved (i.e. according to the Sunnah) and the reprehensible (i.e. against the Sunnah) forms of divorce is only with regard to time and not with regard to number.⁵⁵⁴

Jurists of the Hanafi school of law provides that divorce can be given without the presence of witnesses at the time of communication because divorce is the acknowledged right of husband in Islam and requires no evidence in this regard. It is required to record the divorce but presence of witnesses is not mandatory. The jurists provide that pronouncement of divorce can be absolute and unconditional that is immediately effective or divorce can be contingent subject to some condition required to be fulfilled in future. Often such condition is made through a declaration or promise.

(a) Ila and the legal status of wife

Another form of dissolution known as *ila* (a vow of continence) is when the husband makes a vow to abstain from his wife for four months or more. *Ila* is a type of divorce in which a husband abstain himself from having sexual intercourse with his wife for the period of four months.

⁵⁵⁵ لِّلَّذِينَ يُؤْلُونَ مِن نِّسَائِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ

“for those who take an oath for abstention from their wives, a waiting for four months is ordained.”

It is believed that if a man is able to control his sexual urges against his wife for four months, he is entitled to have divorce with her. Jurists disagreed on the issue that marriage dissolves automatically at the completion of four months or not. Hanafi jurists hold the opinion that on completion of the period of vow, divorce takes place which will be irrevocable divorce (*talaq-*

⁵⁵⁴ Mughni al-Muhtaj.

⁵⁵⁵ Surah al-Baqarah 2: 226

e-bain) and if he wants to rejoin her, he can conclude a new contract of marriage. The basis of their opinion is the husband in abstaining from sexual intercourse, acts unjustly towards his wife, which is her right. This is also view point of Ali ibn Talib, Abdullah ibn Masud, ibn Abbas, and Zayd ibn Thabit⁵⁵⁶.

The jurists of other schools of law agreed that the divorce cannot be automatically happened. Jurists of Al-Shafi'i school of law hold the opinion that on the completion of the period of vow, divorce does not take place automatically without any order of the court, but gives her right to demand a divorce from the husband in consequence of decree by the *qazi* she become repudiated by a divorce which is revocable in nature.⁵⁵⁷

According to jurists of Maliki School of law, the husband on the expiry of the period of vow should either have recourse to her or divorce her.⁵⁵⁸

The Hanbali jurists also favour the opinion expressed by Al-Shafi'i and Maliki jurists that the divorce does not automatically take place with the expiry of the period of vow. It becomes incumbent on the husband to pronounce a revocable (*raji*) divorce after the termination of period of *ila*.⁵⁵⁹ The Hanafi jurists provide that after the completion of waiting period of four months period the divorce has become irrevocable. Majority of the Islamic jurists provide that separation of husband and wife is subject to a pronouncement of divorce by the husband or through a divorce suit filed by the wife. After which it is deemed to be a revocable divorce. However, Maliki provides that returning back to the marital status is dependent upon the consummation of marriage.

⁵⁵⁶ *Badai Sanai*, vol. 3, p. 275.

⁵⁵⁷ *Al-Umm*, Imam A-Shafi'i, vol 5, P. 287.

⁵⁵⁸ *Al-Mudawwanah al-Kubra*, Vol 5, p. 352.

⁵⁵⁹ *Al-Mughni*, Vol. 7, Pp 318-337.

(b) Zihar and the legal status of wife

Zihar is a word derived from *zahr* i.e. the back. in which “husband compares his wife with his mother or any female in prohibited degrees”. The Qur’an contains the injunction of *Zihar* in the following verse:

الَّذِينَ يُظَاهِرُونَ مِنكُم مِّن نِّسَائِهِم مَّا هُنَّ أُمَّهَاتُهُمْ إِنَّ أُمَّهَاتُهُمْ إِلَّا اللَّائِي وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ
مُنْكَرًا مِّنَ الْقَوْلِ وَزُورًا⁵⁶⁰

“if any men among you divorce their wives by *Zihar* (calling them mothers), They cannot be their mothers: none can be their mothers except those who gave them birth..”

Zihar does not amount to divorce, the jurists agreed that if a man says to his wife “you are for me as my mother’s back”, it amount to *Zihar*, and the wife is entitled to prevent her husband from taking conjugal liberty, till he has made proper expiation and if he refuses, then the judge can force her husband to expiate or repudiate his wife.⁵⁶¹ To derive the legal injunction concerning *zihar*, the basis is found from the incidence took place in the era of Prophet Muhammad for the code of law pertaining to *zihar* is derived from the verses of Qur’an and judgments of the prophet after revelation..

“Ab Salamah and Muhammad bin Abdur-Rahman (bin Thawban) narrated that Salman bin Sakhr Al-Ansari from Banu Bayadah said that his wife was like the back of his mother to him until Ramadan passed. After half of Ramadan had passed he had intercourse with his wife during the night. he went to the Messenger of Allah to mention that to him. The Messenger of Allah said to him: ‘Free a slave. He said: ‘I don’t have one’. he said: ‘Then fast two consecutive months.He said: ‘I am unable.’ he said: Feed sixty needy people. He said: ‘I can

⁵⁶⁰ Surah al-Mujadila 58:2

⁵⁶¹ *Badai Sanai*. alKasani.Vol 3. P 359.

not'. the Messenger of Allah said to Farwah bin Amr 'Give him that *Araq* and it is a large basket that holds fifteen or sixteen *Sa* to feed sixty needy people."⁵⁶²

c) Lian and legal status of wife

It is imprecation (*lian*) where the husband confirms under the oath that his wife has committed the act of adultery and further that he is not the father of the child born to her and the wife on the other hand confirms under oath contrary to the confirmation of husband.⁵⁶³ The wife's capacity is annulled due to this action by the court and she is no more associated with her previous husband and got talaq e bain.

5.4.4 Shari'ah injunctions regarding divorce procedures

5.4.4.1. Divorce given on the basis of condition of woman

If the wife be a person who is not subject to the courses from extreme youth or age, her husband be wanting to repudiate her by three divorces in the regular way, he is first to pronounce a single sentence of divorce upon her, and at the expiration of one month another, and in like manner a third at the expiration of the next succeeding month ; because the term of one month corresponds with a return of the courses, as is mentioned in the Qur'an . It is here to be observed that if the first divorce be given in the beginning of the month, the three months from that peIt is here to be observed that if the first divorce be given in the beginning of the month, the three months from that period are to be counted by the lunar calendar, and if in the middle of it, by the number of days, with respect both to the completion of divorce and of the *iddah*. This is the rule with Ab an fah .-The two disciples maintain that the second and third months are to be invariable counted by the lunar celender⁵⁶⁴. The authentic

⁵⁶² *Jami` at-Tirmidhi*. The Book on Divorce and Lian (13) Chapter (20) *What has been related about the atonement for Zihar.* dith. 1200. See index serial no. 6

⁵⁶³ Surah An-Nur 26:6-9

⁵⁶⁴ Ibid. vol 1, p. 73

viewpoint of Imam Ahmad bin Hanbal which is generally agreed upon by the Hanbali Jurists is: “if the woman is such that marriage with her has been consummated but who no longer menstruates, or such who has not yet menstruated, or is pregnant, in her case there is neither any difference of approved and disapproved with regard to time nor with regard to the number of divorces pronounced”.⁵⁶⁵

According to Jurists of Al-Sh fi ‘ ‘ School of Law it is not permitted and forbidden to announce divorce to a woman in marriage (i) with whom husband has consummated and who menstruates while she is in her menstruation period or (ii) on an ovarian who might conceive during a period of purity in which her husband has had sexual intercourse with her and the pregnancy of wife is still not confirmed. As for as the number of divorces is concerned whether three divorces are announced at once or announced in the one same period of purity or announced in distinct periods of purity they are not in any manner repugnant to the teachings of the Sunnah of the prophet. In the matter of the woman (i) whose marriage has not yet been consummated or, (ii) who no longer menstruates or, (iii) who has not yet menstruated or, (iv) whose pregnancy is not yet confirmed, there is no distinction between the approved and disapproved practices of divorce⁵⁶⁶.

5.4.4.2 Divorce given in prescribed time

The waiting duration of a married woman is three monthly menstruation periods after the declaration of divorce. In the light of this religious commandment the appropriate time to declare divorce seems to be when she is not having menstruation to properly start the time of waiting period. “you should divorce them when their waiting-period begins.”⁵⁶⁷ As a waiting period could not be started from the menstruation period during which the divorce has been

⁵⁶⁵ *Al-'Ilal wa-Ma'rifat al-Rijal*, Ahmad ibn Hanbal. (Wasi Allah ibn Muhammad Abbas ed. Beirut: Mu'assasat al-Risala, 1983), vol: I, p. :219

⁵⁶⁶ Mughni al-Muhtaj

⁵⁶⁷ Surah Al-Baqarah 2:228

declared. Moreover, this command also requires that a wife should also not be divorced in the purity period during which the couple had a physical interaction.

« ابْنُ عُمَرَ، أَنَّهُ طَلَّقَ امْرَأَتَهُ، وَهِيَ حَائِضٌ فِي عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَصَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ ذَلِكَ، فَقَالَ لَهُ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: مَرَّةً فَلْيُرَاجِعْهَا، ثُمَّ لِيَبْرُكْهَا حَتَّى تَطْهُرَ، ثُمَّ تَحِيضَ، ثُمَّ تَطْهُرَ، ثُمَّ إِنْ شَاءَ أَمْسَكَ بَعْدُ، وَإِنْ شَاءَ طَلَّقَ قَبْلَ أَنْ يَمَسَّ، فَيَلِكَ الْعِدَّةُ الَّتِي أَمَرَ اللَّهُ عَزَّ وَجَلَّ أَنْ يُطْلَقَ لَهَا »⁵⁶⁸

“Ibn ‘Umar Allah be pleased with them reported that he divorced his wife while she was in her menses. ‘Umar (Allah be pleased with him) asked Allah's Apostle () about that, and he said: Command him to take her back until she is pure and then she enters the second menses and then becomes pure. Then either divorce her (finally) or retain her”.

Owing to physical interaction in that period when the divorce is declared a husband and wife both would not be confident about whether the wife has conceived or not. As waiting period, cannot be initiated on the assumption that there would be menstruation periods in the coming months and calculation would be made then or on assumption that it is a waiting period of a conceived woman. As a result this command provides two rules at the same time: firstly, that divorce should not be declared while during menstruation period and secondly, that divorce might be declared either during the tenure of purity without any sexual interaction with wife in that period or at the event when it is a known fact that woman is pregnant. The interpretation of this verse is best explained by the Prophet () himself. The details of Abdullah bin ‘Umar ‘s divorced his wife have been reported in almost all collections of dith and the same in fact are the source of the law in this connection.

«أَنَّه طَلَّقَ امْرَأَتَهُ وَهِيَ حَائِضٌ، فَاسْتَفْتَى عُمَرُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: إِنْ عَبْدَ اللَّهِ طَلَّقَ امْرَأَتَهُ وَهِيَ مَرَّةً فَلْيُرَاجِعْهَا، ثُمَّ يَدَعُهَا حَتَّى تَطْهُرَ مِنْ حَيْضَتِهَا هَذِهِ، ثُمَّ تَحِيضُ حَيْضَةً أُخْرَى، فَإِذَا طَهَّرَتْ فَإِنْ شَاءَ فَلْيُفَارِقْهَا قَبْلَ أَنْ يُجَامِعَهَا، وَإِنْ شَاءَ فَلْيُمْسِكْهَا، فَإِنَّهَا الْعِدَّةُ الَّتِي أَمَرَ اللَّهُ عَزَّ وَجَلَّ أَنْ تُطْلَقَ لَهَا النِّسَاءُ»

“Nafi' narrated from 'Abdullah, that he divorced his wife while she was menstruating. 'Umar asked the Messenger of Allah about that and said: Abdullah has divorced his wife while she was menstruating. He said: Tell 'Abdullah to take her back, then leave her until she becomes pure from this menstrual period, then menstruates again, then when she becomes pure again, if he wishes he may separate from her before having intercourse with her, or if he wishes he

⁵⁶⁸Sahih Muslim. Book 18 book of Divorce dith 3480

may keep her. This is the time when Allah, the Mighty and Sublime, has stated that women may be divorced.”⁵⁶⁹

The meaning of this verse is further explained by another dith. Prophet Muhammad () was anger on the person who is against the way of divorced prescribed by the *Shari'ah*.

« عَنْ رَجُلٍ طَلَّقَ امْرَأَتَهُ ثَلَاثَ تَطْلِيْفَاتٍ جَمِيْعًا، فَقَامَ
يَا رَسُوْلَ اللهِ، اَلَا اَقْتُلُهُ »⁵⁷⁰
: اَيْلَعَبُ بِكِتَابِ اللهِ وَاَنَا بَيْنَ اَظْهَرِكُمْ حَتَّى قَامَ رَجُلٌ :

Ibn 'Abbas has given this commentary of it “one should not pronounce divorce during menstruation nor in the period of purity (tuhr) during which the husband may have had sexual intercourse. But one should leave the wife alone till she attains purity after the course; then one may pronounce a single divorce on her. In this case even if there is no reconciliation and the waiting-period expires, she would be separated by the single divorce”.⁵⁷¹ This kind of *Rajai* repudiation is common type meaning that marriage is not dissolved unless the tenure of waiting period is finished. The husband carries the right to have the option of revoking divorce anytime during this tenure either impliedly by again resuming the normal marital life including having sexual interaction with his wife or by expressing it by words or in writing. There is no need to get the consent of wife regarding it or requirement to have a fresh marital contract or dower. Marriage would be considered as if it is in continuation without any disruption. The command as regards to the revocable divorce is grounded on the The Qur' nic ruling that provides: “And their husbands have the better right to take them back in that period if they wish for reconciliation.” This may be single or double divorce. This comes just a few lines after “And divorced women shall wait (as regards their marriage) for three menstrual

⁵⁶⁹ *Sunan an-Nasa'i* . Book of Divorce. dith.3389

⁵⁷⁰ *Sunan Nasai*. Book of Divorce . Chapter (6) *Three Simultaneous Divorces And A Stern Warning Against That*. dith 3401.

⁵⁷¹ *Ibn Kathir*.

periods.”⁵⁷²In fact divorce is revocable except that which takes place without consummation of marriage or that which is affected at the request of wife for some consideration. *Talaq raji* doesnot dissolve marriage contract completely because still the divorce wife remain wife of the divorcing husband therefore wife is entitled to maintenance and dwelling during iddah as discussed above. *Talaq raji* however does not entitled the wife to immediate payment of dower if it is deffered either to the death of husband or pronouncement of irrevocable divorce. However, in case husband dies, the right of inheritance from deceased is established because of the persistence of marriage contract between the spouse.

5.4.4.3 Maintenance of the divorced woman

a. In case of revocable divorce (*talaq rajai*)⁵⁷³

Maintenance after revocable divorce is the responsibility of husband because she is still considered his wife. The verse indicates this rule.

أَسْكِنُوهُنَّ مِمَّنْ حَيْثُ سَكَنْتُمْ مِّنْ وَّجَدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِن كُنَّ أُولَاتٍ حَمَلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ فَإِن أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ⁵⁷⁴

b. In case of irrevocable divorce (*talaq bain*)⁵⁷⁵

After revocable divorce the jurists differ among themselves whether maintenance is legal right of woman or not. anafi jurists had the opinion that the woman is permitted to receive residence and expenses. They aurgued that divorce woman can hold the maintenance in the words of Allah Almighty:

⁵⁷² Surah Al-Baqara2:228.

⁵⁷³*Talaq Raji* (Revocable Divorce) Ruju means the resumption by the husband of the marital relations with wife after the pronouncement of divorce but before the expiration of *iddah* without need of the new marriage contract. This is the established right of a husband given by Shariah. Divorce in which the husband has right to revoke the divorce during iddah is called *talaq raji*. .

⁵⁷⁴ Surah At Talaq 65:6

⁵⁷⁵*Talaq Bain* (irrevocable divorce) In this form of divorce the wife is completely separated from his husband and it dissolve marriage contract between the parties completely. If the husband does not take her back during iddah after one or two pronouncements of divorce then it is called *talaq bain* as *sughra*, however the husband and wife can be reunited with new marriage contract for new dower..

يَتَأْتِيَا النَّبِيَّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ ۖ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا تَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُبَيَّنَةٍ ۗ

Majority of the Jurists have the opinion that the above verse gives maintenance to every woman who is divorce. The maintenance includes the right to dwelling as it is mandatory on her by Shar'ia to stay in the house therefore the divorce woman has complete legal capacity to receive maintenance by her ex-husband. Jurists of Hanabli school of law differ from this opinion. They take evidence of their opinion from the tradition related to Fatima Bint Qais whose husband gave her two divorce and Allah's messenger () didn't order to provide her maintenance.⁵⁷⁷

Among Islamic jurists on the issue of *failure to pay maintenance* there is a difference of views regarding the right of wife to demand divorce at the event of failure to provide maintenance by husband. The difference is mainly as to whether non maintenance is a valid ground for exercising such right of divorce. The Hanafi school of thought has a clear stance that it is not a valid basis for demanding divorce. They further provide that it is not a valid basis whether (i) the husband is intentionally refusing to pay or (ii) his financial state do not permit him to pay in both situations. They based their view on the command of Allah provided in The Qur'an in Surah at talaq 65: 7 interpreted as that men having enough resources should spend according to their means and men having restricted financial resources should spend considering their restricted resources. In the light of this according to Imam Abu Hanifah it is for husband who could not provide maintenance to his wife owing to his restricted resources. However, a husband who simply declines to provide maintenance to his wife without any fair reason and by being unfair such unfairness in marital relations can be addressed without invoking the

⁵⁷⁶ Surah At-Talaq 65:1

⁵⁷⁷ *Al-Madkhal li Dirasat al-Fiqh al-Islami*. Hussain Hamid. P. 49.

provision of divorce. Such as if husband is arguing that he is not able to pay owing to restricted income but possess a good amount of properties in such situation he can be asked to sell his properties and to pay the maintenance from the proceeds of sale. Furthermore it is provided that he can be sent to prison until he agrees to pay the maintenance to his wife on regular basis. Abu Zahra is of the same opinion as Hanafi school on the basis that there is no express provision in The Qur' n and the Traditions of the prophet that permit divorce only on the ground of non-provision of maintenance and clearly declares act of divorce the most abominable action of all the permissible actions. Imam Malik, Imam Humble and Imam Al-Shafi' especially Imams Malik and Humble permit wife to invoke divorce through the court of law on the basis of failure on the part of husband to pay maintenance and husband possesses no property. They state it on the basis of command provided in The Qur' nic al-baqarah 231 that provides either to have the wives back on reasonable grounds or set the wives free on reasonable grounds. However, if the husband has taken back a woman but has failed to provide her maintenance again it would be considered that she has not been taken back on reasonable grounds. Further this view is supported by the authentic tradition of the prophet providing that "there shall be no injury and no injury shall be remedied by another" and declares it a serious injury inflicted by husband upon wife if he refuses to maintain her and issue of her suffering must be resolved by the court. The court has power to dissolve the marriage by ordering divorce on the basis of any deficiency on the side of husband and failure to maintain wife would be considered serious deficiency and harm to wife and therefore divorce can be ordered by court in such situations.⁵⁷⁸

⁵⁷⁸ Abu Zahra, pp. 347-354

c- the pregnant woman whose husband give her divorce

According to verse of The Qur' n she is entitled to maintenance till the delivery her baby. The

The Qur' n says:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وَجْدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ
فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ⁵⁷⁹

Another group of jurists asserts that Islamic law oblige husband to pay maintenance to the divorced wife to the divorced wife for the rest of the her life or until she gets marries someone else. The proponents of this opinion make their basis of the following verse:

وَالْمُطَلَّقاتِ مَتَعًا بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ⁵⁸⁰

In their opinion 'mata' stands for maintenance or *nafaqa* but according to Shar'iah this debate continuous that whether woman has not legal right to ask for maintenance after divorce or not.

It is based on the following narration.

قَالَتْ فَاطِمَةُ بِنْتُ قَيْسٍ: طَلَّقَنِي زَوْجِي ثَلَاثًا عَلَى عَهْدِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: قَالَ مُغْبِرَةُ: فَذَكَرْتُهُ لِإِبْرَاهِيمَ، فَقَالَ: لَا نَدْعُ كِتَابَ اللَّهِ وَسُنَّةَ نَبِيِّنَا صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِقَوْلِ امْرَأَةٍ لَا نَدْرِي أَحْفَظْتُ أَمْ نَسَيْتُ. وَكَانَ عُمَرُ يَجْعَلُ لَهَا السُّكْنَى وَالنَّفَقَةَ

“Fatimah bint Qais said ‘My husband divorced me three times during the time of the Prophet. So the Messenger of Allah said: There is no housing for you nor maintenance. Al-Mughirah (one of the narrators) said: I mentioned that to Ibrahim and he said: Umar said: We do not leave the Book of Allah and the Sunnah of our Prophet for the saying of a woman, and we do not know if she remembered or forgot. And Umar used to give her (the divorced woman) housing and maintenance.”⁵⁸¹

5.4.4.4 Wife's residence during Iddah (waiting period)

In the light of The Qur' nic rule that states that women should not leave their husband houses nor should they be pushed out of their husband houses except in situations when they have

⁵⁷⁹ Surah at Talaq 65: 6

⁵⁸⁰ Surah al-Baqarah 2:241

⁵⁸¹ *Jami Tirmazi*. Book (13) book of Divorce. Chapter (5): The woman with three divorces gets no housing or maintenance (from the husband) dith: 1180.

committed an illegal sexual intercourse surah at talaq 65:1 provided that a divorce woman has right to spend her period of iddah at her marital home. To spend her period of Iddah while remaining in her marital home is not only her right but also an obligation that she must observed. During that period of iddah at her husband home she is obliged to be obedient to her husband that husband can claim as a right. Jurists argue that obligation of wife to stay in her husband home is dependent upon whether the iddah is followed by separation through contractual arrangement that includes irrevocable divorce and death. In the light of this rule if woman has left her husband marital home while being in iddah duration without a valid reason she surrenders her right to be maintained after leaving the place. However, jurists acknowledge that a valid reason for her departure from her husband marital house during the duration of iddah is acceptable. Such as if she is facing security issues including threat to life and property or if she is forcefully pushed out of the marital home by the real owner of house. In this situation during the iddah duration of a revocable divorce she has to shift into another place of residence provided by the husband. For the rights to the wife as mention above, the Shariah has given full capacity to wife that at the time of dissolution of marriage contract by husband she can exercise her capacity and avail all rights given tot her by Shariah to protect her dignity and social life. Therefore muslim woman is not vulnerable in the rules of Islamic law which has granted her full capacity to exercise her rights as being wife.

5.5. Woman's legal capacity for dissolution of marriage contract

According to *Shari'ah* wife can get herself out of the Marriage, by making an offer to her husband with some consideration. If husband accepts the offer of the wife, he is bound to give divorce (*Talaq*) to his wife. *Khul* is an exclusive right given to a wife to take divorce from her husband by giving ransom. Imam Jurjani defines *al-Khul* as end of marriage

contract after compensating to the husband.⁵⁸² *Talaq e Tafweez* – It is also known as delegated divorce, in which husband delegates his authority over divorce to give it to his wife or to another person. Wife can give divorce to herself whenever she wants to dissolve the Marriage contract. *Talaq e Tafweez* gives a right to woman to give herself divorce (*talaq*). Interpretation of this divorce (*Talaq*) is quite simple and appropriate. Husband delegates his power to his wife and in his absence, if wife wants to free herself from the bond of Marriage, she can give herself divorce (*Talaq*).⁵⁸³

Similarly, power is delegated to any third person. If husband believes that wife is not capable of giving divorce to herself, any third person can give divorce to wife on his behalf in his absence. *Talaq e Tafweez* provides women right to give divorce to herself.

5.5.1 *al-Khul'* Legitimacy according to the Qur'an and Hadith Literature

The term *al-khul'* means “extracting oneself”. Ibn Manzūr defines *khul* and writes, “the root of *khul'* is *khal'*. The verbal noun *khal'* refers to the act of extraction, removal, detaching or tearing out. In its real sense, *khal'* is generally associated with things or object, such as garments”⁵⁸⁴. Lexicon dictionaries of Arabic languages defines, *al-khul as*: “to remove or put off something you have on you or to get rid of it”⁵⁸⁵. Here meaning *al-khul*, is used as that of “put off your shoes” occurring in the following verse from Surah Taha, to instruct Syedna Mosa (a.s.) to take off his shoes as mandatory act:

⁵⁸² *Kitāb al-T'arfat*. Ali b. Muhammad al-Jurjanī. (Beirut: Dar al-Suroor n.d.) p.145

⁵⁸³ Ibid. p. 149

⁵⁸⁴ *Lisan al-'Arab*. Ibn Manzūr M. (Beirut: Dar Sadir publishers 1955) vol 4:, pp76-77.

⁵⁸⁵ Ibid. Ibn Manzūr, , vol. 4, p. 179. See also *AI-Qamus al-Muhit*. Majid Al-Din Fayrooz Abadi. (Beirut: dar Al-Marifah 1978) .Vol. 3, p. 24.

al-Mu'jam al-Wassit. Anis Ibrahim. (Egypt: Maktaba As-Surook Ad-Dawliyah. 1425h) p. 250

إِنِّي أَنَا رَبُّكَ فَاحْلَعْ نَعْلَيْكَ إِنَّكَ بِالْوَادِ الْمُقَدَّسِ طُوًى .⁵⁸⁶

“Verily I am Thy Lord! Therefore (in My presence) put off Thy shoes: Thou art In the sacred valley Tuwa”

In the same manner a wife may also require *al-khul* from her husband when she prefer to acquire separation from him in her marriage relation and liberate from the marriage contract, therefore she may refurbish herself. It is here to understand the deep meanings of the word *al-khul* represent in this context the to explain the soundness in the marriage bond and relationship between the spouses. Allah Almighty also emphasizes the strength in association between the husband and wife that marriage cultivates by using the expression *libas* means “garment”. It is to explain here in this meaning that if a woman demands *al-khul* from her companion, she is in this way getting liberate of, or out of, the marriage bond. This is a symbolic impression of liberate from marriage relationship somewhat not tangible or substantial. In real interpretation the word *khul* is derived from a word: *al-khal*. *khal`a* is “when one takes off his clothes”.⁵⁸⁷ According to Alauddin Masud al-Kasani, who refers to two Qura’nic verses, i.e., the meanings: “We shall have removed all ill feeling from their hearts”⁵⁸⁸, and, “then he pulled out his hand.”⁵⁸⁹ to explain the lexical meaning of *al-khul* as: ‘*al-khul*’ is lexically ‘*al-naz*’ and that is to drag something out from something else.’ Therefore, ‘*khala`ha*’ means that husband has removed his wife from the marital relationship.⁵⁹⁰ Therefore it is not liked by *Shar’iah* to demand for separation oftenly without solid reason.

⁵⁸⁶ Surah Taha 20:12

⁵⁸⁷ *Lisan al-‘Arab*. Ibn Manz r M. (Beirut: Dar Sadir publishers 1955) vol 4:, pp77

⁵⁸⁸ Surah Al-Araaf 7:43

⁵⁸⁹ Surah Al-Araaf 7: 108

⁵⁹⁰ *Badai al-Sanai*. Alauddin Masud al-Kaisani. (Dar Ihya’ al-Turath al-‘Arabi, 2000) vol3. p.227.

«أَيُّمَا امْرَأَةٍ سَأَلَتْ زَوْجَهَا طَلَاقًا فِي غَيْرِ مَا بَأْسٍ، فَحَرَامٌ عَلَيْهَا رَائِحَةُ الْجَنَّةِ»⁵⁹¹

“Prophet () said: If any woman asks her husband for divorce without some strong reason, the odour of Paradise will be forbidden to her.”

Technically, this term *al-khul'* in *Shar'iah* means “marriage extraction and is the act of accepting compensation from the wife in exchange for her release from the marital tie”⁵⁹².

Imam Ahmad bin Ali bin Hajr al-Asqalani interprets it as: “Separation of the husband from his wife for money consideration which is to be given to the husband”⁵⁹³.

As provided by Ibn-e-Rushd, “the terms *al-khul'*, *fidya*, *sulh* and *mubara'a* refer to the same meaning, which is a transaction in which wife pays compensation for obtaining her divorce. Ibn Rushd differentiates the term *al-khul'* in which she has to return all that the husband has spent on her, from *sulh* where she pays only partially, *fidya* where she pays more than she received, and *al-mubara'a* where she writes off her claim against the husband”⁵⁹⁴.

Ibn-e-al-Arabi describes that Imam Malik ruled and gave opinion to explain khul, “*al-mubari'a* is *al-khul'* before consummation of marriage, and '*al-mukhliatu*' is when she obtains *al-khul'* after consummation of marriage, and '*al-muftadiyatu*' is to redeem herself by paying some of her money, however, these terms are used interchangeably”⁵⁹⁵.

Kamal bin Al-Humam defines *al-khul'* as: “putting an end to marriage for compensation by using the word *al-khul'*”⁵⁹⁶.

Legislation regarding *al-khul'* originates from the Qur'an as provided in the following verse of Surah Al-Baqarah:

⁵⁹¹ *Sunan Abi Dawud*. Book of Divorce Chapter: Regarding Khul'. dith 2218

⁵⁹² *al-Binayh*. Badruddin Ma mud al-Ayni, (Beirut: Dar al-Fikr, 1990) p. 291

⁵⁹³ *Fata al-Bari*. A mad b. 'Ali bin ajr al-'Asqalani (Karachi: Dar al-Taqeem, n.d.)vol 9, p.396.

⁵⁹⁴ *Bidayat Al-Mujtahid*. Mu ammad bin A mad Ibn Rushd (“The Distinguished Jurist’s Primer”, trans .Imran. Ahsan Nyazee. UK: Garnet Publishing Ltd. 1996) vol2. P. 79.

⁵⁹⁵ *A kam al-Quran*. Abu Bakr Muhammad Ibn al-Arabi, (Al-Tawfikia publishers n.d.) vol:1.p. 251

⁵⁹⁶ *Sharh Fatah al-Qadir*. Kamaluddin bin Al- umam. (Beruit: D r al-kutub al'Ilmiyah, 2003) vol 4. P.188

فَلَا جُنَاحَ عَلَيْهِمَا فِيهَا إِذَا أَفْتَدَتْ بِهِنَّ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا. ⁵⁹⁷

The reason of its revelation associated with the decision by the Prophet of Allah () regarding Thabit Bin Qais, who was among the Prophet's () companions amongst the Ansar and his wife bint Abdullah bin Ubai. It was stated that “the wife of Thabit met the Prophet of Allah and complained about her lack of love close to hatred towards her husband. She requested the Prophet of Allah to resolve the issue in manner that further protect her faith and assist her to perform her religious responsibilities. The Prophet asked her husband to leave his wife in exchange for a garden she had already obtained from him as a dower.⁵⁹⁸ The *muffasireen* and the jurists contemplating upon the exegesis ⁵⁹⁹ of the Quran declared this verse as the verse of *al-khul*.

Ibn Kathir interpretation and states that: “If the couple could not live together in harmony and unity, and if the wife did not perform her duties toward her husband or if she detested him and could not live with him any longer, she has the right to get rid of him by giving him back what she had already received from him. She is not blamed in paying him back this nor is he blamed for accepting it.” ⁶⁰⁰ Hazrat Ali bin Abaleeb (May Allah be pleased with him) narrated that

“There are three phrases when uttered by the wife (to the man), it becomes legal for him to take ‘*al-fidya*’ (the compensation): When she tells him that I will not obey you, that I will not fulfil your promise on oath, and I will not purify myself after intercourse with you. It is

⁵⁹⁷ Surah Al-Baraqaah2: 229

⁵⁹⁸ *Sahih al-Bukhari*. Book 63 Book of Divorce, Chapter 12 “*Al-Khul' and how a divorce is given according to it*” dith 5273.

⁵⁹⁹ *al-Tafsir Al-Kabeer*. Imam Fakhr ud -Al-Din Al-Razi (Beirut: Darul-Kitab Al-Ilmiyyah, 1990),vol:6P. 87. *Jami Al-Bayan fi Tawil Al-Qur'an*, Muhammad Al-Tabari, (Beirut: Darul Kutub AlAImiyah, 1997) vol:2, p. 475.

AlJami liAhkam al-Quran. Ibn Al-Arabi,. (Beruit: Darul-Marifah, n. d.)vol: 3., p. 92.

⁶⁰⁰ *Tafsir Al-Qur'an al-Azeem*, Ibn Kathir Ismail, (Beirut: Muasas Ar-Rayyan, 1999), vol. 1. P. 367.

reported from ‘Abdullah ibn Abbas that her omission to keep within the bounds set by Allah Almighty is (treated as) disdain for the husband and a bad nature on her part”.⁶⁰¹

While discussing *al-khul‘*, Muslim jurists legitimate the process of khul in the explanation of Imam al-Al-Shafi‘ “when one of them cannot keep within the bounds set by Allah, so both (are considered) unable to keep within the bounds of Allah almighty”.⁶⁰²

Imam Jassas states that “it means if both of them thought”⁶⁰³. In Ahkam ul Quran it is stated, “The fear that the ‘two may not be able to keep within the bounds set by Allah Almighty’, arises when either of them violates their marital duties and transgresses upon mutual rights, or the rights of one or both of the partners are denied”.⁶⁰⁴ Imam Jassas provided the complete account of Ibn Abbas as “thus, if she says, I swear by Allah that I will not fulfill your oath, and I will not agree to your request of sleeping with you in the bed, and I will not obey you. If she did this, it is allowed for him to take from her ‘*al-fidya*’ but he should not take more than what he gave her (the dower) and let her go (provided) she caused the harm. Then, he (Ibn ‘Abbas) recited, ‘but if they, of their accord, give up unto you aught thereof, then enjoy it with pleasure and good cheer’, Surah An-Nisa4:4 and it is said, that when there is no harm or cheating (in obtaining it), then it is pleasure and good cheer as Allah swt described it”.⁶⁰⁵

Imam Qurtubi writes the view of Atta ibn Abi Raba who said: “*al-khul‘* and taking (compensation for the husband) become legal when the woman says to her husband: I hate you and do not like you or something similar”.⁶⁰⁶ Imam Qurtubi explains that “the majority of jurists are of the opinion that the addressees in the words of the Exalted ‘*wa in khiftum*’

⁶⁰¹ *Ahkam al-Qur’an* Jissas, , vol 1, p. 534

⁶⁰², *Kitab al-Umm* Muhammad bin Idrees al-Shafi‘i (Dar Kotaiba, 2003) vol 1. p. 178

⁶⁰³ *A kaam al-Quran*, Imam Abu Bakr al-Jassas (Beirut: Dar al-Fikr, 2001) vol: 1p. 533

⁶⁰⁴ *Ibid Ahkaam al-Quran*, Jassas, vol1. P 534.

Radd al-Muhtar Muhammad Amin Ibn Abidin (Beirut: Dar al-Fikr, 1979) vol: 3, p.445.

⁶⁰⁵ *Ibid. A kam al-Qur’an*, Ja as. vol: 1,p.534.

⁶⁰⁶ *Al-Jami li Ahkaam al-Qur’an*. Muhammad bin Ahmad al-Qurtubi. (Riyadh: Dar Alaam-e-Kutub 2003) vol:3. P. 136

(And if you fear) are the *ukkm* (state authorities). And the statement ‘if they both want to set things right’ Surah An-Nisa 4:35 means the arbitrators according to Ibn Abbas, *Mujahid* and others; that is, if the arbitrators wanted reconciliation, Allah will bring about reconciliation between the spouses”.⁶⁰⁷ Muhammad al-Ahmar bin Ashur discusses that “if the spouses would be addressed (by ‘tum’), then the wording would be: (if you feared that you cannot keep or you (two partners) cannot keep”⁶⁰⁸ Imam Qurtubi defines that “the arbitrators chosen by the state authority should see who is the cause of discord and once this is established they should dissolve the marriage through *al-khul’*. He further asserts that one arbitrator should be from the man’s side and one from the woman’s side because they know their problems better. However, ‘if there is no one from the spouses’ people who could be appointed as arbitrators, so other suitable persons may be appointed by the state authority”.⁶⁰⁹ According to the Prophet’s (ﷺ) *sunnah*, which provides basis of legitimacy of *al-khul’*, there are many *hadith* in which the Allah’s Messenger (ﷺ) ruled that the wife can get separation from her husband by paying ransom and get *al-khul’* from her husband.

Many *hadith* collections have recorded the complain of wife of Thabit bin Qais against him to the Prophet (ﷺ). The occurrence is reported in four of the authentic *hadith* literature of which carries the narration of the Prophetic (ﷺ) traditions. Imam Al-Bukhari reported this *hadith*

«يَا رَسُولَ اللَّهِ، ثَابِتُ بْنُ قَيْسٍ، مَا أُعْتِبَ عَلَيْهِ فِي خُلُقٍ وَلَا دِينٍ، وَلَكِنِّي أَكْرَهُ الْكُفْرَ فِي الْإِسْلَامِ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أُنْزِلِينَ عَلَيْهِ حَدِيثَهُ؟ قَالَتْ: نَعَمْ، قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَقْبِلِ الْحَدِيثَ وَطَلِّفِيهَا تَطْلِيفَةً»⁶¹⁰

“Ibn Abbas reported that the wife of Thabit bin Qais came to the Prophet (ﷺ) and said, O Allah's Messenger (ﷺ) I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him). On that Allah's Messenger (ﷺ) said (to her), Will you give back the garden which your husband has

⁶⁰⁷ Ibid. *A kam al-Qur’an*, Qur ubi, vol:5, p.175

⁶⁰⁸ *Tafsir Al-Tarir wa Al-Tanveer* Muhammad al-Ahmar bin Ashur (Dar Sa’adun, 1997) 2:408.

⁶⁰⁹ *A kam al-Qur’an*, Qur ubi, vol:5, p.175.

⁶¹⁰ *Sahih al-Bukhari*. Muhammad Ismail al-Bukhari . Book 63 Book of Divorce, Chapter 12 : “*Al-Khul’ and how a divorce is given according to it* “. *Hadith* 5273

given you (as *Mahr*)? She said, Yes. Then the Prophet () said to Thabit, O Thabit! Accept your garden, and divorce her once.”

In another version of the same occurrence is reported and the Messenger of Allah ordered Thabit bin Qais to divorce his wife in compensation of the garden as she paid ⁶¹¹. Through this narration of wife of Thabit Bin Qais, it provides the source upon which the Islamic legislation of *al-khul* is constituted, because it was the first incident of this way of separation in the time of Prophet (). Ibn Hajar Al-Asqalani reported that “what Ibn Abbas had said about this story was ‘the first *al-khul* case in Islam”⁶¹². Basis of this narration is that wife of Thabit bin Qais requested and approached Allah's Messenger () which provides an evidence that the Allah’s Messenger () was the legislator and Judge of his time. Therefore she approached to the Messenger of Allah () in quest of a legal solution to her problem, and she made in her claim clearly that she due to her dislikness towards her husband and at the same time she was unsatisfied about her attitude towards her husband not to obey the rules of *Shari’ah*, indicating that she might not behave as a good Muslim and behave good to her husband and she may also not do good enough in performing her responsibilities towards him. On the basis of these reasons, the Messenger of Allah () ordered her husband Thabit bin Qais to divorce her once in accordance with the rules of *al-khul*. The formulation of principle is established according to the narration recorded in the dith of Sahih Al Bukhari the word *iqbil* meaning *acknowledge* and the word *alliqha* meaning to give her divorce ⁶¹³ shows the words by Messenger of Allah in an imperative form which is clearly indicate that husband consent was not taken for divorce and Messenger () had ordered him.

⁶¹¹ Ibid, al-Bukhari adith no. 5274

⁶¹² *Fatah al-Bari*. A mad bin ‘Ali bin ajr al-‘Asqalani. vol 9, p.377.

⁶¹³ *Sahih al-Bukhari*. Book 63 Book of Divorce. dith 5273

There are a number of a dith in dith literature which contracted the legitimacy of *al-khul'* and exhibit the genuine reasons for which the wife demand for *al-khul'*. Imam Malik in his *Muwatta* recorded the narration that “Habibah Bint Sahl Al-Ansari was married to Thabit Bin Qais Bin Shammas. Messenger of Allah () went out in the morning and found her at his door step at the break of dawn. Allah’s Messenger asked : ‘Who is this?’ She replied, ‘O Messenger of Allah, I’m Habibah Bint Sahl’. He asked, ‘What do you want? Habibah answered, ‘it is either I or Thabit (i. e., her husband), meaning it is impossible for the two to be together. She’s asking for separation. Later on, when her husband arrived Allah’s Messenger told him that: ‘Habibah said everything she could remember’. Habibah said, ‘O Messenger of Allah, I still have all what he gave me. Messenger of Allah , then, asked Thabit ‘to take from her’, and he did and Habibah stayed in her house.”⁶¹⁴

According to the narration recorded by Imam Al-Nisai “Thabit b. Qays b. Shamas hit his wife and broke her limb and she was Jam la bint ‘Abdullah b. Uby. She complained to her brother who took her to the Prophet () and the Messenger of Allah summoned Thabit and told him, ‘take from her what you have given her and let her go (free). He said: Yes.”⁶¹⁵

Abi Dawud recorded the same dith which narrates the incident of Habiba’s as she was married to Thabit bin Qays who broke her limb by hitting. She came to the Prophet () to complain and the Prophet called Thabit and ordered him that “Take some of her money and separate from her. Thabit said: Is this permissible, Prophet of Allah? The Prophet said: ‘Yes’. Thabit: ‘I gave her two gardens as dower and they are her property’. The Prophet (peace be upon him) said: Take them and separate from her which he did”.⁶¹⁶

⁶¹⁴ *Al-Muwatta'*, Malik bin Anas (Cairo: Dar al- dith, 1993), P. 442.

⁶¹⁵ *al-Sunan*. Abu ‘Abdur Ra man al-Nasai’. dith no. 3497 see index serial no. 22

⁶¹⁶ *Al-Sunan* Abi Dawud, dith no. 2228

In the above narrations Thabit's wife is named as either Jamila or abiba however in other narrations she is called Thabit's wife. Imam Bukhari called her Thabit's wife in two other hadith and in one reported by Ikrama she was called *Jamila*. Ibn Maja and Al-Nasa'i mentioned her name as *Jamila* whereas Imam Malik, Ibn anbal and Ab Dawud, mentioned her name as *abiba*.

According to the narration reported by Imam Ahmad ibn anbal :

عَنْ عَمِّهِ سَهْلِ بْنِ أَبِي حَنْمَةَ، قَالَ: كَانَتْ حَبِيبَةُ ابْنَةُ سَهْلٍ تَحْتَ ثَابِتِ بْنِ قَيْسِ بْنِ شَمَّاسِ الْأَنْصَارِيِّ فَكَرِهَتْهُ، وَكَانَ رَجُلًا دَمِيمًا، فَجَاءَتْ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَجَّهَهُ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: " أَتُرِيدِينَ عَلَيْهِ حَدِيقَتَهُ الَّتِي أُصَدِّقُكَ؟ " : فَأُرْسَلَتْ إِلَيْهِ فَرَدَّتْ عَلَيْهِ حَدِيقَتَهُ، وَفَرَّقَ بَيْنَهُمَا

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“Sahl b. Ab Hathma related that ab ba bint Sahl was married to Thabit bin Qays Al-Ansari, who was an ugly man. She said: ‘Messenger of Allah: O, by Allah, were I not to fear Allah, I would spit in his face whenever he touches me’. The Prophet () said: ‘Would you give him back his garden?’ She said: ‘Yes’, and she gave it back. Then the Prophet () separated them”.

5.5.1.1. Consent of Husband and Authority of Court

Even though Thabit bin Qais showed his total obedience in front of the law ordered by the Messenger of Allah without any arguments, therefore it is consensus of the jurists on this issue that husband should be consulted in the case of khul. Imam Jassas examined the situation and writes: “the fact that both Thabit and ab ba were asked by the Prophet () implies that khul‘ is consensual because the husband has been placed at the center point in this episode, otherwise the Prophet could have dismissed him completely and divorced abiba entirely on his own”.⁶¹⁸

Oussama argues that “Muslim legists seem to allow the Qur’anic implication of a consensual transaction to over rule the Prophetic ruling in the abiba’s khul‘ separation case”⁶¹⁹.

⁶¹⁷ *al-Musnad*, Ahmad b. anbal, hadith no. 15663.

⁶¹⁸ *A kaam al-Qur’an*. Imam Jassas. vol:1:p.539

⁶¹⁹ “*The Dawning of the Third Millennium on Shari’a*”:Oussama Arabi. (2000) issue no. 1 Egypt’s Law p. 21

The consensus of the Muslim jurists in the matter of husband's consent is different from the version of *idith* and to an extent from the Quran also as regards to the approval of husband for *khul'*, especially regarding the consent of the husband. Although the injunctions of the verse of the Qur'an was further elaborated by *abiba's* case and that the Messenger of Allah's () ruling has precedential value.

However, jurists of Maliki school of law differ from most Jurists of Sunni school of law regarding the matter of consent of husband regarding *al-khul*. Moreover, there is no consensus on the matter that the verse of surah Baqarah 229 only permits a consensual negotiated understanding based on bargaining as a few expressly stated that the word *tum* is addressing to the command of the ruler. If the court fails to decide who between the spouses is at fault that is causing separation the court may appoint two arbitrators each representing one of the spouses. The Maliki school of law jurists have convoluted on the functions performed and consign to the legal arbitrators.⁶²⁰ Evidence provided by the event of *Thabit's bin Qais* wife give rules of *khul* by its own and the The Qur' n did nto over ruled this principles. Therefore, to reach a clear conclusion analyse the opinions of jurists regarding verse.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا

There is no unanimously agreement on the term *khul* by Muslim Sunni jurists of all school of laws. because the underline difference in their definitions are with the fundamental procedure of whether *al-khul'* is treated as divorce (*talaq*) or a form of *faskh*. The two terms divorce (*talaq*) and *al-faskh* is very vital in its differentiation and explaining because *al-faskh*,

⁶²⁰ 'Women May Divorce at Will' (2001) vol.16 no. 1 Arab Law Quarterly pp.17-18.

⁶²⁰ Ibid.p. 236

⁶²¹ Surah An Nisa 4:35

immediate end the marriage contract with divorce in once which is not happened in case of divorce due to articulation of three divorces in *Tuhur* period. The second difference between these cases is that *Al-faskh*, takes place for instantaneous or imidiate reasons therefore neither the husband nor the wife benefited from as they both lost most of their marriage constitutional rights.

Al-Malik defined *al-khul'* as “ a case of divorce for compensation”⁶²².

Al-Al-Sh fi' 'i said that “*al-khul* is a separation between the husband and the wife for a definite compensation; according to this the husband has to pronounce the word *talaq* or *al-khul*. He may say that I divorce you or *khala`tuki* for so and so, and she may accept it”.

The Juirsts of Hanbali school of law explained *al-khul*: “the man’s leaving of his wife for compensation that he takes from her or from someone else by pronouncing certain words”⁶²³.

These are differences in defining *al-khul* by the jurists which explicate the diverse views.

The court may command to enforce *khul* if the circumstances conclude that cause of the discord was created by the husband. In this condition, as a principle the wife is asked to give the dower back to her husband granted to her by her husband. However, if cause of dispute is created by the husband, the court will bring the marital contract to an end by divorce and the husband would give the dower (*Mahr*) to the woman if he has not given yet. Maliki’s stance is that the Court might order divorce or *khul'* without bringing into consideration the requisite approval of any of the spouse.⁶²⁴They agreed that the court has authority to dissolve the marriage either by divorce or *khul'* depending on the fact that who between the spouses is the reason of the dispute.A few jurists are of the opinion that the court has authority to bring the marital relationto an end by *khul'* or divorce without obtaining the consent of husband. It

⁶²²*Mughni al-Muhtaj* . Muhammad Al-Sharbini, (Cairo: Maktaba al-Mustafa , 1985) vol. 3. P. 262

⁶²³*Kashshaf Al-gina*. Mansur Al-Bahwati. (Beirut: Dar-Al-Fiqr, 1982) vol.3. P. 126.

⁶²⁴*Al-Mudawwana al-Kubra*.SahnunibnSa'idibnHabib at-Tanukhi Vol:2. P. 235.

is quite clear from the classical text and the observations of Maliki jurists discussing verse 4:35 in their main texts.

“Imam Malik discusses in his marvelous work *Muwatta* three different versions of ‘ab ba’s case and seems to introduce the husband’s consent in the third version, in which the Prophet (ﷺ) invited Thabit and told him about his wife and about her willingness to return him the garden to which Thabit said: ‘This is to my liking; Yes.’ The Prophet said: Then she gives it back.”⁶²⁵

Imam Malik did not explicitly give opinion regarding consent of husband is legally mandatory for khul. From the above statement Imam Malik’s stance is founded on the belief that legally the approval of husband is not vital constituent for carrying out khul.

5.5.1.2 Al-Khul’ –*Shari’ah* injunctions regarding woman’s capacity

Shar’iah injunctions regarding dissolution of marriage contract has been discuss in detail, while at the separation demanded by the wife, it is prerequisite before the start of the procedure of divorce the process of reconciliation through arbitration is developed between the spouses and advocate to settle and reconcile agreement among the husband and the wife, in spite of the quandary of the crisis starts from the wife or from the husband, or with both of them. The *Shar’iah* injunction mentioned in the Qur’an, systematically through the procedure of arbitration while appointing of two councilors mediators to solve the problems and reconcile the differences amongst the spouses and bring them happily returned to the marriage bond. Therefore according to Islamic *Shari’ah*, the spouses have to apply all possible solutions and arbitration to exhaust the problems, and if they still consider that there is no reason to be in marriage and not satisfy to stay in the relationship then *Shari’ah* allows them to separate in good terms and like man wife can also apply *khul* for this reason. In

⁶²⁵*Al-Mudawwana*.Sahnun ibn Sa’id .P. 240.

linguistically and technically *al-khul* the definition of “ elimination of the marriage ties between the spouses in exchange for a monetary compensation or other payable by the wife or somebody else such as her guardian, in fulfillment with her desire to end the marriage”.⁶²⁶

The *al-khul* is legally acknowledged when an adult, mature and free wife who has complete legal capacity i.e. rational, sane and not declared legally incompetent demands it.

5.5.1.3 Consent and approval of the wife is a pre-requisite of *al-khul*

Therefore the most appropriate definition of *al-khul*' is articulated by the anafi jurists, Imam Shams Al-Din Ibn Abidin because of its comprehensive and closer to the above mentioned linguistic meanings of the word *al-khul* ‘, than the definitions presented by eminent Muslim Jurists. Imam Shams Al-Din Ibn Abidin has defined *al-khul* as:

“Eliminating the right to marriage (*nikkah*) that is conditioned by the wife's consent after she pronounces the word *al-khul* or anything of the same meaning”⁶²⁷.

The explanation of this, the statement “the right to marriage (*nikkah*)” explains here *al-khul* may mandatory only in case where marriage contract has been contracted in the accordance to the injunction of Islam. Therefore if marriage (*nikkah*) does not fulfilled the mandatory conditions of *Shar'iah* or if the marriage held after *talaq ba'in* (i. e. irrevocable divorce), or if the wife become apostate, the *khul* is consider void and unacceptable according to *Shar'iah* rulings. The definition expresses “that is conditioned by the wife’s consent”, which means that consent and approval of the wife is a pre-requisite of *al-khul* before it obtained.

The reason here is in *al-khul* compensatory things are paid by the wife therefore her consent in this agreement is vital. If in the situation the wife refuses the *al-mukhalaah*, (which is another word used instead of *al-khul*'), or if some coercion apply on her to accept

⁶²⁶ *Bidayat Al-Mujtahid*. Ibn Rushd vol2. P Ibid. p. 82.

⁶²⁷ *Radd Al-mukhtar `ala al-durr al-mukhtar*. Shams al-Din Ibn Abidin Al-Tamartashi.vol. 5, pp. 86-88

compensation against her will, *al-khul* becomes annulled and such kind of severance between the husband and the wife is considered as divorce⁶²⁸. Ibn Abidin's defines the statement "she pronounces the word *al-khul*" , here it is understood to mean that the wife express a word or phrase that means *al-khul*, because assertion of divorce does not eliminate the legal financial privileges of the wife for example: dower (mahr). The Jurists of anafi School of law examined that *al-khul* nullifies the financial legal rights of the wife immediately . The last portion of Ibn Abidin's definition of *al-khul* explain by the phrase "anything of the same meaning", just like that *al-mukhalaah* or *al-khul* this happen in the situation where the wife uses those words for *al-khul* the word which have similar meanings or phrase having similar meanings that includes in the meanings of *al-khul*, it may take place. According to the anafi jurists these expressions are five in words. Muslim jurists also apply the list of such words. "These expressions include: *al-mubara'ah*, *al-talaq*, *al-mufaragah*, *al-bi wa al-shira'*, in addition to *al-khul* itself".⁶²⁹ When the wife pronounces any of the above mentioned words or phrases to terminate the marriage contract with her husband, then the procedure for *al-khul* happened. According to Ibn Hazam:

"if a woman thinks that she cannot obey her husband and fulfill his demands, then 'she may free herself if he agrees.' However, 'if he refuses (to divorce her), he cannot be forced .'"⁶³⁰

He discussed that a wife cannot be forced to free herself from marriage contract. "And the consent of both (the husband and wife) is essential for its legality (i.e., *khul'*). And if it (i.e., *khul'*) was affected without these two conditions (i.e., compensation from the wife and the consent of the husband), then it is invalid".⁶³¹ Imam Al-Khiraqi, Hanbali jurist writes " If the

⁶²⁸ Ibid. *Radd al-mukhtar* Ibn Abidin . vol: 5 .p. 89

⁶²⁹ *Bidayat Al-Mujtahid*. Ibn Rushd The Distinguished Jurist's Primer vol2. P. 79

⁶³⁰ *Al-Muhalla* Muhammad Ibn Hazam, (Dar al-Turath n.d.) Vol:10, p. 235

⁶³¹ Ibid. p236

woman dislike the husband, and does not want to disobey Allah in preventing him from coming to her, it is presumed that she ransom herself from him and the compensation ought not to exceed the amount he originally paid to her as dower; finally, she may separate from him by paying him in excess of the dower, this would be reprehensible, but the separation would nevertheless be legally effective”.⁶³²

Therefore it is concluded that, *al-khul* is an agreement between husband and wife, where the husband divorces his wife after taking compensation amount.

5.5.1.4 Al-Khul‘ in Islamic jurisprudence: Defining husband and wife’s capacity

(a) Regarding consent of husband in the process of *al-Khul‘*

Jurists of Hanafi school of law completely acknowledge the authority of wife of Thabit bin Qais but unanimously bestow the right to the husband an authoritative role regarding *khul‘*. Imam Jassas considered that “the fact that the Prophet had sought the opinions of both Thabit and his wife, places the latter at the centre stage of the debate since the Prophet could have dismissed him completely and granted a divorce to Thabit himself”.⁶³³ Hanafi jurists maintain that the agreement of the husband is indispensable for the legality of *al-khul‘*. Imam al-Sarakhsi writes regarding this view as: “*al-khul‘* is a transaction that requires the consent of the parties like all other transactions.”⁶³⁴ Considering the consent as mandatory element Imam Kasani writes: “the consent of the husband necessary even if the amount of compensation to be given to him is less than the amount of dower”.⁶³⁵ He further explains “the basic element of *khul‘* is offer and acceptance because it is divorce (*talaq*) for

⁶³²*Al-Mughni*. Ibn Qudama vol: 8, pp. 173-176, Ibn Qudama reported imam Khiraqi’s three principles in his book.

⁶³³*Akam al-Qur’an*. Imam Jassas. vol: 1, p.539

⁶³⁴, *Kitab al-Mabsut* Muhammad b. Ahmad al-Sarakhsi (Beirut, Dar Iqbal al-Turath al-‘Arab 2002) vol:6, p. 169.

⁶³⁵*Bada’i Sanai* Imam Kasani., vol: 3, p.228

compensation, thus, there cannot be any separation without acceptance”. He emphasizes, “a court cannot force anyone to enter into contractual relations and therefore, it cannot grant khul‘ without the husband’s consent”.⁶³⁶ Jurists of Hanafi School of law are unanimously agreed on the approval and consent of husband on the bases of the above mentioned reasons.⁶³⁷ For the jurists, to exercise khul by the Muslim wife, finds its basis in the Surah Al-Baqara 2:229 as mentioned above. Osama Arabi interpreted this that:

“the woman to ransom herself from her husband by means of a negotiated settlement’, thereby meaning that the consent of the husband is essential for khul’”⁶³⁸ This interpretation seems to be against the narration of Thabit’s wife discussed above where the approval of the husband was not taken by the Prophet (ﷺ).

Regarding consent of the husband, Maliki jurists’ view is not simple to comprehend whether the consent of the husband is necessary for khul‘ or not . The perplexity of defining the issue is mainly on the bases that whether the jurists consider the husband’s consent a legal necessity or not by its implication. Imam Malik has discussed in his work that “Qur’anic verse 4:35, ‘ab ba’s ruling, and two cases involving neglectful husbands, and his legal formulations suggest that he gives the two arbitrators the main role in the dissolution of marriage, either by al q or khul‘. In addition, he also presumes a negotiated settlement”.⁶³⁹ Following are the issues which are clear to explain in Maliki School which are mentioned below: In circumstances when wife approaches the court with her statement that it is difficult for her to be in marriage relation with her husband, it must be clear that who become the

⁶³⁶ Ibid. vol 3, p. 229

⁶³⁷ *Fath al-Qadir* Kamal bin al- umam, vol3,p,199

Radd al-Mukhtar. Ibn ‘Abidin vol: 3,pp.439-41;

al-Bahr al-Raiq Zayn al-Abidin Ibn Nujaym (al-Matba‘a al-‘Ilmiyya, 1894) vol: 4, pp. 77-78.

⁶³⁸ “The Dawning of the Third Millennium on Shari‘a”: Osama Arabi, (2000) *Egypt’s Law Review* no. 1.

“Women May Divorce at Will” (2001) vol:16 issue.1. *Arab Law Quarterly* pp. 17-8.

⁶³⁹ *Al-Mudawwana al-Kubra*. Sahnun b. Sa‘id, (Khayriyya Press, 1325 A.H.) vol:2.pp 231-232.

cause of discord amongst the two. The court investigates the cause of discord between the spouses and attempt to convince them for reconciliation. If the court could not achieve to reconcile, then the court it has the authority to dissolve the marriage.⁶⁴⁰

While discussing the doctrine of khul all jurists mentioned the Prophet's decision in the matter of Jamila, where according to a few narrators Prophet has ordained her to not pay the amount more than the dower paid to her by her husband. Jurists consider that the wife seeking khul should be paying more than her dower money for this to be permitted legally. In the matter of khul Imam al-Al-Shafi'i declared this concept and writes "al-khul' is like divorce (*talaq*) which can only be effective by the consent of the husband⁶⁴¹ He: Where a man wants to separate from his wife and he intends divorce but does not intend a specific number, then the separation is a single irrevocable divorce, this is so because it is a sale (bay') like other sales and it is not allowed for him to take possession of her money while continuing to possess her".⁶⁴²

Imam Al-Al-Shafi'i statement that the husband is infatuated a married contract therefore, he has the final right to dissolve it. Imam Al-Al-Shafi'i has given two versions of Thabit bin Qais's wife's narrations, one narration recorded by Imam Malik .Furthermore, "in the second version, abiba complains of some injury done to her, which probably implies that the harm was of a physical nature. The Prophet () ordered Thabit, to 'Take what she is giving you', which is repeated in both versions by al-Shafi'i".⁶⁴³ Imam al-Al-Shafi'i considered *khul'* "as divorce (*talaq*) and give authority to court to solve it in or outside the court as it is to be settled solely by a court as the paying of compensation and divorce (*al-alaq*)

⁶⁴⁰ *Al Kafi fi Fiqh ala Madhahab ahl al-Midena*. Ibn 'Abdul Bar al-Qurtabi. (Makatabat al-Riyadh al- aditha 1980) vol 2: p.596

⁶⁴¹ *See al-Umm*. Imam Al-Shafi'i .vol:11. P. 183

⁶⁴² *Ibid al-Umm*. vol:11. P. 183

⁶⁴³ *Ibid, Kitab al-Umm*, vol:11. P. 177

are permissible in the court as well as outside it”.⁶⁴⁴ On juristic ruling on the husband's consent in *Al- Khul'* a disagreement amongst Muslim jurists on the issue when the wife ready to pay a compensation amount to her husband for *al-khul'*, whether the husband may accept the compensation or not and and agree to give al-khul, and if not, should he be forced to do so? To conclude the different opinions that various jurists of school of laws expressed regarding this issue mentioned above, in two main points: First view point is adopted by majority of jurists and it is stated that “the husband may not be obliged to accept the wife’s offer in compensation for al-khul, but it is preferable that he does”.

This viewpoint of proponents is based on “the order of the Messenger of Allah to Thabit Bin Qais to accept it (i. e. the garden in the form of a compensation) and divorce her (Qais's wife) once” is not imperative but only for the sake of advice and guidance and not obligation. Furthermore, Ibn Muflih also said that “al- khul is permissible if the couple can no longer live together, and it is preferable that the husband accepts it.”⁶⁴⁵ This opinion is also obtained by Al-Asqalani and Al-Tabari who defines that same opinion in their books⁶⁴⁶.

The second opinion was expressed by Ibn Taimiyah and Al- Shawkani⁶⁴⁷ who argue that “the husband should be obliged to accept the compensation offered by his al-khul' seeking wife. They base their view on what the Prophet said to Thabit Bin Qais when he asked him to ‘accept it (i. e. the garden as a form of compensation) and divorce her (Qais's wife) once. They argued that what the Prophet said amounts to an order and this makes it compulsory for the husband to accept the compensation; thus, it is unconditional’⁶⁴⁸.

⁶⁴⁴ Ibid, *Kitab al-Umm*, vol:11. P. 180

⁶⁴⁵ *Kit b al-Fur* .Ibn Mufli al-Maqdis ,Shams al-Din Abu Abd Allah Muhammad , vol. 5, p. 343. 22

⁶⁴⁶ *Fatahul-Bari sharah Sahih Al-Bukhari*. Ibn Hajr A1-Asqalani. vol. 9, p. 312.

⁶⁴⁷ *Nayl al- Awtar* A1-Shawkani,vol:6. p. 261

⁶⁴⁸ Ibid. p. 262

By reviewing these different opinions regarding whether or not the husband's consent should be taken when his wife's offer compensation for al-khul, it is concluded that the second argumentation presented by Ibn Taimiyah and Al-Shawkani is more clear for its implication. The wife has right to get al-khul, because this right is granted to her by the *Shari'ah*. Therefore husband cannot persistent to deprive her of this right, when after he gets compensated for this by the wife. Prevented from not complying with the rules of *Shari'ah* by the husband is not correct as prescribed by the Qur'an. It is disobedience of the injunctions of the Qur'an and the principles of *Shari'ah* when the husband not to give her khul' for the sake of harm, in case if the husband refuses to give al-khul to the wife willingly then she has the option of submit her request in the court against her husband in which she demands for al-khul from him as mentioned in the case of Jamila who presented her case in front of Messenger of Allah . Therefore, after failing of efforts to settle the issue of al-khul' the court will decide the matter as a last resort. In other words the decision shall be in favour of wife. The court of law will order the husband to divorce his wife according to the provisions of the *Shari'ah*. Explaining this issue, Abdullah Ibn Mabruk said "This is in consistency with the *Shari'ah* and the law to settle disputes and put an end to bad deeds that may result if the problems and differences between the two spouses are not settled, particularly after vainly exploring all channels of reconciliation". It is required to obtain the approval of husband to apply *al-khul* does not contradict with the role that the court may have in this regard as it notes how both partners of the contract enjoys their rights by mutual consent.

Therefore husband does not misuses his right to divorce in the way to for the sake of deceiving and harm towards his wife. In such circumstances, there will be doubt and

skepticism to humiliate and harm the couple from both sides. In other words, the husband is required to be submissive in front of law at the same time. It is inconsistent as well that the *Shari'ah* legalized al-khul for the wife if its conditions are fulfilled and also declares its application subject to the approval of the husband. This is in fact in contradiction of the wisdom of legalizing al-khul. This finding is further endorsed by Muhammad Kamal Al-Din who examined and said: “Leaving the matter to the judge is in accordance with Islamic *Shari'ah* As for obliging the husband to accept the *al-khul* of his wife, it is based on evidence coming from the Qur'an and the sayings of the Messenger as well as the principles of Islamic jurisprudence in general”.⁶⁴⁹

As Imam Malik did not precisely mentioned his opinion regarding this issue therefore his notion become perplexed. However above mentioned specific views of the other Maliki jurists illuminate the matter wheret the approval of husband is not required in khul' and therefore *khul* can be applied without his approval⁶⁵⁰. IbnRushd while providing his stance regarding khul' says that,

“yet, the juristic reasoning is that *fida* (ransom) granted to a woman is something equivalent to what is possessed by the man; namely, (the right to) divorce. A man possesses repudiation when he force a woman, while a woman possesses *khul'* when she wants to force a man (her husband).”⁶⁵¹ Conclusion may derive from his opinion that Ibn Rushd discussed al-khul' as a legal right of the wife that is the equal of a husband's right to divorce as in the process of khul', it is not associated to the conditional approval of the husband. For,unlike divorce initiated by the woman for just cause (*darar*), whether the motive be a contagious disease or

⁶⁴⁹*Ahkam al-ahwal al-shakhsaiyyah lilmuslimin* Imam Muhammad Kamal al-Din (Alexandria: Munsha'at Al-Marif., 2001),vol: 2. p. 178.

⁶⁵⁰ Ibid, vol 2: p266.

⁶⁵¹*Bidaya al-Mujtahid*. Ibn Rushd.. vol: 2, p. 81

the man's impotence, conditions of which the woman was uninformed at the time of the marriage, or the failure to provide for the family or domestic Abuse or the husband's prolonged absence from the home, the woman who initiates divorce by khul` is not obligated to state the reasons for her action. Therefore court can be pronounced divorce for the just cause without husband's consent; al-khul` does require husband's approval. This is, then, an institution that gives the woman freedom of decision regarding her wish to remain with her husband or not, even if in the final analysis, the final decision is of husband to accept or reject this divorce procedure. However, it is important that the margin of maneuver allowed the wife in this case is not at all comparable to the absolute right a man has to repudiate his wife not only without cause but also without her consent⁶⁵². The Qur'an does mention the possibility of a compensation given to the repudiated wife by the husband.

(b) Role of arbitrators in the process of al-khul

Regarding the vital liability of arbitrator, Ibn Rushd writes that "they (the jurists) disputed the agreed decision of the arbiters to separate them (the husband and wife) whether it would require the consent of the husband. Malik and his disciples said that their decision about separation and union is valid without specific delegation by the spouses and without their consent. Al-Shafi`, Abunanifah and their disciples said that they have no right to separate them, except when the husband delegates such authority to them".⁶⁵³ Taqi-ud-din al-Hilali Maliki defines the role of arbitrators that the "Jurists differ regarding the issue of arbitrators; are they appointed by the state authority so that their ruling is binding without the consent of the spouses or are they proxies for the spouses. There are two opinions regarding this issue: the majority of scholars prefer the first opinion i.e. their ruling is binding without the consent

⁶⁵² "The Right to Divorce for Women (khul`) in Islam: Comparative Practices in Mauritania and Egypt" Corinne Fortier. Pp.156-175.

⁶⁵³ Ibid, vol: 2, p. 119

of the spouses because of the Qur'anic verse, 'appoint an arbitrator from his people and an arbitrator from her people', so they are named as 'hakamayn' (arbitrators) and an arbitrator is allowed to rule without the consent of the disputant and this is the apparent meaning of the Qur'anic verse (4:35)".⁶⁵⁴

From this statement it is explained that jurists have considered an essential function of arbitrators and the judge may order to dissolve the marriage contract by *khul'* without the consent of the husband. In addition to this discussion, most of the jurists of Maliki school of law regard *al-khul'* as divorce (*talaq*)⁶⁵⁵.

(c) amount of compensation is to be taken for *al-khul'*

Here it is deliberated that how much financial compensation a husband can take at the event of redemption or *al-khul'* as compensation from his wife. It is a condition of *al khul'* that husband must be compensated by wife. However, the value of compensation to be paid by wife is not provided by any source therefore ambiguity prevails in this regard. Owing to it Islamic jurists have difference of opinion regarding the estimated value of compensation leading to two main stances regarding it:- First, jurists from Hanafi Maliki and Al-Shafi'i and the most well known among the Hanbali school of law stated that "the compensation the husband gets from his wife for agreeing to *al-khul'* should be left unspecified. This means that it is left to the husband to take less, more or even the same amount of money as he had already given her in dower when they first got married. However, it is preferable that the husband should not take more than stated in the dower"⁶⁵⁶. Imam Malik supported this point of view he writes: "I had never known any of those who we follow, as good examples, prevent a compensation that is higher than the dower, but I believe that doing this (i. e. taking

⁶⁵⁴ *Ahkaam al-Khul' fil Islam*. Taqiuddin al-Hilali (Al-Maktab al-Islami:n.d.) p. 12

⁶⁵⁵ *Ahkam al-Qur'an*. al-'Arabi al-Maliki (d. 543 H). vol: 1, p. 250

⁶⁵⁶ *Al-Mughni*. Ibn Qudamah, Muwafiq Al-Din vol. 8, p. 175

a compensation higher than the dower) is not of gracious manners”. Imam Al-Shafi‘i argues in this point that: “there are no restrictions regarding this particular point; therefore, it could be higher or lower than what is actually specified in the dower”.

The first stance that comes from the guidance provided by The Qur’ān: Surah al-baqarah 229. It was provided that they argue that something mentioned her that is required to be granted by wife to her husband for her freedom may be too meager or abundant. However husband cannot be at fault for accepting whatever compensatory amount his wife provides him for getting her independence from the marital contract. Furthermore, a further discussion regarding the view that compensatory amount would be little or much derives from the following account.

“Al-Baihaqi reported about Abū Saeed Al-Khudri, who said my sister was married to one of the Ansar and he gave her a garden as a dower. They could not continue with the marriage. They raised the matter to the Allah's Messenger, who said to my sister : Give him back his garden and he will divorce you. She replied, ‘Yes I will, and I will give him more. In another narration of the story, she replied: ‘his garden and more’”.⁶⁵⁷

The second opinion is one adopted by some jurists based on opinion of Imam Ali bin Abi Talib, and Imam Ahmad. It relies on the point that “the husband is not permitted to take in compensation, if his wife wants to leave him, more than he had paid in dower when he got married to her. They went a step further and said that if he had already done so, he should return the extra money to her”. Ala al-Din Al-Mirdawi writes about Abū Bakr al-Jassas who declared: “taking extra money is not permissible and this extra money is returnable to the wife”.⁶⁵⁸

⁶⁵⁷ *Subul al-Salam*, Muhammad Al-Sanani, vol: 6. p. 194

⁶⁵⁸ *Al-Insaf fi maarafat al-rajih*. Ala al-Din Al-Mirdawi vol:8. P.398.

It means a husband should not get from her wife back an amount in compensation that he has paid her at the time of marriage in form of dower and if he gets he needs to give that back to her. The supporters of this view present the verse of the surah al baqarah 229 to corroborate their stance that plainly provides that it is not legitimate to get back that husband has granted to wife except in the event of al-khul. At the time of Al khul husband may get back only a part of what he has granted to his wife and not full of it. Therefore, if it is not permitted to husband to get back all that he has granted to his wife how can he demand more than granted to her in form of dower. In a narration by “Ab Al-Zubair who said that Thabit had given a garden to his wife as a dower; thus, when she complained to the Prophet asking for al-khul, he asked her, would you give him back the garden he had given you? She replied, Yes, and more. The Prophet said, no, don't give him more just his garden.” It was reported by Al-Shawkani that separation would be final when the wife would pay to her husband and if she would not provide the husband compensation al Khul would not be possible. However, in Islamic law husband is not permitted to get from his wife the compensation for Al- Khul more than what he has given to her in form of dower also known as *Mahr*. The other view in this matter seems more acceptable that the husband should not be permitted to get from his wife al-khul compensatory price in excess of what he had granted his wife as dower at the event of marital contract for the number of reasons discussed below.

Firstly, the jurists carrying this stance have forwarded the persuasive evidence comparing to the jurists carrying opposite stance. This other group provides that it might be decided by the husband himself at the event of al-khul to get from his wife in form of compensation in excess of what he has granted to her in form of dower at the event of marital contract. However, the evidence in support if it is not strong enough to carry weight as the dith of

Ab Said Al-Khudri has a challenge as Al Shawkani acknowledged in this regard that the dith is weak with regards to attribution as the Prophet didn't ask the wife to pay more than what she got from husband in form of dower.

Secondly, there is a consensus in the views of jurists of Hanafi, Maliki and Al-Shafi' schools of Law with regards to granting the excessive amount of compensation by wife to her husband. However they have provided the qualification in this regard that it would be better and nicer for the husband to refuse to get the compensatory amount more than what he has given to his wife in form of dower. As in relevance to it Imam Malik has added that husband can be permitted to get more compensation but it would not be considered a courteous behavior. Moreover, the Qur'an commanded that the husband and wife should spend life in an equitable and if an event of separation occur they should be separated in a gentle manner. In this context separation in a gentle manner denotes that husband should not be unfair and not get from his wife at the event of separation in addition to what he has granted other than a dower. As dower, was granted to wife by husband at the time of marital contract authorizing the husband for relishing his wife that he has already relished. Therefore, if husband is inclined to get compensation from wife at the event of al-khul he should not take more than he granted her as dower at the time of marriage. There is no harm or sin in getting equal to what he has granted her as dower because it is legal to do so permitted by Allah in *Shari'ah*.

In *Shari'ah* the husband is not permitted to obtain money from his wife that is more than the amount of the dower. It is founded on the notion that if the husband is allowed to have extra amount this will pave the path for the husband to treat his wife in ill manner and demand high amount of compensations for obtaining khul. This is inconsistent with the rationale of

legislating and permitting al-*khul'* as instead of guarding the wife from the detriment the wife in this situation would find herself into another difficulty. As it is against the legal principle that, no damage should be caused to any of the spouses. Abdullah Al-Kahlawi explains this concept in his book, he writes: "It is detested for the man to take in compensation from his wife more than what he had given her in dower, as this may cause her much harm and it contradicts the requirements of 'separating with kindness' and 'gracious manners' ".⁶⁵⁹

Al-*khul'* is the means for the wife to take a separation from her husband and ends the marriage contract, if he consents, and upon payment of a certain sum. The most subversive aspect of this legal procedure is the fact that it allows the woman to divorce without having to provide justification. In the case of the compensation amount Ibn Rushd writes:

"According to Imam Malik and a group of jurists, it is permitted to a woman to secure freedom with more than what has come to her from the husband, by way of dower."⁶⁶⁰

Hanbali jurists argue from the Qur'anic verse also pointed out that "taking more or less (than the amount of the dower) is allowed and that he can take more than what he gave her." Ibn al-Qaiyam defines that husband can take anything in compensation as "a ruling given by Caliph Uthman bin Affan in which a woman paid everything as her *khul'* settlement she possessed and Caliph Uthman ordered the husband to take even her hair-pin (*Iq s*),"⁶⁶¹ Caliph Umar bin Al-Khattab ordered a man "whose wife had violated her marital duties (n sh za) and 'Umar said (to him): 'separate from her (*ikhla'ha*) even if she gives (you) her earrings (qirat) in compensation".⁶⁶² Ibn al Qaiyam while discussing the difference of

⁶⁵⁹ *Al-Khul'*. Abdullah Al-Kahlawi. (Cairo: Dar Al- Rashad, 2000) p. 145

⁶⁶⁰ *Bidayat al-Mujtahid*. Ibn Rushd.. vol: 2, p. 81.

⁶⁶¹ *Ibid*. vol:4, p. 87

⁶⁶² *Ibid* p. 87

opinions of jurists provides that “according to Imam Ahmad bin Hanbal taking more than the amount of dower is reprehensible (*makruh*)”.⁶⁶³ Ibn al-Qaiyam writes that “*khul‘* is called *fidya* (ransom) because it involves the paying of the compensation (*al-mu‘awada*) and therefore it is consensual”.⁶⁶⁴

(d) al-*khul‘* an irrevocable divorce (*alaq bain*)

Muslim Jurists who consider al-*khul‘* an irrevocable divorce (*alaq bain*) agreed that adjudication is not necessary for its effectiveness, it can be concluded outside the court.⁶⁶⁵

Imam al-Kasani explains that al-*khul‘* is “a single irrevocable divorce (*alaq*) because it is divorce by using metaphorical words which is irrevocable in our school and because it is divorce for compensation (*alaq bi al-iwad*) and when the man accepted the compensation it is necessary that she should own herself as a result of paying compensation and she cannot redeem herself without irrevocable divorce (*alaq*) therefore it (*khul‘*) is irrevocable divorce (*alaq*)”.⁶⁶⁶

Imam Abū Hanīfah defines the underlying principles as “a man cannot retract his offer should he initiate *khul‘*, as he is governed by the rules of oaths; he has to wait for his wife to accept or reject his offer. She has to submit to the rules of compensation and is allowed to retract her offer before his response. Imam Abū Hanīfah bases his reasoning on the principle that *khul‘* is *bay‘* (sale transaction) on the part of the wife, as she is buying back control over herself”.⁶⁶⁷ “If the discord emanates from the husband, then it is not permissible for him to take any compensation in return for *khul‘*”.⁶⁶⁸ The clear meaning of words of the Qur’an

⁶⁶³ Ibid p. 89

⁶⁶⁴ Ibid P. 90

⁶⁶⁵ *A kam al-Qur’an* Al-Jassas vol:1,p.538.
Kitab al-Mabsut . Imam Al-Sarakhsi vol 6, p.168.

⁶⁶⁶ *Badai*. Imam Kasani vol:3. P.228.

⁶⁶⁷ Ibid. *Badai*. Imam Kasani. vol, 3. p228.

⁶⁶⁸ Ibid, *Badai’ Sanai*. Vol 3. p.235

provides that “the woman pays compensation to free herself”. Imam al-Kasani argues that: “If the matter is resolved by a stranger, then he is allowed to order her to pay the equivalent of the dower, and if he ordered her to pay more or less than the amount of dower, then, in case of more amount, it is not binding without the consent of the woman and in case it is less, then it is not binding without the consent of the husband”.⁶⁶⁹

According to Imam Marginani: “If the discord is because of her, we consider it disapproved that he takes from her more than he had given her.’ However, ‘If he takes back in excess (of what he gave her) it is valid for the purposes of adjudication. Likewise If he takes more when the discord is due to him.”⁶⁷⁰ In other words, according to the jurists of Hanafi school of law, the husband has equivalent authority of consent in divorce and *al-khul’* regarding consent to dissolve the contract and compensation. The Maliki jurists referred verse of Surah Nisa 4:34⁶⁷¹ of the Qur’an as discussed above. According to their opinion “divorce (*talaq*) revocation is allowed but the couple can remarry with a fresh Nikkah without the wife’s intervening marriage (*al la*)”. Ibn al-Qaiyam of the Hanbali school of law while deliberating upon the ruling of the Prophet’s in the matter of *abiba* referred to the versions of Al-Bukhari, Al-Nasa’i, Ab Dawud, and Al-Dar al-Qunni and derived several rules relating to *khul’*. He argued that *khul’* is a legal act as provided in the Qur’an⁶⁷² and the Qur’an permits it with or even without the approval of the Sultan of the time that is the authority of the state. The Qur’anic verse specifies that the resulted separation between husband and wife would be an irrevocable divorce. As Allah has called it *fidya* and if the divorce can be revoked as in view of some scholars there would be no ‘fidya’ ransom for the

⁶⁶⁹ Ibid, *Badai’ Sanai*. Vol 3, p.237

⁶⁷⁰ *Al-Hidaya*, Marginani, vol. 2, p. 30.

⁶⁷¹ *Surah An-Nisa 4:34* “Men are protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them).”

⁶⁷² *Surah Baqarah 2:229*

woman.⁶⁷³ Ibn Abbas narrated that The wife of Thabit bin Qais was granted a Khul from her husband during the time of the Prophet. So the Prophet ordered her to observe an Iddah of a menstruation .⁶⁷⁴

5.5.1.5 Al-Khul is right of Wife for dissolution of marriage contract

After reviewing the opinions of the jurists' belong to the different schools of law, the conclusion draw on following legal aspects: To sum up the concept of dissolution of marriage contract, in the Qur'an explains the doctrines of of khul' as: the wife thinks that she cannot maintained the marriage bond. the basis of evidences for validity of al-khul is unanimously cited from the The Qur' n verse 2:229 and narration of wife of Thabit bin Qais. Majority of jurists have agreed on the option that the arbitration has to examine the extent of dispute amongst the partners and arrange arbitrators. In case there is no possibility of reunion of the couple then the court establishes whether khul' can be ordered particularly when the dispute or harm is credited to wife and she is willing to compensate her husband. The query is not solve by the apparent meanings of the verse whether consent of the husband is mandatory in dissolution of marriage contract in case of khul and this is why explanation by dith resolve the problem regarding consent. Jurists of Maliki school of law conclude that "khul' can be affected by the arbitrators and their decision shall be binding without the consent of the husband and the wife".⁶⁷⁵ In the opinion of jurist of the Maliki school of law, "if the husband is the cause of the discord then he should not take or be given any compensation, but if the wife is the cause of the discord then she must pay compensation to

⁶⁷³ *Zad al-Ma'ad*. Shamsuddin Ibn al-Qaiyam al-Jawziyah (Mansura, Dir al-Ghad, 2009) vol. 4. P. 86

⁶⁷⁴ *Jami' at-Tirmidhi*. Book 13 The Book on Divorce and Li'an, chapter (10) what has been relating about khul. dith 1185

⁶⁷⁵ *Bidaya al-Mujtahid*. Ibn Rushd.. vol: 2, p. 81

the husband”.⁶⁷⁶ Regardless of the issue of consent of husband in khul the court may order the marriage contract and ask the wife to return dower as compensation given to the husband. After mutual consensus on compensation amount by both parties there is no harm to receive compensation by her husband and to get Khul from him. The perceptible meaning of the verse 229 is that the wife has the complete legal capacity to release herself from marriage bond by paying compensation. Jurists unanimously agreed that after getting khul the divorce will be irrevocable (*alaq bian*.) The wife gives compensation for khul whose amount of is equal or more than dower. Both spouses settled compensation on more than dower then it has legal binding but it is morally reprehensible.

The legal requirement of the approval of the husband for khul‘ is essential in the opinion of the majority of school of law, the majority collectively agreed that khul‘ is consensual and further the approval of the spouse is compulsory. However, in this regard the Maliki jurists concluded that the arbitrators are permitted to bring the marital relation to an end even though the husband or wife has not passed on any authority to the arbitrators. It is equal to granting court the power to bring the marriage to an end by khul‘ without obtaining consent of the husband. The majority of the Islamic jurists provides husband an unqualified right at the cost of wife owing to the concept of *qaw ma*. On the other hand, in case of khul the final resort must be made to the courts in deciding the fate of both the spouses.⁶⁷⁷ The compensation must also be determined by the court because there are certain matters where the role of court is very crucial in disposing of cases of this nature. It cannot be decided by a lay man when one spouse claims that she cannot live with him anymore but the husband insists on living together, therefore the court steps in to resolve these matters. The court is

⁶⁷⁶ *Bidayat al-Mujtahid*. Ibn Rushd. Vol:2, p.67.

⁶⁷⁷ “*The Law of Khul‘ in Islamic Law and the Legal System of Pakistan*”. M. Munir . Lahore University of Management Sciences Journal .p33

then obligated to determine that whether they should be staying together or not and they should also determine that what kind of damage has been done that this marriage is irreversible to the point of hatred that they cannot live together and there is no point of return to the marriage. Thus it is concluded that Muslim jurists unanimously agreed that wife cannot take khul' without the agreement of her husband due to his legal capacity in marriage contract. Thus Imam Malik and the jurists of this school of law have the opinion that for the resolution of disputes existing between spouses the arbitrators should be appointed and if they could not create union between them then court may give decision in wife's favour by given compensation.⁶⁷⁸

5.5.2. Woman's legal capacity for dissolution of marriage - *Tafwid*

Divorce is the right of husband however in certain cases islam acknowledges the right of a woman also to free herself from marriage bond. Islam allows the dissolution of marriage at the request of wife in two ways: a divorce ordered by the court if she proves that she is being subjected to harm in her marriage and khul which doesnot require any reason. A wife mere dislike for her husband is reason enough for the khul from him. While applying for khul she is not required to provide any justification for her request other than that she doesnot want to stay married to her husband. Syed Ab l Ala Mawdudi in his commentary writes:

“In this matter, if some sort of settlement is reached between the man and wife in the house itself, then the decision taken thus will be effective. However, if the matter goes to court the court will only investigate as to whether the woman has become averse to the husband to such a degree that to carry on with him is not possible. After investigating this, the court is empowered to suggest a compensation and to divorce his wife. Normally jurists have not

⁶⁷⁸ *Bidaya al-Mujtahid*. Ibn Rushd.. vol: 2, p. 81

approved that the husband should be given more than the dower which he may have given her. However if the same couple should desire to marry again then it will be perfectly lawful for them to act this”.⁶⁷⁹

Studies on Family law in Islam generally address repudiation of the marriage contract by the husband initiated by divorce. The divorce demanded by the Muslim woman is rare and uncommon in Muslim societies even though it is authorized by the majority of jurists of Muslim schools of law therefore all jurists allows in Islamic law, whether Shafî i, Hanbali, Malilki and anafi acknowledge its validity. *Delegation of divorce* is a way for dissolution of marriage through which a wife is granted this right by the Shar’iahto terminate her marriage contract. “The power to give divorce that is the right of husband which he could delegated to wife or to third person either absolutely or conditionally and either for a particular period or permanently such divorce is known as *Talaq-i- Tafweez*”.⁶⁸⁰ Muslim jurists have divided the delegation of power to divorce by the husband into three classes, namely:

(a) *Tawfid* (delegation)

“The wife to whom the power is delegated exercise it in respect of her own person and has got a right to exercise the power or not to do it”.

“And if a man says to his wife, ‘The authority to divorce thyself is in thy hand as often as thou pleaseath:’ the authority shall be in her hands to divorce herself as often as she pleases until the number three is completed.”⁶⁸¹

⁶⁷⁹*Tafh m al-Qur’ n*. Sayyid Abul A’l Mawd d . (Towards understanding the Qur’ n)Trans by Zafar Ishaq Ansari (United Kingdom: the Islamic Foundation)1989. vol.1. p. 175.

⁶⁸⁰*Radd al mukhtar*. Ibn Abideen. (Matbaah Majidiyyah:1982). Vol;2. P. 484

⁶⁸¹*Fatawa-i-Qazi Khan* Imam Fakhruddin Hassan Bin Mansur (Lahore: Law Publishing 1977), vol. 2, p. 258.

(b) *Tawkil* (agency)

In *Tawkil*, the husband assigns an agent on his behalf to divorce his wife. The representative exercise to give divorce to his wife through the power delegated to him in respect to the wife. He has no authority to continue the marriage, such powers have not given to him, and he can only divorce the wife. It is stated that “a person says (to another) ‘Give your daughter to me in marriage, on the condition that the right of repudiation will remain in thy hand.’ And the girl’s father accepts. The right will not vest in the father, because the power is delegated before the *nikkah*”.⁶⁸²

(c) *Risalah* (messenger ship)

“The husband appoints a person his messenger to convey his message to the wife that he has delegated the power to her i.e. his wife”.⁶⁸³

5.5.2.1 Legitimacy of delegation of Divorce (*Tafwid*)

Doctrine of the delegation of the power of divorce is based on an incident mentioned in the Qur’ n where in the Messenger of Allah () told his wives that they were at liberty to live with him or to get separation from him as they choose. Thus the following verses revealed:

يَتَأْتِيَا النَّبِيَّ قُلُوبًا لِأَزْوَاجِكَ إِنْ كُنْتُمْ تُرِيدُونَ الْحَيَاةَ الدُّنْيَا وَزِينَتَهَا فَتَعَالَيْنَ أُمَتِّعْكُنَّ وَأُسْرِحْكِ بِ
سَرَاحٍ جَمِيلًا ﴿٧٨﴾ وَإِنْ كُنْتُمْ تُرِيدُونَ اللَّهَ وَرَسُولَهُ وَالْآخِرَةَ فَإِنَّ اللَّهَ أَعَدَّ لِلْمُحْسِنَاتِ مِنْكُنَّ
أَجْرًا عَظِيمًا⁶⁸⁴

O Prophet! say to Thy Consorts: "If it be that ye desire the life of This world, and its glitter,- then come! I will provide for your enjoyment and set you free In a handsome manner"

⁶⁸² *Radd-ul-Mukhtar* . Ibn Abideen.vol;2. P. 485

⁶⁸³ *Radd al mukhtar*. Ibn Abideen. Vol;2. P. 487.

⁶⁸⁴ Surah Ahzab 33: 28-29.

The power to give divorce is the right of husband but an incident mentioned in the Qur'an in which, the Prophet (ﷺ) gave this right to his wives that they have the choice to live with him or to get separation from him, which established the principle of delegation of divorce.⁶⁸⁵

Prophet (ﷺ) isolated his wives for the duration of about a month after which the abovementioned The Qur'anic verse was revealed. In this regard A'isha (Allah be pleased with her) reported that "when it was ordained by Almighty Allah to the Prophet that he should give his wives a choice or option to choose to which Prophet ((ﷺ)) goes on saying to his wives that he is going to mention a very important matter before them but they have to make promise that they will seek guidance from their parents and will not make any decision in hurry. To this Aisha said that her parents would never allow her to go for separation, to this Allah asked prophet to deliver this message to his wives that if they want the perks of this life then they will be provided with those adornments and will be allowed a fair departure. And if they want the desire of Allah, his prophet and of life hereafter then Allah has definitely prepared a very good reward for them. To this she replied that what should I consult my parents for, because I opt Allah, his Prophet and life hereafter. Following this all other wives did the same as was done by Aisha".⁶⁸⁶

Muslim jurist accepts the doctrine of delegation of divorce (*tafwid at talaq*). According to them it is contingent from this *haddith* that a husband can legally delegate power to dissolve the marriage to his wife. It is explained by the Muslim jurists that the Prophet (ﷺ) in practice to the above injunction of the The Qur'an, he gave option to his wives to choose either live

⁶⁸⁵*Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce*: Harsh Kapoor(ed.) (Women Living Under Muslim Laws Publishers: 1996) p. 13.

⁶⁸⁶*Sahih Muslim*. Book of Divorce Chapter Giving wife as a choice does not count as a divorce. *haddith* 1475.

him or a separation, that is, they might either get their marriages end with him or prefer to continuous living with him as his wives.⁶⁸⁷

On the basis of this principle, *Shari'ah* at the time of marriage contract (*Nikkah*) allows the husband to delegate his power of giving divorce to his wife which is called Delegation of Divorce (*Talaq-e- Tafweez*) and this right is exercised by her under the power delegated to the wife⁶⁸⁸. This right may be delegated by the husband to his wife either at the time of contracting marriage or during the marriage, which the wife can use with the same force as when it is pronounced by the husband himself.

5.5.2.2. *Shari'ah* injunctions regarding legal capacity of wife on delegated divorce

Classical jurists differed as to the validity of different forms of delegation. An agreement made either before or after the marriage providing that the wife is at liberty to divorce herself from her husband under certain specified conditions (e.g. husband taking a second wife), is valid, provided that such power is not absolute and unconditional and that the conditions are reasonable and are not opposed to *Shari'ah*. According to *Shari'ah*, “although the power to issue a divorce belongs in principle to the husband, he may delegate this power to his wife or a third party, with or without stipulating conditions. Once this power is delegated, it cannot be revoked or withdrawn. This is known in the Fiqh terminology as *Tafwid*”. According to *Al-Hidayyah* it is defined as: “If a husband says to his wife ‘divorce yourself when you please’ she is at liberty to divorce herself either upon the spot or at any future period because the word when extend to all time and hence it is the case as if he were to say divorce yourself at whatever time you like”.⁶⁸⁹

⁶⁸⁷“*The Muslim Law of Divorce.*” K.N. Ahmed. pp. 184-185

⁶⁸⁸*Principles of Muhammadan Law.* M.Mahmood (Lahore: Al Qanoon Publishers 2009)p. 784

⁶⁸⁹*Al-Hidayyah:* vol 1, p, 11.

It is competent to the husband who has attained puberty to delegate his power of divorce to a third person or to the wife herself, conditionally or otherwise for it is an elementary principle of Islamic Law. Some jurists would make a distinction between ordinary delegation which may be unlimited in point of time but where the delegation may also be revoked and special delegation to wife (tafwid) which is irrevocable, but where the wife is given an option limited in time, confined to the mijlis (meeting) and lost on rising from it.⁶⁹⁰ These distinctions are not now largely regarded and limitation depends on the terms of the grant. The limited variations are recorded as *ikhtiyar* (option) because given the choice, or *amr bayed* (liberty) because given the liberty.⁶⁹¹

Ibn Abidin discuss this right of delegation he writes: "A person says (to another) 'Give thy daughter to me in marriage, on the condition that the right of repudiation will remain in thy hand.' (And the girl's father accepts). The right will not vest in the father, because the power is delegated before the Nikkah."⁶⁹² "Delegation of divorce is the assignment of a power it is not agency, and therefore the husband can not retract from it; so much so that if he gives her (such authority), and then swears that he will not repudiate her, but she divorces herself, according to the most approved opinion, the husband shall not be treated as guilty of breaking his oath."⁶⁹³ "If a wife would say 'I divorced myself once' or 'I chose myself with one divorce,' one absolute (irrevocable) divorce will take effect for the reason mentioned above, viz (when the delegation has been made by means of this ambiguous expression in

⁶⁹⁰ *Fatawa Alamgiri* vol 2, p. 383.

⁶⁹¹ *Al-Hidayyah*: vol 1. P. 13

⁶⁹² *Radd al Muhtar ala Durr ul-Mukhtar* . Muhammad Ala ud Din Haskafi. (trans. B.M. Dayal Lahore: Law Publishers and Co.n.d.) vol. 4p. 170.

⁶⁹³ *Ibid Radd-ul-Muhtar. vol 4. p. 172*

determining what kind of divorce is effected) regard is had to the terms used by the husband in delegating the power and not to terms used by the wife in effecting the divorce.”⁶⁹⁴

Every word which may properly be used by husband for effecting divorce, can be rightly used by wife in reply. Thus if a wife (in whose hand her business is placed) says ‘I am divorced’ or ‘I divorced myself’ it will take effect, contrary to the effect of her saying ‘I divorced thee’ (whereby it will not take effect) because it is a wife that can be divorced and not a husband.⁶⁹⁵ The husband in Islamic law has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself. This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court .⁶⁹⁶

5.5.2.3. Conditions for delegation of divorce

Muslim Jurists discuss the stages in which husband can delegate his power of divorce to his wife. They concluded three situations which is explain as under:

1. the delegation of divorce takes place at the time of contract of marriage. If the wife demands *tafwiz* along with other conditions and husband accepts it, the jurists agreed that it is permissible and valid. Imam Ab an fah argues: “If the man married her on condition that she will have the right to divorce herself, then this will be valid.”⁶⁹⁷
2. The delegation of divorce takes place with condition before agreement on marriage contract. If the woman demand the right of divorce herself if they get married and husband attributes *Tafwid* to the marriage. “Meaning he says: If I marry you, then you have the right to issue one irrevocable divorce upon yourself.” However, if the man did not attribute this to the

⁶⁹⁴ Ibid vol. 4 p. 182

⁶⁹⁵ Ibid vol. 4. p. 181.

⁶⁹⁶ *Outlines of Muhammadan Law*. A. Fyzee, (Delhi: Oxford University Press, 1974), pp. 158-159.

⁶⁹⁷ *Al-Hidayah*. vol 1. P. 13

marriage, it will be void.⁶⁹⁸ Imam al-Sarakhsi states: “If a man delegates the right to divorce to his wife, then this is similar to giving an option (khiyar) in trade, except that this is completely valid and logical, for the husband is the owner of issuing the divorce, thus he is in a position of delegating something that he owns. Hence, it will be binding, in that the husband will not have the right to revoke this delegation”.⁶⁹⁹ The delegation of divorce takes place after the husband and wife enter in marriage. Husband is willingly accept and delivered his power of divorce to his wife.

5.5.2.4 Shari’ah principles for the Delegation of Divorce (Tafwid)

Following are the principles which is designed by the Muslim jurists for exercising power of delegated divorce by the wife:

1. In case the husband give the right to exercise divorce by the wife in a restricted time and she does not exercise her right and time expires then her right to divorce will have no legal value. Until husband delegates the right of divorce for a specific period or permanently, then the wife can exercise it accordingly⁷⁰⁰.
2. In case the husband delegated divorce to wife to exercise once, or she divorced herself irrevocably, then she has to exercise it accordingly. The wife has to exercise the right to divorce according to the way it is delegated to her.⁷⁰¹
3. According to Hanafi and Maliki jurists “once the husband delegates this right to his wife, he cannot overturn or revoke it”.⁷⁰²

⁶⁹⁸ *Legitimacy of Delegated Divorce*. Noreen Akhtar Butt and Dr Virinder Kalra. Lyallpur Historical & Cultural Research Journal pp. 82-93

⁶⁹⁹ *Kitab al-Mabsut*, vol:7, p. 221

⁷⁰⁰ *Radd al-Mukhtar*. Vol 5. P.28

⁷⁰¹ *Ibid. Radd al-Mukhtar*, vol. 5. p. 32

⁷⁰² *Badai Sanai*. Al-Kasani. Vol:3, p. 179.

4. In case the delegation of divorce is for a specific period of time and the wife is not exercise this right in that specific period, therefore on the termination of this time, the right will also no longer remain with wife⁷⁰³.

5. the delegation of divorce doesnot divest the husband of the power of divorce and both husband and wife can exercise the power vested in them. If husband exercises it, her right becomes void and ineffective.

6. If the husband delegated the power of divorce on permanent condition and the wife rejects to exercise it , then her rejection has no effect on its permanent delegation. In case the wife rejects the offer and the right of delegation is not permanent, then she has no legal right to exercise divorce will be expired.⁷⁰⁴

7. in the absence of husband, wife can exercise delegated divorce. The presence of husband and witness are not mandatory in the case of delegated divorce. This principle shows the complete capacity of woman to exercise divorce without any impediment. According to anafi and maliki jurists, the divorce that takes place as a result of exercise of tafwiz is in nature of talaq bain (irrevocable divorce of minor degree).⁷⁰⁵

5.5.3. Legal right of woman on divorce by the court (*Fiskh*)

Divorce by the court is different from talaq and other forms of dissolution because it based on different form. Following are the instances where Fiskh requires ruling by the court:

5.5.3.1. *Failure to provide maintenance by husband*

There are two point of views on this issue: anafi jurists say judicial separation is not permissible on the bases of failure to provide maintenance. They aurgur that husband is either solvent or insolvent and one cannot blame him for this reason as Allah almighty says:

⁷⁰³ Ibid p.182

⁷⁰⁴ *Radd al-Mukhtar*, vol 5. P.41

⁷⁰⁵ *Badai Sanai*. Al-kasani. Vol 3, p. 179.

لِيُنْفِقَ ذُو سَعَةٍ مِّن سَعَتِهِ ^ط وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ ⁷⁰⁶

Incase husband is rich and solvent and yet he refuses to provide maintenance, the anafi jurists rule that “this injustice could be redressed without recourse to separation. He could be compelled to pay using different means putting him in jail, etc.”⁷⁰⁷ Maliki, Hanabli and Al-Shafi’i jurists are of the view that “even if the husband is poor, the wife has the right to take the matter in the court. The court would either compel the husband to pay maintenance or else would invalidate the marriage contract”.⁷⁰⁸

5.5.3.2 Option of puberty

The court has the power to exercise and annul the contract on attaining the age of puberty. It is the right of both spouses that on attaining age of puberty, according to anafi jurist, they can opt option of puberty and request court to annul the contract.

5.5.3.3 Harm to wife

Incase of violence on wife, the woman has right to request court for dissolution of marriage contract. The Qur’an says:

وَلَا تُمَسِّكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ⁷⁰⁹

“but do not take them back to injure them, (or) to take undue advantage;”
The Qur’an also decrees: “she should be retained in honor or released in kindness”.⁷¹⁰

5.5.3.4 Desertion by husband or his imprisonment

Imam Malik has the view that “the wife of a missing person may seek judicial separation after a waiting period of four years. In the same manner maliki fiqh has recognized judicial divorce on ground of injurious treatment of the wife by her husband. The majority ruling on this issue

⁷⁰⁶ Surah at Talaq 65:7

⁷⁰⁷ *Al-Hidayyah: Sharah Bidayat al-Mubtadi*. Ali ibn Abu Bakr al-Marghinani. (Cairo: Dar us Salam 2000). Vol 2, p. 287.

⁷⁰⁸ *Mughni al Muhtaj*. Vol.3, p. 442.

⁷⁰⁹ Al-Baqarah 2:231

⁷¹⁰ Al-Baqarah 2:22

entitles the wife to judicial relief whereby the court may punish the recalcitrant husband. Maliki jurists ruled that if the treatment in question amounted to injury (darar) the wife may request the court for dissolution on that ground".⁷¹¹

5.5.3.5 Separation by court due to al-khul

As discussed earlier, if the husband doesn't give consent to the khul or demand more amount, in this case, the court could decide about the marriage contract. In this type of mutual consent (*mubarat*) either husband or wife can make offer. By mutual agreement, marriage contract can end and there is no consideration involved in it. *Mubarat* is solely dependent upon mutual consent of both the parties after discussing every type of *talaq* and their interpretation, it is quite clear that concept of Talaq is not at all gender bias. It provides equal rights to both men and women for dissolution of marriage contract.⁷¹²

5.6 Conclusion of the Chapter

At the end of this chapter, it can be concluded that divorce or any other form of dissolution of Marriage, is not gender bias towards the Muslim woman. Muslim man is provided with certain rights, but it should be consider that Muslim women are also provided with equal or more rights than men. The dispute only arises incase of biased understanding towards Islamic Law and misinterpretation of juristic opinions. According to the Qur'an, the basis of dissolution of marriage is the failure of the spouse lived as companion with one another in kindness and equity. The disclosure is not required by *Shar'iah*, that might compelled to commit injury, engage in crime, embarrassment or harmful acts against eachother. *Shar'iah*

⁷¹¹*Shar'iah Law: An Introduction*. Mohammad Hashim Kamali. P. 76.

⁷¹²*Types of Talaq and Dissolution of Muslim Marriage-A Different Perspective*. Siddharth Dhawan The World Journal on Juristic November, 2017.p. 1-8.

does not make the publicity of the divorce grounds mandatory, for safeguard the interest and honor of both spouse. Divorce can be seen as ultimate power to a Muslim man, but the fact is hidden by denying other forms of dissolution of a Marriage. Divorce by the husband provides both husband and wife time to reconsider their decision. Doctrine of divorce introduced by the *Shar'iah* is to provide last solution to both the parties, when they feel that marital relation cannot be sustained any longer.

Islam is a religion of the justice; it maintains straight and well-balanced relation between husband and wife. The fact is that divorce or separation in *Shar'iah* is distributed amongst religio-legal categories. The starting point is the permissibility of divorce that might be extended to either direction dependent upon a particular situation. Divorce as a permitted legal action that is considered by the Prophet as the extreme unacceptable action in the eyes of Allah of all the lawful actions. Divorce is considered a very last resort in *Shar'iah*. *Shar'iah* is against any hasty decision of dissolution of marriage and prohibits three divorces in one. It commands kindness and good conduct towards each other. The Qur'anic verses regarding divorce give the rulings with strong moral grounds. *Shar'iah* has provided right of maintenance for woman even after the pronouncement of divorce within a certain duration of time and in appropriate situations. At the construction of marriage contract, both man and woman are equal parties like wise its dissolution is not the exclusive right or privilege of husband. In fact, *Shar'iah* has granted the wife more grounds for dissolution of contract. Divorce in Islam is fundamentally a sacred matter like marriage that is more than a mere legal contract. Marriage is deep-rooted in high moral or ethical values and principles. Islam clearly provides that marital partners should associate with one another in affection and depart as well with affectionate feelings towards one another. In marriage, *Shar'iah* prefers everything regarding

husband and wife that might enhance the likelihood of success of marriage and decrease the possible inconvenience related to the dissolution of marriage most importantly through the mode of reconciliation.

CONCLUSION

1. Findings and Conclusion

The research is an investigation of the doctrine of legal capacity of woman through an analysis of the modern and classical legal texts especially in Islamic family laws. Muslim Woman is defined as similar to Muslim man on the religious scale by creation of both from the single soul. Qur'an and traditions of the Prophet make Muslim woman as subject of *Shar'iah* without any distinction from the Muslim man.

1.1 *How the doctrine of legal capacity of a Muslim woman is defined in the Primary texts and in Islamic jurisprudence?* First chapter explores the teachings regarding rights and obligations and provides that a Muslim woman is the combined subject of a divine law that considers her spiritually equal to her male counterpart and of a human law that discriminates against her in the material world in favour of her male counterpart. *Dhimma*, whether interpreted as accountability or legal personality women and men are considered equal before Allah in that *dhimma* is without distinction amongst men and women. As discussed in detail above in chapter 1 para 1.3.1 that men and women are equally accountable to Allah *swt* as a starting point for equal treatment of men and women in the broad spectrum of law. This is observed as discussed above in chapter 2⁷¹³ that *dhimma* (legal accountability to Allah almighty) is inherent in all people and not differentiated between men and women.

1.2 *Why 'deficit' capacity is formulated for the woman by jurists?* Classical legal theories by muslim jurists on doctrine of legal capacity are theoretical works where it is not necessary to categorise women as a separate identity as discussed above in detail in 2nd chapter impediment

⁷¹³ Para 2.3

to legal capacity or they consider that there is no distinction between women and men as legal subjects. However, modern writing on women's legal capacity is not manifestation of classical legal theory⁷¹⁴ but is indeed modern in its origin and formation. Contemporary legal work however appears less amenable to the absence of a category of legal capacity for women. It imposed severe restrictions upon women as legal subjects by referring to them as imperfect or deficit legal capacity. As explicitly discussed in research the classical legal literature frames a distinctive female legal subject in Islamic jurisprudence. The legal works in contemporary jurisprudence limits the parameters of women by declaring disability in intelligence and physical vulnerability. The modern legal text explicitly categorizes woman as a different type of legal subject based on her gender and categorized under imperfection or deficiency. The reason the jurists assign women imperfect legal capacity is that of imperfect intellect. The text of The Qur' n and dith never gives such difference, instead it is what the jurists consider the women's intellect as the constraint on women's legal capacity. Describing women as subjects with imperfect legal capacity excludes them from the rulings of *Shar'iah*, which would be a man only. In this discussion by normative jurists on women's legal capacity lack or imperfection is normal and natural for women.

In addition, the laws on marriage and the treatment of marriage in classical legal literature suggest a unique legal capacity, especially for married muslim woman. Discussion regarding marriage and legal capacity of woman concludes that marriage in Islam 'is a covenant'. Distinction between the sacred and the secular was never explicit in Islamic law. Marriage contract is conditional ceremony which needs witness and public announcement is highly recommended as pre-requisite for the validity of marriage. *Shar'iah* has granted Muslim woman complete right to make her own marriage contract, right of independent consent,

⁷¹⁴ See above chapter 2 para 2.11

ownership of dower (*Mahr*), and maintenance, right to have fair and equitable treatment by the husband, individually and in case of polygamous marriage are rights that the Muslim wife granted by Islamic law. It is concluded that this is blamed on the customs, cultural barriers and inherited traditions of the community of the woman which mistreated her against the commands of *Shar'iah*. Such practices are not acceptable for muslim woman as legal subject of *Shari'ah*. Woman has given capacity to exercise her legitimate rights as a wife.

1.3 *What is the approach of Muslim jurists regarding legal capacity of woman in a marriage contract and dissolution of marriage contract?* In the light of Islamic law in marital contract in terms of rights towards the legal partner Muslim women are supposed to be dealt with in a same way as men. In fact Islamic law always endeavors to make marital life of a man and woman harmonious that can be possible only when both would be treated on equal grounds. *Shariah* has provided men certain rights towards their wives and against that wives have the corresponding duties and in the similar manner wives are granted certain rights towards husbands against which husbands have corresponding duties. Husbands and wives may enjoy their rights to make their lives comfortable and are supposed to perform their duties towards one another without any exemptions to establish a harmonious marital relationship. If any partner would not perform his or her duties towards other it would be violation of the commands of Islamic law relying basically upon the The Qur' n and holy guidance provided by Prophet Muhammad .

The present study has explained that the woman has complete legal capacity to give consent with her free will for a valid married contract whether the Muslim woman is an adult virgin or previously married as discussed above in chapter 3. Thus, some guardians impose their will and without asking the woman force marry to their own social benefit under *wilayat ijbar* , is

an explicit violation of the commandments of *Shar'iah* which is unanimously forbidden by Muslim jurists in the interest of protection of the woman. A literal application of Qur'an and ad th has resulted in discriminatory laws that compromise women's rights. Preferably, interpretation ought to favour women's rights and realise the potential for laws based on equality in the Islamic tradition.

Furthermore, in chapter 4 the research has also discussed the evidence that the dower is the property of wife and *Shar'iah* has given her complete capacity to pass it and spend it according to her wish. The wrong notion by the early jurists that dower is bride's price money, is critically evaluated and through evidences based on Qur'an and traditions that it is gift presented from husband as mandatory for his wife. In other words, *Shar'iah* considers dower as a sign of honour and exalts the wife on one hand and considered it to be a symbol of sincerity and expression of the gratification of a man to get married to a woman on the other hand. These reasons make it clear that dower is not merely the amount paid for sexual relation but it has significant value in the eyes of *Shar'iah* that's why it is mandatory on husband to pay even failure in its payment in life of husband make it debt on his property which has to be paid. Moreover, it is explained above in chapter 4 how maintenance is the right of the wife and it is obligatory upon husband to pay it to his wife as it is evident from Qur'anic text, Prophetic traditions and juristic opinion. Therefore, a wife need not to pay herself from her personal money if her husband can afford financially to provide maintenance to her and their children, if the husband fails to provide maintenance then a wife might refuse to obey her husband and consult the court in this matter.

The present study also argued in favour of another type of *ahliyyah* of wife that is the right of wife to secure an equitable treatment from her husband in case of polygamous marriage. If the

husband fails to maintain justice amongst his wives, a wife may consult court for her right of maintenance and other provisions of the marriage contract. In *Shar'iah*, it is mandatory on both partners in the marriage to treat each other with kindness. However, it is misinterpreted that the wife is not equitably treated, however in Islamic family laws the significance of this right to women is so great. As emphasized in the Qur'an the equality and kindness between husband and wife is a vital basis for stable married life. It is observed that husbands are not tolerating unintentional mistakes of wife and humiliate, beat and restrict them in homes as mis-interpretation of *Nashuz*. This is violation of commandments of Qur'an and Sunnah of Prophet

In chapter 5 another aspect that is explicitly explored in this research is the woman capacity to dissolve marriage contract. Divorce (*Talaq*) is seen as ultimate power to dissolve marriage contract by a Muslim man but the fact cannot be denied that it is the moderate mode of dissolution of a Marriage where interests of wife is protected by provision of maintenance (*nafaqah*), *iddah* and *matah*. *Shar'iah* gives a set of rights and obligation for both husband and wife at the time of marriage contract. Divorce (*Talaq*) is not only mode of separation but it is also safeguard the interests of woman by provision of other modes. Moreover, it is not even ultimate legal capacity of a man only. Concept of divorce introduced by *Shari'ah* is to provide remedy to both the parties, when they feel that marriage is not working properly. Importance of divorce and waiting period can be recognized if it be compared with other existing dissolution of marriage laws. *Al-Khul*, *Talaq e tafweez* and *Mubaraat* are the kind of divorce granted by the *Shar'iah* to Muslim woman according to which the wife dissolves marriage contract by paying some kind of compensation usually return her dower. The provision of this right of divorce proves that in the eyes of Islamic law husbands and wives

both are dealt through a balanced approach. In Islam as it is legitimate for a husband to pronounce divorce to his wife whenever there is a special situation arises. On the other hand it has also made it possible for a wife to use al-khul` as a mean to get separation from her husband which is equivalent to the right of husband to pronounce divorce to his wife. A wife might use her option of al-khul' whenever she considers necessary in marital relation without being obligated to explain and further justify the acceptable reasons for attaining al-khul'. At the end of the chapter, it is concluded that divorce or any other form of Muslim dissolution of marriage, is not gender bias towards the Muslim men or women as they are provided with certain rights. Moreover, it should not be ignored that Muslim women are also provided with equal or more rights than men. The dispute only arises because of misinterpretation owing to ignoring the relevant facts.

1.4 *How misunderstandings and related criticism can be evaluated and clarified through true understanding of teachings of Shar'iah?* Finally, in spite of the doctrine of legal capacity rests on the notion of an undifferentiated spirituality, which suggests that Islamic law includes a core of spiritual equality between women and men or an inner essence of gender justice that has not been fully recognized in modern practice that results in conflict in Islamic law between a theological equivalence of men and women and a legal or external inequality of the both of them on the basis of gender difference. Islam is not a religion of laws but it is a religion of guidance and mercy towards all mankind. Qur'an guides equality, mercy and love between Husband and wife and this can be only achieved only if the partners are treated equally. Therefore Islamic laws have granted men certain obligations towards their wives and in the same way wife has certain duties towards her husband.

The present research has endeavoured to explain the legal capacity of woman in Islamic Family Law by clarifying the rights and duties of woman in this regard in the light of principles of *Shar'iah*. Therefore, as evident from the conclusion of the present research the above research has significant implications as a result of the lucency of the doctrine of legal capacity of woman in Islamic Family law. Firstly that would enhance the awareness of woman regarding their rights as well as duties available under *Shar'iah* in this context. Such awareness as a result would better equip them to protect their rights that is the dire need of our time. Furthermore, in the light of the clarity provided in the research regarding legal capacity of woman in *Shar'iah* different muslim states would be able to improve their Family laws for better and effective protection of woman that would promote harmony in material relationships and society at large. In the light of the obtained findings while answering the fifth research question following recommendations can be made in this regard.

2 Recommendations

Having explored the doctrine of legal capacity of Muslim woman in Islamic Family Law, the research finally provide certain recommendations which will have an important contribution in making the family unit more effective by understanding the role Muslim men and women. To maintain balance and tranquility in the family that will secure family unit and in turn will play a crucial role in the stability and development of the society.

Firstly, comparing classical approach with the normative approach the present research provides that Muslim jurists who draws assumption regarding women's legal capacity in contemporary times may continue classical texts and its interpretation as text for flexibility of legal capacity of women as subjects of law. The classical Islamic concept of women and the legal faculties are sufficiently available, whereas there is constant negotiation between

classical Islamic norms and the evolving needs of Muslim communities adapting to modern gender concerns.

Secondly men and women intending to get married should be educated by providing them explicit guidance regarding their rights and duties towards one another in marriage based on the primary sources of *Shar'iah* for the sanctity of the family as a result it will develop a better understanding in men and women of these basic issues and will prepare the coming generation of the society to face the relevant future challenges. Special centers for the purpose of consultation and directional services must be established to assist the relevant individuals to resolve the disputes they faced in the light of principles of *Shari'ah*. These centers would help to guide the couples at the event of disputes in the light of injunctions of Islamic law about their right as well as duties. That as a result would increase the harmony in their relations and would also reduce the ratio of separation in marital affairs.

Thirdly, it is desirable to educate men and women regarding principles of *Shari'ah* regarding their rights as well as duties in marital relationships. Furthermore, provision of knowledge about the stipulations that may be required to discuss and incorporate in the marital contract to establish a strong marital bond and a joyful marital life. This education and awareness can be provided to Muslim woman through educational institutions and the media that includes the mediums like social media, print media, audio and visual media like radio and television.

Forthly, further researches and projects should be conducted to highlight the legal capacity of woman in every aspect of subject of *Shar'iah* to emphasise the equality of muslim women in the light of *Shar'iah* given by the Law giver-Allah Almighty.

Finally, it is recommended here that the prevailing laws in Muslim countries should be improved and where required new laws should be enacted and implemented in Muslim states

in true spirit in the light of the present findings. That will further promotes harmony in marital relations by protecting the interests of Muslim women in society to satisfy the objectives of *Shari'ah*.

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35, 272	Surah Al-Baqarah 2	184	أَيَّامًا مَّعْدُودَاتٍ فَمَنْ كَانَتْ مِنْكُمْ مَّرِيضًا ...	1.
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290	Surah Al-Baqarah 2	223	نِسَاؤُكُمْ حَرْثٌ لَكُمْ فَأَتُوا حَرْثَكُمْ ...	4.
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	Surah Al-Baqarah 2	236	لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمُ النِّسَاءَ مَا لَمْ ...	13.
171	Surah Al-Baqarah 2	237	طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ ...	14.
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Glossary of the terms

Aqd : contract

Batil : void

Bulugh: puberty

Bikr: virgin

Fard: obligatory

Fasid: irregular

Faskh: annulment

Ibadah: ritual act

Iddah: waiting period for woman following divorce or widowhood

Ijab: offer

Khiyar al-bulugh: option of puberty

Khul: divorce initiated by a wife in which she surrenders her dower in return for release

Lian: imprecation

Mahr: dower

Mahr mithl: proper dower appropriate to the status of woman

Mata: gift

Nafaqa: maintenance

Nushuz: rebellion

Raji: revocable

Talaq: divorce

Tafwid: to delegate the right of divorce to the wife

Thayyib: a woman who is previously married

Wali: guardian

Wilayah ijbar: compulsory guardianship

Waliyah shirakah: complementary guardianship

Zihar: a declaration of separation by husband.

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