was followed prominently but on the other, the limits of Ijtihad were chiefly restricted. Though the earlier Mujtahids would exercise the power of interpretation of the texts, but the latter jurists could not cross the barrier of the formers. The jurists were classified according to their power of interpretation. The classification of the jurists or lawyers in this period was graded into seven different categories starting from Imams of four schools down to the ordinary Mufti. (juriconsult). The later jurists hold the lower rank and as such incompetent to exercise independent judgment. It impliedly means that the door of Ijtihad is closed. But the closure of Ijtihad creates deadlock and stands as barrier to the way of development. It is to be noted that in this period a large number of eminent commentators and annotators like Tabari, Jamaksari, Baidabi, Bhajjali, Ialalain, Fikhruddin, Rajcte were born, Besides, Ibn Hammam, Ibn Nazim and Ibn Abedin made a lot of contributions to the development of Hanafi law. Further more, Hedaya, Inaya, Nihaya, Durul Mukhtar, Raddul Muhtar, all are commentaries, are the important contributions of fourth period.

Fifth period

The fifth period of the evolution of Islamic law began with the fifth century of the Hijri, i.e. with the abolition of caliphate or Sultanate and it has not come to an end. Actually, this is the period of taqlid. A large number of books were written and are being written in this period, but these are mere compilations. Some writings are the commentaries of commentaries. The most standard work on Islamic law is the *Fatwa-i-Alamgiri* written and published under the orders and supervision of Emperor Aurangzeb.[5] *Muhammadan law* in two vol. by Syed Ameer Ali, *Reconstrnction of Religions Thoughts in Islam* by Dr. Muhammad Iqbal are the products of this period. These books are mostly the analysis of opinions of earlier writers. There is nothing new in them. In this long period, there has not bean evolution of Islamic law, but new problem may arise which needs to be solved in the light of the Quran, Hadith and Ijma. Since Islam is a dynamic and complete code of life, it can suggest timely solution of any problem up to the day of resurrection.

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5 Mir Waliullah, Muslim Jurisprudence, P.113.

Chapter Six

Muslim Marriage

1. General Observations

Marriage is one of the oldest institutions in the history of human civilization. It is the foundation of all civilized communities. Considerable attention has been paid by all systems of law to the principles, rules and regulations to the contract of marriage. Thus marriage is a legally and socially sanctioned union between two persons of the opposite sex.[1] In Islamic jurisprudence, it means (*aqd*) or union.[2] The Arabic word for marriage is *Nikah*. In Bengal, a first marriage is commonly called *Shadi* which properly means joy or festivity. A second marriage is usually called *Nikah*. The word *nikah* thus used is supposed to imply an inferior kind of marriage which is altogether a misnomer.[3] Marriage is regarded as the union of two souls for love and two bodies for procreation and legalising of children.[4] Again, it has been defined as a social, noble and sacred contract, that has been referred to in the Holy Quran as *Mishaqan ghaliza,* solemn covenant.[5] "A mere casual commerce, without the intention of cohabitaion and bringing up of children, would not constitute marriage under any supposition. But when two persons of the opposite sex agree to have that commerce for the procreation and bringing up of children and such lasting cohabitation in a state of nature would be marriage."[6] The intention of both the parties, husband and wife, therefore, plays a vital role in the mode of sexual gratification.

Syed Ameer Ali points out that marriage is an institution ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity.[7] In Islam, marriage is a contract which has for its object the right of enjoyment and

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1 Encyclopaedia Britanica, Vol. XIV, P. 926.
2 Muhammad Ali, The Religion of Islam, P. 602
3 S. Ameer Ali, Mahommedan Law, Vol. II, P. 257(1979).
4 Fazlul karim, al-Hadis, Vol. II, P. 629.
5 Al-Quran 4 : 21
6 Encyclopaedia Britannica, Vol. XIV. P. 931.
7 Ameer Ali, Muhammedan Law, Vol. II, P. 241(1979).

legalizing generation.[8] It brings unity to the lives of husband and wife themselves and for the family they raise. It is also instituted to bring solace to human life and to meet one of the prime and original necessities of man.[9] That is why it is lawful even in extreme old age when the hope of getting offspring is ceased and even in death-bed illness (*Marz-ul-Maut*).[10] It is considered as the basis of social life and the beginning of family life. Islam considers marriage to be a very sacred act and a step towards a better, purer and happier life.[11] The Holy Quran declares,

> "Among His signs is that He created spouses for you from among yourselves so that you may console yourselves with them; in that are signs for those who reflect."[12] Islamic marriage is a civil contract which requires neither a priest nor ceremony nor a *Qadi*[13] for its performance.[14]

Human relation is dynamic and a maritial relation is no exception to this general rule. The relationship between two persons of opposite sex, legalized by marriage, is so delicate that it requires constant adjustment of the parties, and the law consideres it wise to give the husband predominance over the wife. The Quran states,

> "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. Therefore, the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah has guarded."[15]

However, the contract of marriage gives the husband no power over the wife's person beyond the limit of law and no right upon her goods and property. The Islamic marriage is a permanent contract between the husband and the wife. It is not for a temporary period. Hence, it is more or less a durable union between a male and a female lasting till the death of either of the party.[16]

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8 Sheikh Burhan-ad-Din Ali, Hedaya Tr. & ed., Charles Hamilton, P. 25.
9 N.B.E Baillie, A Digest of Moohummadan Law, P. 4.
10 Baillie, A digest, P.4.
11 Al Quran, 7:189.
12 Al-Quran 30:21 : See Thomas Ballantine Irving and Others, The Quran : Basic teaching , P. 187.
13 Literallty Qadi means Judge. In Indo-Pak subcontinent, the title Qadi is used for the Registrar of marriages.
14 Shakurun V. Abdul Majid AIR 1955 NUC 202.
15 Al Quran, 4 ;:34.
16 Though marriage is a permanent tie between the husband and the wife, it may be repudiated if and wen necessary. Repudiation may take place either through talaq given by the husband or the wife may receive decree of repudiation of marriage through the court.

2. Legal Nature of Muslim Marriage

As marriage in Islam is purely a civil contract[17] which involves an agreement between the husband and the wife, so it must satisfy all the basic conditions of a contract.[18] But a contract of marriage differs from other contracts in some respects. In all other contracts, the terms and conditions are settled earlier. But there are many conditions and resumptions of law in case of marriage contract in which the wife corresponds to the property and dower to price.[19] Thus a contract of marriage is not like other contracts allowed by law for a limited pariod only.[20] As regards the nature of marriage Ameer Ali is of opinion, "Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union."[21] Thus under Islamic Law, marriage is a civil contract and as such both husband and wife must satisfy themselves that each should have a desirable partner for life.[22] It is laid down in the Quran, "Marry woman of your choice"[23]. The Prophet (peace be on him) said, "When one of you ask a woman in marriage, if he is able to look at what will induce him to marry her, he should do so."[24] Further, Al-Mugha bin Shuba said: "I asked a woman in marriage and the Prophet (peace be on him) asked me whether I had looked at her. When I replied that I had not"; he said, "Then look at her, for, it is better that there should be love between you."[25] The jurists of all ages unanimusly approve of looking to each other. Imam Aboo Hanifa is of opinion that it is lawful to have a sight of the bride before marriage.

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17 Abdul Kadir V. Salima ILR (1886) 8 Allahabad 149 (Full Bench). In this case a Hanafi Muslim (Abdul Kadir) brought a suit for restitution of conjugal rights. The defendant pleaded that the suit was not maintainable as the muhr (dower) was not paid; whereupon the plaintiff deposited the whole amount in the court. The wife also pleaded cruelty and divorce; both the allegations were found to be false. Held (by the Full Bench) that as the wife had cohabited with her husband for three months after her marriage, and there was no evidence of demand by the wife of her unpaid dower, the husband was entitled to restitution. The Full Bench was consisted of Sir Comer Petheram (Chief Justice), Mr. Justice Straight, Mr. Justice Old field, Mr. Justice Brodhurst, and Mr. Justice Tyrrel. See Asaf A. A. Fyzee, Cases in the Muhammadan law of India and Pakistan (Oxford University Press, 1965), P. 103.
18 Section 2 (h), Contract Act, 1872, as adapted in Bangladesh.
19 Saburunnessa V. Sabdu Sheikh AIR (1934) Cal., 693.
20 Baillie, A Digest, P.18.
21 Ameer Ali, Mahommedan Law, Vol. II, P. 241(1979).
22 Muhammad Ali, The Religion of Islam, P. 616.
23 Al-Quran, 4:3.
24 Mishkatal Masabih tr. & ed. James Robson, Vol. IV, P. 662.
25 Ibid.

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According to Imam Malik, this is lawful with the permission of the bride. Imam Shafeyi and Imam Ahmad bin Hanble also hold the view that this is lawful either with or without permission.[26] Hence it is recommended that the two parties should have a look at each other before the contract is made.

A contract of marriage creates mutual rights and duties between the husband and the wife. Islam prescribes definite obligations for them. It does not consider woman as an object of enjoyment only. Rahter she plays a vital role as a suitable partner of the man. This idea has been stated beautifully in the Holy Quran: "They (your wives) are an apparel for you and you are an apparel for them."[27] Islam advocates equality between the husband and the wife in respect of rights and duties in spite of having their separate fields of actions. While advocating equality between the two, Islam recognises greater responsibility and authority of the husband than the wife. In this respect the Quran states, "And they (the wives) have rights similar to the rights against them according to what is equitable, but men have a superiority over them".[28]

In order to avoid chaos and to maintain peace and tranquility in the family, the husband has been given higher authority, because "Men are the maintainers and protectors of women, because Allah has made some of them to excel others, and because they spend out of their property."[29] Marriage in Islam is not only meant for sexual gratification, but also for sustaining mutual mental peace, love and affection which may be attained by mutual co-operation and understanding. Islam has elevated to a great extent the social and legal status of the wife. "Retain them (wives) in good fellowship" and "treat them with kindness"[30] is the oft-recurring order of Allah through the Holy Quran. A good number of *hadith* are collected relating to good treatment with a wife. "The most excellent of you", the Prophet (peace be on him) is reported to have said, "is he who is best in his treatment with his wife."[31] He (peace be on hin) further said, "The believers who show most perfect faith are those who

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26 Fazlul Karim, Al-Hadis, P. 646.
27 Al-Quran, 2:187
28 Al-Quran, 2:228
29 Al-Quran, 4:34.
30 Al-Quran, 65:2
31 Waliuddin Muhammad bin Abdullah Al-Khatib, Mishkat- ul-Masabih, P. 118.

have the best disposition among them (wives) and better among you are those who are better towards their wives."[32]

As Muslim marriage is a civil contract distinguished from sacramental form of marriage, most of the incidents of contract are consequently applicable to such marriage, for example, consideration of marriage in the form of dower, breach of the contract by divorce, vesting of legal rights and obligations on the contractual parties and bestowing no greater authority on the husband than what the contract provides in lawful manner. The legal effects of Muslim marriage, therefore, are those which legalize mutual enjoyment of the parties in a manner permitted by law or according to nature. It subjects the wife to the power of restraint; i.e. it places her in such a condition that she may be prevented from going out and showing herself in public. It imposes on the husband the obligation of *muhr*[33] and of maintenance[34] (*nafaqa*) for his wife provided she is not disobedient or rebellious.[35] It establishes on both sides the prohibitions of affinity[36] and the rights of inheritance. It obliges the husband to be just between his wives and to have a due regard to their respective rights and it imposes on them the duty of obedience when called for and confers on him the power of correction when they become disobedient. It forbids the husband to associate with, either as wives or concubines, two women who are sisters or so connected with each other as to render their association unlawful.[37] Both the parties of marriage, therefore, must show respect to their respective rights and duties. If either of the party fails to fulfil obligations towards the other, the affected party has the right to sue against the other. Thus Islamic marriage is a civil contract and not a sacrament like the Hindu marriage.

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32 Mishkat, P. 182.
33 Al-Quran, 4:24; 4:4 See Thomas Ballantine, Irving, The Quran: Basic Teachings, P. 202.
34 Al-Quran 2:236; 65:7
35 Hedaya, P. 141.
36 Al-Quran, 4:23
37 Baillie, A Digest,. P.13.

3. Pre-Islamic Marriage System[38]

Islam recognized the authority of some local customs and usages (*urf*) as guiding the application of law. Many decisions of law are based on usage or custom, so much so that it has been taken as a principle of law.[39] The institution of Islamic marriage is no exception to this. Islam recognized only those usages which were not contrary to Islamic *shariyat*.

The pre-Islamic Arabs recognized four types of union of man and woman in the name of marriage.[40] The first of these was a permanent marriage tie according to which a man would ask another for the hand of his daughter or ward and then would marry her by giving her certain amount of dower. Islam has accepted this form of marriage in a modified manner. The second form was: "A man would say to his wife, send for so and so and have cohabitation with him, and the husband would remain absent from her and would not touch her until her pregnancy was clear."[41]The third form was that in which any number of men, less than ten, would gather together and have sexual connection with a woman. When she became pregnant and gave birth to a child, she would call for all of those men and would say that the child belonged to a particular man from among them. He was then bound to accept the responsibility and paternity of the child. In the fourth form, there were prostitutes who used to have a definite number of visitors and their tents had a special flag as a sign of their calling. If a woman of this class would conceive, the men who frequented her house were assembled and physiognomists decided as to who was the father of the child.[42] The last three forms of

[38] Pre-Islamic period here refers to the period before the advent of prophet Muhammad (Peace be on him). Actually Islam came to the earth with the first man, Hadrat Adam. The declaration of the Quran: "The same religion has he established for you as that which He enjoined Noah and the which we have sent by inspiration to thee (Muhammad), and that which We enjoined Abraham, Moses and Jesus". Al Quran, 42:13; 3:3; 2:84. The religion of Allah (Al-Islam) is the same in essence whether revealed to, for example, Noah, Abraham, Moses, Jesus, prophet Muhammad (Peace be on him) or to any other prophets. See A. Yusuf Ali, The Glorious Quran, P. 1308. It is for this reason that Islam is called Din Al-Fitrat or the religion of human nature, and all its laws are in accord with reason. Al-Quran, 30:30. Allah has been legistating and revealing His wishes and commands through His prophets in accordance with the needs and conditions of different countries, nations and stages of civilization throughout the ages. The Holy Quran is the last of such revelations. It embodies all the basic laws which are essential to mankind.

[39] Abdur Rahim, Muhammaden Jurisprudence, P. 26.

[40] Muhammad bin Ismail Bukhari, Sahih Al-Bukheri Tr. & ed. Mozammel Haq & others, Vol. V, P. 48.

[41] Muhammad Ali, The Religion of Islam, PP. 606-7.

[42] R. Levy, The Social Structure of Islam, P. 118; See also A. Fyzee, Outlines of Muhammadan Law, P. 8.

sexual connection were only legalized adultery in one form or another[43], and Islam did not recognize any of them. Islam reformed marriage tie retaining its essential feature in order to improve the position of woman.[44]

Another form of marriage tie, besides the four types mentioned above, popularly known as *Muta*, was prevalent in the then Arabia. Technically, *muta* means temporary marriage. It is derived from *mata* meaning profiting for a long time.[45] It also means a marriage of enjoyment. The institution of *muta* was fairly common in Arabia both before and at the time of the Prophet (peace be one him). The Prophet tolerated it for some time. Under this system, marriage was contracted for a fixed period of time– as for a day, a month or a year or for any other specified time in consideration of certain amount of *muhar*. Such marriages were entered upon mainly by men who found themselves staying abroad for a period.[46] After the expiry of the stipulated period, the marriage contract would be automatically ceased. This type of marriage may be treated as fornication in the sense that Islamic marriage cannot be contracted for a particular period. The marriage must continue until either of the party dies or it is repudiated either by the husband or by the wife in accordance with the operation of the prescribed rules of *Shariyat*. *Muta*, therefore, cannot be considered a marriage (*Nikah*) under any definition of Islamic law, However, Prophet Muhammad (peace be on him) permitted *muta* to his followers during early days of Islam on longer campaigns.[47] All schools of law, except the *Ithna Ashari* of *Shia group*, are agreed that such marriage was finally declared unlawful. *Hazrat* Ali reported a *hadith* from the Prophet (peace be on him) regarding the prohibition of *muta*. "The Prophet of Allah (peace be on him) forbade the temporary marriage (*muta*) with women, and the eating of flesh of domestic asses on the day of *khaibar*".[48] And the expedition of khaibar took place in the 7th Al-Hiji[49] in the month of Muharram i.e. three years before the demise of the Prophet (Peace be on him). It is also stated in another hadith, "Whoever of you has married a woman for a

[43] Joseph Schacht, An Introduction to Islamic Law, P.7.

[44] H. A. R. Gibb & other, Shorter Encyclopaedia of Islam, P. 447.

[45] Muhammad Ali, A Manual of Hadith, P. 269.

[46] Encyclopaedia of Islam,P. 418.

[47] Encyclopedia of Islam, P. 418.

[48] Miskhat, Vol. 4, P. 669; See Shahih Al Bukhari, Vol. V, P.42.

[49] Allama shibli Numani, Shiratunnabi Tr. ed. Saifullah Siddique and others. Vol. I, P. 481.

period, shall give her what he promised and claim nothing of it back and he shall separate from her; for God had forbidden this upto the day of resurrection".[50]

It is held that the *muta* in many cases can only be described as legalized prostitution.[51] Marriage in Islam is, therefore, not a temporary union but for the entire span of life. Thus marriage contracted for a limited period is invalid; and on that account Hadrat Umar (R) regards it as fornication and as such he strictly executed its prohibition.[52]

4. Polygamy in Islam

Polygamy was prevalent in ancient societies. The Babylonions, Assyrians, Persians and the Israilites practised polygamy and there was no restriction as to the number of wives. The Talmud of the Jerusalem restricted the number on the consideration of ability of the husband to maintain wives. Among the Athenians, the most civilized and cultured nations of antiquity, the wife was a mere chattel, marketable and transferable commodity.[53] Moses, Abraham, Daud, Solomon and some other great Prophets took several wives.

Monogamy is the rule of Islam, while polygamy is an exception. Under exceptional circumstances, Islam allows a man to have more than one wive at a time. Eduard Von Harthimann observes, "The natural instinct of man is in favour of polygamy and that of woman in favour of monogamy".[54] The biological need and economic capability of the husband and, above all, equitable treatment between the wives are pre-conditions for a husband to marry more than one wife.[55]

Polygamy in Islam is, therefore, a specific relief. The Holy Quran expressly states; "Marry such woman as seem good to you, two, three, or four, but if you fear that you cannot do equal justice to them all,

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50 Encyclopaedia of Islam, P. 418.
51 Encyclopaedia of Islam,P.420.
52 Hedayah, P. 33; Hazrat Umar, the second Calip of Islam, did not Prohibit Muta. He only circulated its Prohibition. Prophet (Peace be on him) Prohibited muta at the last part of his life, and as such it was not publicly known. Hadrat Umar strictly implemented its Prohibition with the help of law.
53 F. Karim Al-Hadis, P. 679.
54 R. Roberts, The Social Laws of the Quran, P. 9.
55 Muhammad Faizudi-Din, "Muslim Marriage and Its Statutory Reforms in Bangladesh", The Rajshhi University Law Review, Vol. III, Rajshahi, 1982, P. 41.

then marry only one."[56] Thus Islam imposes a pre-condition upon the husband to the effect that if he fears that he cannot act justly between or among his wives, he must be content with one wife only. As it is almost impossible for a husband to maintain complete equality in the treatment of the wives in all respects, Islam directs him to have only one wife at a time, though, however, under unavoidable circumstances, one is permitted to marry more than one wife but not exceeding four. The Holy Quran unequivocally declares:

> "You will never manage to deal equitably with your wives, no matter how eager you may be to do so, yet do not turn completely aside from one so that you may leave another in suspense. If you maintain proper conduct and do your duty, Allah will be forgiving, merciful.[57]

These two verses make it clear that Islam enjoins taking only one wife but it keeps reservation and safeguard to meet the cases of emergency. As Islam gives a perfect code of marriage without any necessity of future legislation, it keeps its laws elastic in order that these may be adoptable in every circumstance and in every condition of society.

Though monogamy is a right rule of life, sometimes it fails due to excess of females over males and it is only through a limited polygamy that this difficulty can be overcome. Executing the order of the Holy Quran that polygamy is to be limited to four, Prophet Muhammad (Peace be on him) ordered those persons who had more wives than four to divorce the rest keeping four. Ibm Umar told that Ghailan bin Salama accepted Islam and that he had ten wives in the pre-Islamic period who accepted Islam along with him. So the Prophet (Peace be on him) told him to keep four and separate from the rest.[58] Similar hadith is also available in this context. Naufal b. Muiwayiah said: 'When I accepted Islam I had five wives, so I consulted the Prophet (Peace be on him) and he said', "Separate from one and keep four."[59]

Although polygamy is sanctioned, one must not think that advantage of this degrading practice is taken by the generality of Muslims. As regards polygamy in India, for instance, Syed Ameer Ali in his book, 'The Personal Law of the Mohommedans' says,

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56 Al-Quran, 4:3.
57 Al-Quran, 4:129.
58 Mishkat Tr. James Robsen, P. 674.
59 Mishkat Tr. James Robson, P. 674.

> "A custom has grown up in that country, which is largely followed by all classes of the community, of drawing up a marriage deed containing a formal renunciation on the part of the future husband of any right or semblance of right which he might posseses or claim to possess to contract a second marriage during the existence of the first. This custom serves a most efficacious check upon the growth and perpetuation of the institution of polygamy. In India more than ninety five percent of Mahommedans are at the present moment either by conviction or necessity, monogamists".[60]

He further refers that in Persia only two per cent of the population enjoy the questionable luxury of plurality of wives.[61] Similar is the case in Bangladesh.

It is clear from the above discussion that a Muslim may marry up to four wives at a time and no more. As polygamy results in, in most cases, social disorder, jeopardises family peace and very often threatens social relations, it is to be discouraged, if not occasion for it arises.[62]

5) Importance of Marriage

Family is the primary unit of human race. It is the first chohesive force of human civilization. Family owes its existence to marriage. Had there been no marriage, perhaps there would have been no family system. Marriage tie is responsible for the growth of civilization. Thus the existence of family is invariably connected with marriage.

The institution of marriage helps develop the feelings of love and service between two persons of opposite sex. The mutual love between husband and wife is not based merely on momentary passion, rather on responsibility, faithfulness and other finer qualities of head and heart which lay the foundation of civilization. Thus the Quran has states: "And one of His signs is that He created mates for you from yourselves that you might find quiet of mind in them, and he put between you love and compassion."[63] The natural reciprocal inclination of both the sexes becomes lawful through marriage. In the similar manner, love and affection transcend to the offspring who are the results of this lawful union. In fact, the family is the first training ground for the greater social

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60 R. Roberts, The Social Laws of the Quran, P. 11.
61 Ibid.
62 Law Review, P. 43.
63 Al-Quran, 30:21.

circles and does create healthy atmosphere in the society. A person develops in himself a sense of obligation and responsibility in married life. Above all, he is trained here to feel for his fellow members. In this connection the Prophet (Peace be on him) said, "The best of you are those who are best to their wives."[64]

Islam totally prohibits unlawful sexual intercourse, as it creates neither responsibility nor legitimate heirs, on the contrary, indiscriminate sexual relation results in chaos, disorder and even bloodshed in society. Islam treats free sexual relation, without marriage, as fornication which is subject to specific punishment (*Hadd*).[65] The institution of marriage is found everywhere in the world and has been practised from time immemorial. It has thus worked to the advancement and welfare of humanity at large. If unbridled use of sex is allowed and if it continues for a century, human civilization will get rid of its recognisable trait and confusion and doubt shall reign supreme. Marriage is, therefore, one of the most important legal institution in Islam.

All the Prophets, excepting *Hazrat* Isa (S.M.), were married to one or more women.[66] Asceticism is disapproved in Islam as it leads to many evils. Marriage has been declared as a special grace by Allah on His apostles. The Quran states: "(O Prophet), we have sent aspostles before thee and granted them wives and children."[67] Again, Al-Quran stressed the need for the marriage of adult man and woman. "And marry those among you who are single as well as your virtuous servants and maids. If they are poor, Allah will enrich them from His bounty. Let those who do not find (any way to) marry, keep themselves chaste until Allah gives them means out of His grace."[68] Thus marriage is the usual

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64 Mishkat Al-Masabih, tr. & ed. James Robsen, Voll. IV, P. 629.
65 When a person is fully convicted of adultery (Zina), if he be married, let him undergo the punishment of Rajm that is stoning to death: because the Prophet (Peace be on him) condemned Maaz (one of his companions) to be thus stoned to death, who was married; and he has also declared, "It is unlawful to spill the blood of a Muslim, exception only for three causes, namely, apostasy, adultery after marriage and murder, and in this, all companions likewise unite. But if the person convicted of adultery be free but unmarried, the punishment with respect to him is one hundred strips, according to what is said in the Holy Quran: "The woman and the man guily of fornication, scourge each of them with a hundred strips"; although this text be cancelled with respect to married persons, yet in regard to all other than those who are married the law must be executed in conformity to it. See 24: 2; For details, Hedaya tran. Charles Hamilton PP. 178-179.
66 Fozlul Karim, Al-Hadis, Vol. II, P. 679. See Aizur Rahman, Islamer Dristitey Paribarik Jibon, PP. 12-13.
67 Al-Quran, 13: 38
68 Al-Quran, 24: 32-33.

course followed by almost all the Prophets including the last one. The guardians are also ordered for arrangement of marriage of their adult issues. It, therefore, appears that marriage may be delayed for two reasons– (i) if no suitable match is available and (ii) if there is no means with which to maintain wife.

Hazrat Muhammmad (Peace be on him) laid stress upon married life. He said to three of his companions who talked of fasting in day time and keeping awake in prayer during the night and keeping away from marriage: "I keep fast and I break it, and I pray and I sleep and I am married, so whoever inclines to any path other than my *Sunnah*, he is not my follower."[69] He further said: "O assembly of youths, let him marry who amongst you is able to have sexual intercourse, verily this is the best means of keeping the looks cast down and guarding chastity; and whoso is not able to marry, he should keep fast. Verily this will act as castration."[70] He also said that marriage is a part of his *Sunnah*, whoever runs away from his path is not amongst us. Marriage has been compared with the half of religion. The Prophet (Peace be on him) said: "When a man marries, he has fulfilled half of the religion; so let him fear Allah regarding the remaining half."[71] "Marriage-relationship has been given the same importance as blood-relationship. Marriage acts to unite different families leading to closer relation. This has been clearly recognised in the Holy Quran as, "It is He who has created man from water, then He has made for him blood and marriage relationship."[72]

Marriage contributes to many-sided progress of a man–physical, mental, social, moral and spiritual. Many things cannot be achieved in an unmarried state. There is, therefore, a great deal of distinctions between married life and unmarried life. As regards the moral value of marriage, it has been said in the Holy Quran, "that you may not deviate from the right path.[73] Thus "marriage is obligatory on a person whose passions cannot otherwise be restrained from the commission of wrongs or from hankering after what has been prohibited, and who can provide the dower

69 Shahi al- Bukhari, Bengali Tran. Mozzammel Haq and Others, Vol. V, P. 19.
70 Waliuddin Muhammad bin Abdullah al Khatib, Mishkatal Masabih, P. 267.
71 Mishkat al-Masabih, Tr. & ed. James Robson P. 660.
72 Al-Quran, 25:54.
73 Al-Quran, 4:3.

and maintenance of a wife. But it is not sinful for one, who is continent and has no means, to abstain from it."[74]

6. Objectives and Purposes of Marriage

Each and every creation of Almighty Allah is purposeful. The very creation of human being, therefore, is not exception to this. In this connection the Quran declares : "I (Allah) have not created *Jinns* and men but except for my service".[75] It is further declared: "We did not create the heavens and the earth and all that is between the two for idle sport".[76] The above two verses of the Holy Quran clearly explain the very purpose of the creation of the universe including human beings. According to Islam, marriage is an act of *Ibadat* or of religious duty, for it preserves mankind free from pollution. Marriage is enjoined on every capable Muslim, because it helps a man develop his moral character, assists him in fulfilling his duties towards his creator. Besides, lawful growth of population is possible only through marriage.

The objectives of marriage as stated in the Quran are as follows: First, it helps multiply the population. "O people be careful of your duty to your Lord who created you from a single person and spread from them both many men and women".[77] In another verse it is stated, "It is He who created you from a single being, and of the same. He made his mate in order that he might dwell with her (in love)".[78] Further, it is stated, "And Allah has made wives for your from yourselves and has given you sons and daughters from your wives"[79] Continuation of human race requires lawful union between a man and a woman and this can be done through marriage. The divine will is clearly revealed thus: "Your wives are tilt for you; so go to your tilt whenever you wish"[80] Again, it has been said in the Quran, "He is the originator of the heavens and the earth; He has made mates for you from yourselves multiplying you thereby"[81]

It is, therefore, clear that women are not only the means of satisfying sexual lust of men, but are also the means of preserving future

74 Ameer Ali, Mohammedan Law, Vol. II, P. 241(1979).
75 Al-Quran, 51 : 56
76 Al-Quran, 21 : 16
77 Al-Quran, 4 : 1
78 Al-Quran, 7 : 189.
79 Al-Quran, 16 : 72
80 Al-Quran, 2 : 223
81 Al-Quran, 42 : 11

generation. The prime objective of marriage, according to the Holy Quran, is therefore, the continuation of human race on the earth. Secondly, one of the aims of marriage is to protect chastity and moral excellence. The Quran states: "Thus Allah has ordained against you, except for these, all others are lawful, provided you seek (them in marriage) with gifts from your property desiring chastity, not lewdness."[82] The Holy Quran further states: "And respectable believing women are lawful to marry as well as respectable women from among those who were given the book before you, once you have given them their dowers and taken them in wedlock, not in illicit affairs, not having (them) as secret lovers"[83] Islam denounces pre-maritial sexual enjoyment. Rather it prescribes, as stated earlier, specific punishment for unlawful sexual connection. It is stated, "So marry them with their family's permission and give them their marriage portion (dower) decently so that they live a protected life (in marriage). not indulging in illicit affairs, not having secret paramours"[84]

Thus the above verses of the Quran explain clearly one of the important objectives of marriage as protecting a man or a woman from immoral relation. It prevents a man or a woman from fornication and secret love. Marriage has been compared to a fort (*hisn*), because it protects the husband and the wife from immoral actions as the fort protects its inmates from external aggression.[85] The Holy Quran declares that it is only marriage through which chastity and moral upliftment can be achieved. The Holy Quran declares: "They (your wives) are an apparel for you and you are an apparel for them.[86]

Thirdly, the objective of marriage is that it gives not only sexual pleasure, but also sustains mutual mental peace, love and affection which may be attained by mutual co-operation and understanding. Thus the social and legal status of the wife has been elevated to a great extent. "Keep them (wives) in good fellowship" and "treat them kinkly"[87] is the oft-recurring divine advice stated in the Quran. As to sustaining mental peace, Holy Quran states: "Among His signs is that He has created

[82] Al-Quran, 4 : 24
[83] Al-Quran, 5 : 5
[84] Al-Quran, 4:25
[85] Muhmmad Abdur Rahim, Poriber o Paribarik Jiban, P. 89.
[86] Al-Quran, 2 : 187.
[87] Al-Quran, 65 : 2

spouses for you from among yourselves so that you may console yourselves with them. He has planted affection and mercy between you; in that are signs for people who reflect[88]. It states "He is the one Who has created you (all) from a single soul and made its mate from it, that he might find comfort with her.[89]

These verses of the Holy Quran explain the objectives of Muslim marriage. Marriage is necessary for procreation of children and thereby to continue the human race, for maintaining chastity and attaining mental peace and satisfaction of the sexual appetite. These objectives and purposes cannot be achieved without marriage. Hence marriage is, no doubt, one of the important blessings of Almighty Allah showered on human beings. According to the opinion of Nietzsche, a German Philosopher, if free mixing between a man a woman is allowed, the productivity or fertility will be exhausted very soon; and as such a day will come when human race will disappear from the earth.[90]

7. Requisites for a Valid Marriage

A Muslim marriage, in order to be valid, must fulfil prescribed conditions. Otherwise, the marriage cannot be treated lawful and the court of law considers it as illegal. The requisites for a valid marriage are discussed below.

(i) Proposal and Acceptance (*Izab* and *Qabul*)

Marriage, like other contracts, requires declaration and acceptance for its constitution and both must be expressed, without any sort of ambiguity, demonstrating intention. A man, after being satisfied about a woman, makes a proposal or offer of marriage either to the woman in question or to her parents or guardian (*wali*). If a man proposes to a woman for marriage, others are forbidden to propose to the same woman, till the first suitor gives up the matter or it is being rejected.[91] Of course, a proposal of marriage cannot be made to a woman

[88] Al-Quran, 30 : 21
[89] Al-Quran, 7 : 189
[90] Azizur Rahman, Islamer Dristitey Paribarik Jibon, P. 18.
[91] Shahi Al-Bukhari, Bangali translation, Mozzammel Haq and Others, Vol. V, P. 55 see James Robsan, Mishkat Al-Masabih Vol. IV, P. 668. Abu Huraira reported God's messenger as saying, "A man must not ask a woman in marriage when his brother has done so already, until he marries or gives her up."

observing *iddat*.[92] A woman may also propose her marriage to a man or a man may propose the marriage of his daughter or sister to a man. When an acceptance (*qabul*) has been given to the declaration of marriage it becomes a contract. Where the parties are legally competent, the declaration may be made by authorised agents of sound understanding. Thus a marriage may be legally contracted by a declaration made by one of the parties to the marriage and accepted by the other.[93] The acceptance must not vary from the declaration.[94] Marriage may be contracted by the parties expressing themselves, as if a man were to say to another "contract your daughter in marriage to me,"- and he were to reply, "I have contracted" (my daughter to you). Marriage may also be contracted by the use of the word *nikah* or marriage, as if a woman were to say to a man "I have married myself to you for such a sum of money (*dower*), and the man were to reply "I have consented". Marriage may again be contracted by the use of the term '*baya*' or sale, as if a woman were to say to a man "I have sold myself into your hands". This is approved, because sale operates as the principle of a right on the person and a right in the person is the principle of a right to carnal conjunction.[95]

Free consent of the contracting parties must be there in order to be a valid marriage, because the contract is effected by the consent of the two parties. The Quran declares: "Do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms."[96] A marriage which is forced upon an adult woman to which she does not give her consent is invalid.[97] *Hazrat* Muhammad (Peace be on him) said that a woman without a husband must not be married till she is consulted, and a virgin must not be married till her permission is asked. [98] When asked how her permission was indicated, he replied that it was by her saying nothing.[99] Thus consent received by fraud or by cocrcion makes a marriage invalid. However, if both the contracting parties are present, the

[92] Iddat is the waiting for a definite period, which is incumbent on a woman after the actual or apparent dissolution of marriage and is made obligatory by consummation or the husband's death. see Neil Baillie, A Digest of Muhammadan Law, P. 652.
[93] Charles hamilton, Hedaya, P. 26.
[94] Neil Baillie, A Digest, P. 12.
[95] Hedaya, P. 26.
[96] Al-Quran, 2: 232.
[97] Neil Baillie, A Digest, P. 10.
[98] This signifies a woman who has not been married whether virgin or not; or a woman previously married who has got no husband owing to death or divorce. see F. Karim, Al-Hadis, Vol. II, P. 648.
[99] James Robson, Mishkat-al-Masabih, P. 665.

declaration and acceptance must be expressed at the same meeting.[100] It is necessary that each party should hear the words of the other so that both the parties know that marriage is being contracted.

Opinion differs regarding the consent of a virgin[101] major woman among the different schools of jurisprudence. The Hanafi view is that a virgin major woman can marry without the consent of her guardian.[102] But according to Shafey and Maliki schools, a virgin major woman cannot be married without the consent of her guardian and where there is no guardian, the Sultan or *Qadi* is the guardian. Because the Prophet (peace be on him) said, "Persons being destitute of guardians have a guardian in the Sultan."[103] Emphasing the need of the need of the consent of the guardian the Prophet (Peace be on him) said, "If any woman marries without the consent of her guardian, her marriage is void, her marriage is void, her marriage is void".[104] Divergent opinions are there among the jurists regarding the consent of bride in the case of a major virgin, minor virgin and major or minor previously married girls.[105]

Opitions are as follows:

(a) Marriage of a major woman previously married without her consent is unanimously void.[106]

(b) Marriage of a major virgin girl without her consent is not lawful. But Imam Shafeyi and Malik differ from this view.[107]

(c) All the Imam except Imam Shefeyi are of one opinion regarding the marriage of a minor previously married girl that her marriage by her guardian is legal without her consent.[108]

[100] Neil Baillie, A Digest, P. 10; see Muhammad Ala-Ud-Din Haskafi, The durr-ul-Mukhtar, Tr. and ed. B. M. Dayal, P. 6.
[101] A virgin is either a woman who has never been married or whose marriage has never been consummated.
[102] P.L.D. 1962, Karachi 442 (D.B.) (All Pakistan Legal Decisions).
[103] Charles Hamilton, Hedaya, P.39.
[104] James Robson, Mishkat al-Mashabih, P. 666.
[105] It is enacted by section 2 of the Contract Act (IX of 1872) that every person is competent to contract, who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. By section-2 of the Majority Act (IX of 1875) the capacity of a Muslim in respect of marriage is not affected and he, being subject to his own personal law, is entitled to enter into a contract of marriage when he has attained puberty. The age of puberty, according to Muslim law, depends on the physical signs which denote that state, and when no such signs are visible, the age of majority in either sex is fixed on the completion of the 15th year. see Nawab A. F. M. Abdur Rahman, Institute of Mussalman Law, PP. 4-5.
[106] Al-Quran, 2 : 232; see Hedaya, P. 34
[107] Hedaya, P. 34

(d) All the jurists and Imam are unanimous in holding the view that a guardian can get a minor virgin girl married without her consent.[109]

The marriage of a boy or a girl underage, by the authority of their paternal kindred, is lawful whether the girl be virgin or not.[110] In case of an adult virgin, silence or smiling before the witness is sufficient indication of her consent, because the Prophet (peace be on him) said, "A virgin must be consulted in every thing which regards herself; if she be silent, it signifies assent and laughter is still a more certain token of assent than silence."[111] But in case of a widow or divorced woman, express consent, such as, "I consent to it," is necessary.[112]

(ii) Guardianship in Marriage (*Wali*)

A guardian for marriage may dispose of the minor in marriage even when a guardian of the person of the minor has not been appointed by the Court, but he should not do so without the sanction of the court to the proposed marriage. A guardian (*wali*) must be a Muslim, free, adult and of sound mind.[113] Of course, an insane guardian can validly act as guardian during his lucid intervals. But the guardianship of a permanently insane person would be invalid. Continued insanity for a month is considered to be a criterion for determining the character of madness.[114] An infidel cannot be vested with this authority with respect to a Muslim, male or female.[115] So also a slave cannot be the guardian of anyone.[116] A minor has no power of guardianship. Profligacy does not act as impediment to guardianship.[117]

Guardianship in marriage of minors and of adults who are insane are the nearest agnates following the order of inheritance, the nearer excludes the more remote.[118]

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[108] Fazlul Karim, Al-Hadis, Vol. II, P. 647.
[109] J. Schacht, An Introduction to Islamic Law, P. 161. see also Hedaya, P. 36.
[110] Hedaya, P. 36
[111] Hedaya, P. 35
[112] Ibid.
[113] Muhammad Ala-uddin, The Durr-ul-Mukhtar, P. 43.
[114] Hedaya, P. 38.
[115] Ibid.
[116] N. Baillie, A Digest, P. 47.
[117] Abdur Rahman, Institute of Mussalman Law, P. 20.
[118] Hedaya, P. 42; Baillie, A Digest, P. 45.

The following persons can act as guardians in the following order:

(a) The father is the natural guardian of his children, failing the father, the guardianship devolves upon the (b) paternal grandfather how high soever, then upon the line of collateral male relations, viz., (c) the full brother, (d) the half-brother by the father's side, (e) the son of the full brother, (f)the son of the half-brother by the father's side how low soever, (g) the full uncle, (h) the half-uncles by the father's side, (i) the son of the full uncle, (j) the son of the half-uncle by the father, and their descendants, (k) the father's full paternal uncle. (l) paternal half-uncle by the father's side, (m) sons of both in the same order, (n) the grandfather's full paternal uncle, (o) his paternal half-uncle by the father's side (p) and then the sons of both in the same order.[119] When there are no agnates, guardianship vests in the following order: The mother, daughter, granddaughter born of a son or daughter, their descendants, full sister, half-sister by the father's side, uterine brother and sister, their descendants, then upon the paternal aunt, maternal uncle, maternal aunt, daughters of maternal uncles, the daughter of maternal aunt. This is according to Imam Abu Hanifa.[120] The agnates (*asabat*) have the power of compulsion over a female or a male during minority and over insane persons though adult.[121]

A remote relation has no right to contract minors in marriage, if there is a nearer relation fulfilling the necessary conditions for exercising the right of guardianship. However, if the marriage is contracted by a remote relation, when a nearer one is available, it must be with the guardian's consent or it must be ratified by him subesquently.[122] But if the parents or other first natural guardians of an infant, are at such a distance as is termed *Gheeb ut moonkatat*,[123] it is, in this case, lawful for the guardian next in degree to contract the infant in marriage,[124] although Imam Shafie and Zafor differ on this point. This happens

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[119] Neil Baillie, A Digest, PP. 45-46.
[120] Neil Baillie, A Digest, P.46.
[121] Ibid.
[122] Auib Hasan V. Mist Akhtari, AIR 1963 All. 525.
[123] It means the distance which cannot be covered earlier than three days and three nights. see The Durrul Mukhtar, P. 45.
[124] Charles Hamilon, Hedaya, P. 39.

when either the guardian's whereabouts is not known or he is at such a distance that he can not be contacted easily.

Where two or more persons are equal in guardianship (e.g., two brothers), a contract of marriage made by either of them would be valid; and if the marriage is validly contracted, it can neither be ratified nor be cancelled by other. If a Muslim minor has been married during her minority by a guardian, the minor has the right to repudiate the marriage after attaining puberty which is called the option of puberty (*Khiyarul bulug*) and can ask the court to pass a decree annulling the marriage. But the jurists hold the view that if minors are given in marriage by father or grandfather, no option after puberty remains to them;[125] because the determination of marriage by father or grandfather cannot be suspected to originate in sinister motives as their affection for their offspring cannot be doubted.[126] But it appears that it is against the express teaching of the Prophet. "Ibn Abbas reported that a virgin grown-up girl came to the Messenger of Allah and narrated that her father had married her against her will, so the massenger of Allah (peace be on him) allowed her to exercise her choice."[127] Where, however, the father or grandfather carelessly or wickedly contracts a minor in marriage, the contract can be set aside by the minor.[128] But if the contract was executed by the authority of others than their parents, each is respectively at liberty, after they become of age, to choose whether the marriage shall be confirmed or annulled. This is the opinion of Abu Hanifa and Mohammad but Aboo Yusuf, an eminent jurist, differs from them and is of opinion that no option remains with them. The right of option in a virgin, after maturity, is done away by her silence: but the right of option of a man is not done away by the same circumstances, for until he expresses his approbation by word or by deed, such as presenting her dower, cohabiting with her etc. and in like manner, the right of option of the female, after maturity, is not annulled until she expresses her consent or disapprobation, or until her consent be virtually shown by her conduct in admitting the husband to carnal connection[129] etc.

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[125] Hedaya, P. 37.
[126] Hedaya, P. 37
[127] Mashabih, P. 666.

But after the passing of the Dissolution of Muslim Marriages Act, 1939, all restrictions on the option of puberty in the case of minor girl whose marriage has been given by a father or grandfather or any other persons has been abolished. Under the said Act, now in force in Bangladesh, a girl married during minority is entitled to a dissolution of her marriage under the following facts:

(i) that she was given in marriage by her father or other guardian,

(ii) that the marriage took place before she attained the age of 18 years,

(iii) that she repudiated the marriage before she attained the age 19 years and

(iv) that the marriage has not been consummated.[130] But the consummation of marriage before the age of puberty does not deprive the wife of her option.[131]

(iii) Legal Competency of the Parties

Every muslim of sound mind who has attained puberty and also free from slavery may enter into a contract of marriage. [132] Thus among the conditions which are requisite for the validity of a contract of marriage are understanding, puberty and freedom in the contracting parties. The majority Act (IX of 1875) prescribes the age of majority to 18 years. Section-2 of the said Act makes exception in marriage, dower, divorce and adoption and these matters are to be dealth with by the personal laws of the Muslim. Hence under Muslim law, the puberty of a boy or girl is established by circumstances. According to Hedaya, the puberty of a boy is established by his becoming subject to nocturnal emission, his impregnating a woman, or emitting in the act of coition; and if none of these be known to exist, his puberty is not established, until he has completed his 18th year. The puberty of a girl is established by menstruation, nocturnal emission, or pregnancy; and if none of these have taken place, her puberty is established on completion of her 17th

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[130] Section 2 (vii), The Dissolution of Muslim Marriages Act, 1939.
[131] Hedaya, P. 38.
[132] Behram Khan V. Akhtar Begum, P.L.D. (1952) Lah. 548. Puberty and majority are, in the Islamic law, one and the same. See Hedaya, P. 529 (f.n.) The lowest age of puberty, according to its natural signs, is 12 years in males and 9 years in females. When the signs do not appear both sexes are held to be adult when they have completed their 15th years.

year.[133] This is the opinion of Imam Aboo Hanifa. However, the earliest period of puberty in the case of a boy is twelve years, and in the case of a girl, nine years.[134] According to Aboo Yusuf and Muhammad, the two disciples of Imam Aboo Hanifa either a boy or a girl is to be declared adult after their completion of 15th year and Imam Shafeyi concurs in this opinion.[135]

The Holy Quran is silent regarding the age of marriage which it identifies with the age of majority. According to Holy Quran, "Make trial of orphans until they reach the age of marriage, if you find sound judgement in them, release their property to them; but consume it not wastefully nor in haste against their growing up".[136] Thus the age of marriage and the age of maturity are identical with the age of majority. A porson, at the age of majority, is capable of exercising his choice in matters of sexual liking or disliking.

The judicial view is that if there is no evidence to the contrary, a person is presumed to have attained puberty at the age of fifteen.[137] But a girl may attain puberty stage even earlier.[138] When a boy or girl approaches the age of puberty and they declare themselves adult, their declaration must be credited and they become subject to all the rules including the rules of marriage affecting adults; because the attainment of puberty is a matter which can only be ascertained by their testimony.[139]

Each party to the marriage must have a sound mind. A lunatic or persons of unsound mind cannot themselves contract marriage. Of course, their guardians can do so on their behalf. A party to the marriage must not be slave if he or she, as the case may be, wants to contract marriage without the consent of the master. In other words, the marriage of a male or a female slave, whether of sound mind or adult, is not lawful without the master's consent.[140] According to the opinion of Imam Malik, marriage of a male slave is valid independent of the consent of his

[133] Hedaya, P. 529.
[134] Hedaya, P. 530.
[135] Hedaya, P. 529.
[136] Al-Quran, 4:6.
[137] All Pakistan Legal decisions 1962, Karachi 442 (D.B.).
[138] Behram Khan V. Akhtar Begum, P.L.D. 1952 Lah. 548.
[139] Hedaya, P. 530.
[140] Hedaya, P. 58.

master, because he is competent to pronounce divorce, and is, therefore, equal to the contracting of marriage.[141] But according to a tradition of the Prophet (Peace be on him), marriage of a slave without the master's consent is not valid. The Prophet (Peace be on him) said, "Whatever slave marries without his owner's consent is an adulterer"; and marriage of a slave, male or female, is a blemish, on which account they are at liberty to enter into such a contract without the approbation of their owners.[142] Imam Muhammad is of opinion that "a master's contracting his male or female slave in marriage is lawful without his or her consent".[143] But Imam Shafeyi holds the view that a master is not empowered to contract his male slave in marriage by compulson.[144] So divergence of opinions prevails among the doctors of Islamic jurisprudence on this subject.

(iv) Presence of Witnesses

The presence of witnesses is essential to the validity of a marriage, where both the parties are Muslims. The Quran declares: "And call in two witnesses from among your men, but if there are not two men, then one man and two women."[145] According to a *hadith*, no marriage is good without evidence.[146] The Prophet (peace be on him) said that the fornicatresses are those who marry by themselves without witnesses.[147] There should be two persons who have been specifically asked to act as witnesses.[148] The witnesses must be present when the proposal and acceptance are made and consent is given. But according to the opinion of Imam Malik, marriages are valid even if these are contracted without witnesses. He viewed that publicity is a condition and not positive evidence.[149] It seems that this view is incorrect in view of clear Quranic provision and *hadith* of the Prophet. A marriage, therefore, is not valid unless it is contracted in the presence of two male witnesses, or of one

[141] Ibid.
[142] Hedaya, P. 58.
[143] Hedaya, P. 60.
[144] Ibid.
[145] Al-Quran, 2:282.
[146] Hedaya, P.26.
[147] F. Karim, Al-Hadis, P. 653.
[148] P.L.D. 1952 Pesh. 47.
[149] Hedaya, P. 26.

male and two female witnesses. Thus marriage contracted without witnesses is merely invalid (*fasid*) but not void (*batil*).[150]

In case of a marriage between Muslims, the witnesses must be free, sane, adult and Muslims.[151] They must hear the speech of both the parties and must be aware that marriage is being contracted. Marriage is not to be contracted in the presence of slave, because such are not competent to act in any respect *suijuris*; nor in the presence of insane persons nor minors, nor infidels, because the evidence of infidels is not legal with respect to Muslims.[152] Blind and dumb persons are competent to be witnesses but deaf persons are disqualified to be so simply because they cannot listen to the proposal and acceptance. The witnesses must not be asleep nor intoxicated as they are unable to understand what they heard. A profligate (*fasiq*) is qualified to be a witness in marriage. There must be in all cases, more than one witness; but it is not necessary that both the witnesses should be males. Marriage may be contracted in presence of one male and two females but not with women only without a male. The contract must be made in the presence and within hearing of the witnesses and the witnesses should also be able to understand what has been said by the parties. Witnesses are required even if the marriage is contracted by the guardian. The guardian himself be a witness if the marriage of a minor is contracted by his or her guardian.[153]

Without publicity and witnesses, marriage is considered clandestine sexual relations amounting to fornication, though there is mutual consent. In this connection the Quran declares; "Taking them in marriage, nor fornicating nor taking them for paramours in secret".[154] The Prophet (Peace be on him) also said, "Make this marriage publicity known, solemnise it in mosques and beat *dafs* (drum) over it".[155] Witnesses and publicity are, therefore, essential conditions of marriage. Had there been no provision like this, there would have been secret sexual connection amounting to fornication jeopardizing the social order and tranquillity.

[150] Baillie, A Digest, P. 155.
[151] Baillie, A Digest, P. 6; see Hedaya, P. 26.
[152] Billie, A Digest, P. 6.
[153] Hedaya, P. 27.
[154] Al-Quran, 4: 24; 5:5.
[155] Mishkatul-Mashabih, P. 670; Shahih al Bokhari, Vol. V, P. 57.

Identification of husband and wife is also an important prerequisite of a valid marriage. If a man having two daughters wants to give in marriage one of them and says 'only his daughter', the contract would be invalid unless one of them was married. Baillie in his book 'A Digest of Muhammadan Law' has given the following illustrations regarding the identification of husband and wife:

> "A man having two daughters, the eldest of whom is named Ayesha, and the younger Fatima and intending to marry the older, contracts her in the name of Fatima, the marriage takes effect as to the younger. But if he had said, 'I have married my older daughter Fatima', there would be no contract as to either. When the father of a young girl has said, 'I have married my daughter such an one to the son of such an one, the person referred to has answered, 'I have accepted for my son', without naming him, the contract is invalid if he has two sons, and lawful if he has only one. And if the girl's father should have named the son by saying, 'I have married my daughter to thy son such an one', and his father should have said, ' I have accepted', would be valid. But when the father of the girl should say to the farther of the boy, ' I have married my daughter', without further addition, and if the father of the boy should say, 'I have accepted', the marriage would take effect as to the father himself'.[156]

(v) Equality in Marriage (*Kafyat*)

According to the Hanafi School of Islamic jurisprudence, equality (*Kafayat*) between the husband and the wife is a necessary condition in marriage. Equality is required in order that a marriage may bear the character of a suitable union in law.[157] In this respect the Prophet (Peace be on him) said, "Select women for your seed and marry (Your) equals and give (your daughter) in marriage to them".[158] Thus marriage must be contracted so far as possible between equals. This is known as marriage in *Kufu* (equality). With a view to make marriage binding, the husband should be the equals to his wife; that is not inferior to her. But it is not required that the wives should be the equals of their husbands. Equality is insisted on only with respect to the husband but not with respect to the wife.[159] The Prophet (Peace be on him) has commanded saying, "Take care that none contracts women in marriage but their proper guardians, and that they be not so contracted but with their

[156] Baillie, A Digest PP.12-13.
[157] Abdur Rahman, Istitute of Mussalman Law, P. 36
[158] Muhammad Ali, A Manual of Hadith, P. 272.
[159] Abdur Rahim, Muhammadan Jurisprudence, P. 333.

equals".[160] The desirable ends of marriage such as cohabitation, society and friendship cannot be completely enjoyed excepting by persons who are each other's equals, as a woman of high rank and family would abhor society and cohabitation with a mean man.[161] Thus if a woman should marry a man better than herself, a guardian has no power to separate them, because she is not disgraced by a man who is not his equal.[162] The inferiority of wife does not invalidate the marriage. But if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it.[163] Thus if a woman were to contract unequal marriage with a servant of her family, the marriage would be annulled on the application of the guardian (*wali*).[164]

The question of equality, therefore, must be considered at the time of making contract, a subsequent change in the condition of the husband would not affect the validity of a marriage.[165] Thus if a husband was the equal of his wife at the time of their marriage but afterwards he became a sinner, the marriage shall not be dissolved. If the husband was a tanner and afterwards he became a tradesman, he will not be an equality if the meanness of his former profession is traceable in him, but not otherwise.[166]

According to the Hanafi School of jurisprudence, the following factors must be considered in order to determine equality:

(i) Lineage, (ii) Islam, (iii) Character, (iv) Freedom, (iv) Freedom, (v) Property, (vi) Profession and (vii) Education.[167]

(a) Equality in point of lineage

Though all Muslims are equal[168] having no distinction between men and women, still in respect of marriage, equality of husband with

[160] Hedaya, P. 40.
[161] Ibid, see Abul Ala Maududi, Tafhimul Quran Tr. & ed. M. A. Rahim, Vol. XV, P. 105.
[162] Baillie, A Digest, P. 62.
[163] Ameer Ali, Mahommadan Law, Vol. II, P. 327(1979).
[164] Ameer Ali, Mahommadan Law, Vol. II, P. 330(1979).
[165] Muhammad Ala-uddin, The Durr-ut-Mukhtar, Tr. & ed. M.B Dayal, P. 51.
[166] Ibid.
[167] Although education is not considered as a factor in respect of which equality is to be had by other jurists, Sir Abdur Rahim considers it as a factor. see Sir Abdur Rahim, Muhammadan Jurisprudence, P. 333.

wife in point of lineage must be considered in order to make harmonious relation between the two. Thus a Quraish is the equal of a Quraish throughout all their tribes and in the like manner an Arab is the equal of an Arab. Therefore the contracting parties, if they are of Arab origin, should possess equality of birth for the validity of marriage. Where a woman, legally competent, chooses a husband without the previous consent of an agnate or where a young girl is given in marriage by a relation, other than the father or grandfather or by one of the latter when he is a reputed profligate, if is necessary for the validity of the marriage that the contracting parties, if they are of Arab origin, should possess equality of birth.

(b) Equality in point of religion (Islam) of paternal ancestors

In deciding equality in Islam, it is not necessary, with regard to the husband, to go back further than his father and grandfather. Thus one who has embraced Islam without having been born a Muslim, cannot be the equal of a Muslim woman born of a Muslim father and similarly, he, whose father only is a Muslim, is not the equal of a woman whose father and grandfather were Muslims. A man who has had two paternal ancestors in faith (Muslim) is the equal of a woman who has had three or more Muslim ancestors. A man who has apostatized from the faith, but returned to it, is the equal of a person who has never fallen into apostacy.[169]

(c) Equality in point of character

According to Abu Hanifa and Abu Yusuf, the most approved opinion is that equality is to be regarded in respect of piety and virtue, that is character.[170] And virtue is treated as one of the first principles of superiority. Thus a profligate cannot be the equal of virtuous woman irrespective of any degree of notoriety of his profligacy. But a profligate is the equal of a woman of immoral character. Because the holy Quran declares in this respect as, "women impure are for men impure, and men impure for women impure".[171] If a man were the equal of his wife in piety and virtue at the time of marriage, but afterwards become depraved, that would not be the ground to invalidate the marriage.

[168] Al-Quran, 49 : 10.
[169] Baillie, A Digest, P. 63.
[170] Hedaya , P. 40.
[171] Al-Quran, 24 : 26.

(d) Equality in point of freedom

Freedom is also regarded as an important factor for equality between the husband and the wife. A slave is not the equal of a free woman. In the like manner, a man whose father was freed from bondage cannot be the equal of a woman free by origin, at least her father and grandfather were free.[172] A freed man is the equal of a freed woman. A man whose grandfather was born free and a Muslim is the equal of a woman whose paternal ancestors were free and Muslims; but if his grandfather had been emancipated or an infidel converted to the faith (Islam), he would not be her equal. Again, a freed man is not the equal of a woman whose mother was free by origin and father a freed man.[173] A freed woman of a noble tribe is not the equal of a freed man of low birth and hence if a freed woman of *Hashimite* were to marry herself to a freed man of a mere Arab, her emancipator would have a right to object.

Equality in respect of freedom and Islam are to be regarded in the case of non-Arabs, for, they pride themselves in these distinctions and not in lineage. But in the case of Arabs, the Islam of a father is not a condition of equality; but freedom is indispensable to an Arab, for, it is lawful to reduce Arabs to slavery. Abu Huzaifa, a great companion of the Prophet (Peace be on him) married Salam, his foster son and formerly a slave, with his niece, Hinda, a Quraish[174] origin. This unequal marriage, that is, marriage between a free man and a free woman belonging to a Quaraish tribe is not an invalid one if this takes place with the consent and guardianship of a valid guardian and therefore the question of unequal marriage and consequently its validity does not arise.

(e) Equality in point of property

Equality is to be regarded with respect to property. This means that a man should possess sufficient property to pay the prompt portion of the dower, and not the deferred amount and also he is able to provide maintenance to his wife. If he is unable to do both or either of these, he is not the equal of his wife, whether she is rich or poor.[175] He is considered to be her equal in respect of property if he has enough for these two

[172] Neil Baillie, A Digest,P. 63.
[173] Baillie, A Digest, P. 64.
[174] Shahih-al-Bukhari, Vol. V, P. 31.
[175] Hedaya, P. 40.

objects-dower and maintenance and nothing more, although she is in possession of great wealth. The argument behind this condition has been put forward in the manner that the payment of dower, specially – Prompt portion of dower is, of course, a necessary condition; for dower is a consideration for the carnal use of the woman; and the permancy of matrimonial connection is largely dependant on the provision of a support to the wife. However, opinion differs regarding the period of ability to provide maintenance. According to one opinion, the period of ability is one month while according to other, it is one year, and the former view is more correct.[176] Abu Yusuf is of opinion that possession of property on the part of the wife is not to be considered in marriage, "since it is not a thing of stable or permanent nature, as property may be acquired in the morning and lost before night".[177]

(f) Equality in point of profession

Equality is to be regarded in trade or profession. This is the opinion of Abu Yusuf and Imam Muhammad. But according to Abu Hanifa, no regard is to be attached to difference of profession "unless where it is of such a degrading nature as to oppose an insurmountable objection; such as, for instance, barbers, weavers, tanners and scavengers, who are not the equals of marchants, parfumers, druggists or bankers".[178] Hence a weaver is the equal of cupper; the tanner is the equal to sweeper and so on. The principle on which regard is to be had to trade or profession is that men assume themselves a certain consequence from the respectability of their callings, whereas a degree of contempt is attached to them on account of the meanness thereof. But a reason, on the other hand, why trade or profession should not be regarded is that these are not absolute upon a man, since he is at liberty to leave a mean profession for one of a more honourable one. However, the custom of each country must serve as a guide to determine the status of profession.

If a guardian has contracted a woman in marriage by her free consent and is ignorant of the husband's condition in life, then neither the guardian nor the woman can annul the marriage, although it is discovered subsequently that the husband was not the wife's equal. But where the guardian has presumed that the husband is the wife's equal and

[176] Hedaya, P. 40.
[177] Hedaya, P. 41.
[178] Hedaya, P. 41.

the husband represents himself to be such, but turns out to be manifestly inferior to the wife, the guardian, in this case, may either ratify the marriage or annul it.[179]

Although general principle has been pointed out in respect of equality, as discussed above, the rules of equality are beneficial to worldly wisdom and, therefore, a *Qazi*, in exercising his power of annulment of marriage, must carefully consider it. He must decide the case according to the circumstances of each individual case.[180]

(vi) Prohibited Degrees to Marriage (*Asbab –Ut–Tahrim*)

Every system of law has imposed some restrictions on the right of a man to marry certain relations and the extent of prohibited degree differs according to different systems. The marriage laws and customs among the ancients were generally very loose. In Egypt, it was lawful to marry sisters and half-sisters, whereas in Persia marriage was allowed with mother, daughter and sister; and the same practice was prevalent among the Medians, Indians and Ethiopians.[181] But such marriages were hateful to the Greeks and Romans. According to Edward Gibbon, "The profane law givers of Rome were never tempted by interest or superstition to multiply the forbidden degrees; but they condemned the marriage of sisters and brothers, hesitated whether first cousins should be touched by the same interdict, revered the parental character of aunts and uncles, and treated affinity and adoption as a just imitation of the ties of blood."[182] But the Arabs before the time of Prophet Muhammad (Peace be on him) would not allow marriage with a mother, daughter, maternal or paternal aunt or with two sisters at the same time.[183]

Islam brings a reform in this field and imposes some limitations specifically on the unfettered capacity of a Muslim to marry any person of the opposite sex. Some prohibitions, according to the Holy Quran and the *Sunnah*, are of perpetual nature which is based on the ground of consanguinity, affinity or fosterage; while others are of temporary nature interdicted by certain relationships or conditions which are susceptible of termination and this prohibitions exist so long as the relationship or

[179] Baillie, A Digest, P. 71.
[180] Asaf A. A. Fyzee, Outlines of Muhammadan Law, P. 106.
[181] Robert Roberts, The Social Laws of the Quran, P. 12.
[182] Ibid.
[183] Ibid.

condition exists.[184] Persons so prohibited from intermarriage are called *muharrim*. It is essential to the validity of a marriage that it has been contracted with those persons of the opposite sex with whom marriage is lawful. A marriage may also be either void (*batil*) or irregular (*fasid*) if it is contracted with those persons who are prohibited either perpetually or conditionally. Thus it is one of the most important pre-conditions of marriage that it is to be contracted with those persons only, who are legally free from any sort of impediments. Only on this account prohibited degree has been discussed as a requisite to be followed for the validity of a Muslim marriage.

There are various causes of prohibition; Consanguinity (blood relationship), affinity, fosterage, unlawful conjunction (of wives) slavery, paganism and marrying of a slave while there is a free wife. Besides, there remain the case of a woman divorced thrice and one involved in another's right, either by *Nikah* or by *Iddat* etc.[185]

Discussions on different types of prohibition are made herewith under various heads in order to have a clear picture of it.

(a) Prohibition due to Consangutinity of Blood Relationship (*Tahrim-un-nasab*)

It is laid down in the Quran: "Prohibited for you (to marry) are your mothers and your daughters, and your sisters, and your mother's sisters, and brother's daughters and sister's daughters."[186] Jurists have interpreted the above verse and categorically pointed out that the following woman are prohibited Permanently for marriage on account of consanguinity:-

(i) his own mother and his grandmothers by the father's or mother's side, how high soever;

(ii) his daughters, grand daughters, how low soever (daughter's daughter or son's daughters);

(iii) his sisters including full sisters and the half-sisters by the father or the mother (consanguine sister or uterine sisters);

[184] Majid Khadduri and Herbert Liebesny, Law in the Middle East, Vol. I, P. 134, Article "Family Law" by Muhammad Abu Zahra.
[185] The Durrul Mukhtar, P. 13.
[186] Al-Quran, 4 : 23.

(iv) his paternal aunts,[187] whether the sisters of his father by both his parents or by the same father only, or the same mother only, or the same mother only; and in the like manner, the sisters of his grandfathers how high soever;

(v) his maternal aunts,[188] whether sisters of his mother by both her parents, or only by the same father or the same mother and in the manner, the maternal aunt of his father and mother how remote soever in ascending order;

(vi) his brother's daughters, whether he be a brother by both parents, or only by the same father or by the same mother; and whether the daughter be the immediate child of his brother or the daughters of his brother's daughter how low soever;

(vii) his sister's daughters or grandnieces how low soever like the above (vi) although born of an adulterous intercourse.[189]

(b) Prohibition on Account of Affinity (*Tahrim-al-Mushahirat*):

Marriage may also be unlawful on account of affinity or marriage relationship. In this respect the Holy Quran declares:

"Forbidden for you (to marry) are the mothers of your wives and your step-daughters that are in your laps (in charge of you) through your wives to whom you have gone in; but if you have not gone in to them, then there is no sin upon you (to marry them); and the wives of your sons whom you have begotten".[190]

The Quran further declares the prohibition on marrying the wives of father as, "Do not marry woman whom your father has married; for this is a shame and hateful, and evil way. Though what is past may be allowed".[191] The above verses of the Quran reveal that the following relations cannot be married by a man on the ground of affinity:

(i) His mother-in-law or grandmother-in-law, how high soever, whether he may have consummated his marriage with her

[187] Abu Huraira reported Allah's messenger as saying, "A man may not marry a woman and her paternal aunt or a woman and her maternal aunt". see Mishkat, P. 672.
[188] Mishkatul Mashabih, P. 672.
[189] The Durrul Mukhtar, P. 13.
[190] Al-Quran 4 : 23.
[191] Al-Quran 4:22

daughter or not.[192] The Almighty Allah have prohibited such a connection in general terms without any regard to that circumstances;

(ii) The daughters or grand-daughters how low so ever of his wife with whom his marriage has been actually consummated[193];

(iii) The wife of his son or son's son or daughter's son, how low soever, whether the son has consummated with her or not; but the wife of an adopted son is not prohibited to the adopted father; Adoption is said to be abolished by the following verse of the Holy Quran: "Call such as are adopted the sons of their natural fathers; this will be more just in the sight of Allah".[194]

(iv) And the wives of his father and of grandfathers, paternal or maternal, how high soever;

(v) Besides the above, prohibition of affinity is established by sexual intercourse, whether it be lawful or illicit. When a man has committed fornication with a woman, her mother, how high soever, and her daughters how low soever, are prohibited to him and the woman herself is prohibited to his father and grandfathers how high so ever, and to his sons, how low soever.[195] If a man touches a woman in lust, the mother or daughters of such woman are rendered unlawful to that man. Similarly, if a woman touches a man in lust, the mother and daughters of that woman are prohibited to him. But Iamam Shafei says that no prohibition arises due to such touching.[196]

(c) Prohibition on Account of Fosterage (*Riza*)

Every woman prohibited by reason of consanguinity and affinity is prohibited also by fosterage. "Forsterage of *Riza*, in its legal sense, means a child sucking milk from the breast of a woman for a certain

[192] Hedaya, P.27; Baillie, A Digest, P. 24.
[193] In this connection the following hadith may be cited: Amir b. Shuaib reports, The Prophet (Peace be on him) said, "If any man marries a woman and cohabits with her, it is unlawful for him to marry her daughter; and if any man marries a woman, it is not lawful for him to marry her mother whether he has cohabited with her or not" see James Robson, Mishkat-Al-Masabih, P. 676.
[194] Al-Quran, 33 : 5.
[195] Baillie, A Digest, P. 25.
[196] Hedaya, P. 29.

time".[197] Prohibition due to forsterage has been declared in the Holy Quran as, "Forbidden to you (for marriage) your mothers who suckled you and your foster-sisters".[198] The Prophet (Peace be on him) also said, "What is unlawful by reason of consanguinity is unlawful by reason of fosterage".[199]

Jurists are of opinion that as the infant takes nourishment from the body of the woman who nurses it, its body becomes a part of her body, just as it is part of the body of the woman who nourished it in the womb and the woman thus becomes a mother of the child. Similarly, her husband is also considered a father of the child.

According to Imam Aboo Hanifa, the period of fosterage is thirty months, while according to Abu Yusuf and Muhammad, it is two years.[200] The Quran states: "His (the child's) time in the womb and (until) his weaning is thirty months"[201] and the smallest period of pregnancy is six months and hence there remain two years for fosterage.[202] The Prophet (Peace be on him) also said, "There is no fosterage after two years".[203] Further, the Quran says, "And the mothers shall suckle their children for two years to make complete the time of suckling".[204] The more correct view regarding the period of fosterage, therefore, is two years. This is also the opinion of Imam Shafaye and Imam Ahmed Ibn Hamble. Suckling beyond the term of fosterage is not an occasion of prohibition. If a child, for instance, continues to suck after the proper period of fosterage is elapsed, prohibition is not hereby established as per the *hadith* of the Prophet metioned earlier. But if a child withholds from taking its milk before the period of fosterage has elapsed, and there be still milk in the mother's breast and any other child suck the milk before the expiration of that period, in this case, prohibition by fosterage is established between those children.[205]

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[197] Hedaya, P. 67; Fosterage is of two kinds. First, where a woman takes a strange child to nurse, by which all-future matrimonial connection between that child and the woman or her relations within the Prohibited degrees, is rendered illegal. Secondly, where a woman nurses two children, male and female, upon the same milk, which Prohibits any future matrimonial connection between them. See Hedaya, P. 67.

[198] Al- Quran, 4 ; 23.

[199] James Robson, Mishkat-al-Masabih, P. 672.

[200] Hedaya, P. 68.

[201] Al-Quran, 46 : 15.

[202] Hedaya, P. 68.

[203] Ibid

[204] Al-Quran, 2:233; 31:14

[205] Hedaya, P. 69.

However, a Muslim is forbidden to marry persons in any of the eight following categories of suckling kin: (i) His mother by suckling and all of her ascendants, (ii) his children by suckling and their descendants; (iii) the children of his parents by suckling and their descendants; (iv) the descendants of his grandparents by suckling if they are of the first degree; but the daughters of paternal and maternal aunts are not prohibited; (v) his wife's ascendants by suckling if the man has separated from his wife, whether before or after consummation; (vi) the descendants by suckling of whomever marries such a wife if he leaves her after consummating the marriage; but if separation has taken place before the consummation of marriage, then such descendants are not prohibited; (vii) the wife of an ascendant by suckling, whether her husband had been separated from her before or after consummating the marriage; and (vii) the wife of a descendant by suckling, to whatever degree, whether or not the marriage has been consummated.

(d) Prohibition on Account of Difference of Religion.

It is unlawful for a Muslim to marry an infidel woman and an idolatress. The Quran in this respect declares: "Do not marry the idolatresses until they embrace faith (Islam) and certainly a believing slave girl is better than an idolatress even though she would please you; and do not give (believing woman) in marriage to idolaters until they believe; and certainly a believing slave is better than an idolater even though he should please you".[206] It is also unlawful for a Muslim woman to marry but except the *Ahl-i-Kitab* (People of the Book).[207]

However, a Muslim man can marry a woman of the people of the Book (*Ahli Kitab*) but no Muslim woman can be given in marriage to a man from the people of the Book. The Quran states in this connection as, "The virtuous woman of the believers and the virtuous of those who have been given the book before you are lawful for you when you give them their dowers, taking them in marriage and not in fornication, nor taking them for paramours in secret".[208] It is to be noted that persons who worship sun, stars or idol or fire (*Majusu*) are not included among the

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[206] Al-Quran, 2 : 221..

[207] Kitabi means those who believe in a heavenly or revealed religion and have a Kitab (book) that has come down to them such as the Bible, the Towrah etc. In Indian sub-continent it is a term applied only to Jews and to Christians. See Asaf A. A. Fyzee, Outlines of Muhammadan Law, P. 94.

[208] Al-Quran, 5:5.

Ahli Kitab. Marriage with idolatress or fire worshipers are void (*batil*) and not merely irregular (*fasid*). Justice Ameer Ali is of opinion that marriages between a Muslim man and a woman of *Brahmo* sect or even a Hindu woman whose idolatry is merely nominal and who really believes in God would be lawful.[209] He goes on saying, "The Mogul Emperors of India frequently inter-married with Rajput (*Hindu*) ladies and the issues of such unions were regarded as legitimate and often succeeded to the imperial throne".[210] He, therefore, proceeds to lay down that such unions are merely irregular, and not void. For example, when a Muslim marries a Hindu woman, the marriage is only invalid and does not affect the legitimacy of the offspring, as the polytheistic woman (*Mushricat*) may at any time adopt Islam, which would at once remove the bar and validate the marriage.[211] But this view, it is submitted, is an inaccurate statement of the law, for, the intermarriage between the Muslims and the polytheists (*Mushrique*) has been denounced by the Quran. It is not understood as to why Mr. Ameer Ali advocates marriage of a Muslim man with a Hindu woman or with a woman belonging to the Brahmo sect who does not believe in Allah and His apostle. Thus marriage of a Muslim woman with a non-Muslim is clearly void and not voidable; and a marriage of a Muslim man with either polytheists (*Mushriques*) or fire worshipers (*Majusee*) or star-worshippers in also void. The Quran, however, permits the marriage of a Muslim with a woman professing one of the scriptural religion *(Ahlikitab)*.[212]

Marriage with a *Ahlikitab* was allowed by the Prophet (Peace be on him) and the first three *Khalifas*, though it was discouraged by Hazrat Umar, the second *Khalifa*. But Hazrat Ali considered it as absolutely forbidden. However, marriage of a Muslim with a woman belonging to *Ahli Kitab* is not void, but highly undesirable.[213]

(e) Prohibition on Account of Unlawful Conjunction.

It is not lawful to marry and cohabit with two women at the sometime, so related to each other by consanguinity, affinity or fosterage, that they could not lawfully be intermarried with each other if

[209] Ameer Ali, Mahommedan Law. (Lahore: Law Publishing Company (1979), Vol. 2, P. 139.
[210] Ibid.
[211] Ameer Ali, Mahommedan Law, P. 252.
[212] Syed Ali Nawaz Gardezi V. Lt.-Col. Muhammad Yusuf, P.L.D. 1963 S.C. 51.
[213] Muhammad Abdur Rahim, Poribar paribarik Jibon (Dhaka; Islamic Foundation Bangladesh, 1983), P. 134.

they had been of different sexes.[214] The Quranic declaration regarding this may be stated: "And (it is forbidden into you) that you should have two sisters together".[215] "Marriage of a man, therefore, with the wife's sister during the continuance of the marriage of the wife or with her aunt or the niece is prohibited. Both of them (two sisters or an aunt and a niece) cannot be lawfully married at one and the same time. But this bar terminates as soon as the marriage is dissolved.[216]

When a man marries two sisters by one contract, and one marriage is known to precede the other, the marriage with the latter of the two is absolutely void[217] and the issue is illegitimate. Prophet Muhammad (Peace be on him) said that two sisters cannot be kept as wives at one and the same time. A Hadith in this connection is available. Zohhak reported, "I asked the messenger of Allah, 'I have accepted Islam, but I have got two sisters (as wives)". He said, "Choose whomsoever of the two you like".[218] The Prophet (Peace be on him) further said, "A younger sister must not be married to one who has married elder sister, nor an elder sister to one who has married a younger sister".[219] A man can marry the sister of his decased wife. But he cannot marry the sister of his repudiated wife during her *iddat*.[220]

(f) Prohibition on Account of more than Four wives

It is lawful for a Muslim to marry four wives, whether free or slaves. But if he has filled up the number of four wives by permanent contract, and all of them are living, marriage with the fifth is prohibited and it is unlawful for him to have more than two slaves by contract out of the four. In this connection the Holy Quran clearly declares: "You may marry whatsoever women are agreeable to you, two, three or four,[221] one is not allowed to exceed the maximum number of wives at a time. The Prophet, therefore, ordered those Persons who had more than four wives before revelation on this issue came to divorce the rest exceeding

[214] Hedaya, PP. 28-29.
[215] Al-Quran, 4 : 23.
[216] Baillie, A Digest, P. 33
[217] Azizunnissa Khatoon V. Karimunnissa Khatoon I. L. R. 23 Cal. 130 (1895)
[218] James Robson, tr. Mishkatul masabih , P. 675.
[219] Fazlul Kareim, Al-Hadis, P. 642.
[220] Heday, P. 29. Iddat literally means numeration. It is the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connection. The most approved definition of Iddat is the term by the completion of which a new marriage is rendered lawful.
[221] Al-Quran 4:3

the maximum limit. It is reported that Abu Umar told that Ghailan bin salamah accepted Islam and that he had ten wives in the pre-Islamic period and all of them accepted Islam with their husband. So the Prophet told him to keep four and separate from the rest.[222] In another *hadith* it is found that the Prophet (Peace be on him) ordered Naufel to be separated from one wife, because he had five wives before his acceptance of Islam.[223] When a man has repudiated one of his four wives, he cannot lawfully enter into another marriage until she has completed her *iddat*, whether the divorce is revocable or complete.[224] But according to Imam Shafei, if the divorce was irrevocable or absolute, he may immediately enter into a contract with another woman and the rule is the same as to marriage with the sister of his wife.[225] Marriage, therefore, with a 5th woman during the *iddat* of one of the four wives is irregular.

A woman is prohibited from marrying when she is already married with a person and that marriage has not been dissolved effectively according to law.[226] This type of marriage is void. Again, if a man has repudiated one of his four wives irrevocably and married two others, one before the other, the contract with the first is to be sustained, but if the contracts were simultaneous both are void.

(g) Prohibition on the Ground of Imprecation (*Lian*) [227]

Imprecation or *lian* is a cause of perpetual prohibition of the imprecated woman to her imprecator. This is the opinion of Abu Yusuf. But according to Imam Abu Hanifa and Imam Muhammad, the husband may remarry her if he acknowledges that his accusation was false by saying, "I falsely laid adultery to her charge.

(h) Prohibition Due to Marriage of Female Slaves on free Woman

The marriage of the female slave upon a free woman is not lawful; because the Prophet (Peace be on him) said, "Do not marry a slave upon (along with) a free woman".[228] Thus if a free woman and a

[222] James Robson, Mishkat, P. 675.
[223] Ibid
[224] Hedaya, P. 32.
[225] Hedaya, P. 30.
[226] Al-Quran 4 : 24.
[227] Lian signifies testimonies confirmed by oath, on the part of a husband and wife in case of the former accusing the latter of adultery. see Hedays, P. 123.

slave are married by one contract, the marriage with the slave is void and the marriage with the free woman is valid.[229] But a marriage of a free woman upon a slave is lawful. Therefore, when a man marries two women by one contract, one of whom is lawful to him, and the other prohibited, his marriage with the one who is lawful holds good, but with the other is void.[230]

(i) Prohibition by Reason of Divorce.

It is not lawful for a man to marry a free woman whom he has repudiated thrice, nor a slave whom he has repudiated twice, till another man has married her legally and the marriage has been effectively consummated with her and subsequently he has repudiated her or has died and thereafter her *Iddat* has expired.[231]

(j) Prohibition on the Ground of Pregnancy.

It is prohibited to marry a woman in her pregnancy, then the auther of the pregnancy is known.[232] This is the opinion of Imam Abu Yusuf. But according to Imam Abu Hanifa and Imam Muhammad, it is lawful for a man to marry a woman pregnant by whoredom, but he must refrain from matrinomial cohabitation with her till her delivery. [233]

(k) Prohibition During *Iddat* Period.

It is unlawful for a Muslim to marry a woman observing *iddat*. The object of *iddat* is to ascertain whether the woman is pregnant or not; for, it helps to determine paternity. A new marriage is lawful after the completion of *iddat*. Marriage is not finally dissolved immediately on death of husband or divorce. But it remains effective until the expiration of *iddat*; for, certain incidents of marriage continue during the period of *iddat*. These are the following:-

(i) the wife cannot contract another marriage, (ii) the husband cannot marry a fifth wife if he has divorced one of the four wives, (iii) she is entitled to maintenance from her husband or from his property,[234]

[228] Hedaya, P. 31.
[229] Baillie, A digest, P. 36.
[230] Hedaya, P. 33.
[231] Al-Quran, 2 : 230; 2 : 32. see Baillie, A Digest, P. 44.
[232] Hedaya, P. 32.
[233] Baillie, A Digest, P. 38.
[234] Hefzur Rahan V. Shamsun Nahar, 51 DLR (A.D) 172.

(iv) the parties are entitled to inherit from each other in certain cases and (v) the prohibition against unlawful conjunction continues.

The period of *iddat*, however, differs due to different circumstances. The *iddat* of a divorced woman is three clear intervals (courses) between her menstrual periods if she is subject to menstruation,[235] but if she is not so due to extreme young or old age, the *iddat* is three lunar months.[236] But if she is pregnant, her *iddat* will continue until delivery or miscarriage[237] (if any). In case of death of her husband, a woman is to observe *iddat* for four months and ten days whether she is minor or adult and whether consummation has taken place or not.[238] But if she was pregnant at that time, the *iddat* is either four months and ten days or until delivery whichever period is longer. A woman repudiated before consummation or valid retirement is not to undergo *iddat* and she can marry immediately. In this respect the Quran states; "O you who believe, when you marry believing woman and then divorce them before you have touched them, no period of *iddat* have you to count in respect of them.[239] But in case of the death of the husband while the wife is observing *iddat* for divorce, a fresh *iddat* for death is to be observed from the date of death.[240]

Iddat commences from the date of divorce, in case of divorce. It commences from the date of death, in case of death of the husband. If information of divorce or death is not known to the wife until the period of *Iddat* has expired, it is held that the *iddat* has been observed.[241]

8. Types of Muslim Marriage

According to the *sunni* jurists, a contract of marriage may be either (1) valid (*Sahih*), or (2) void (*Batil*) or (3) Irregular (*Fasid*). But according to shia law, a marriage is either valid or void. It does not recognize the distinction between void and irregular marriages. Hence under this system, except valid marriage, all types of marriages are considered as void.

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235 Al-Quran, 2:228.
236 Al-Quran, 65:4.
237 Al-Quran; 65:6.
238 Al-Quran, 2:234.
239 Al-Quran, 33:49.
240 Abdur Rahman, Institute of Mussalman Law, P. 172.
241 Hedaya, P. 131.

(i) Valid Marriage

Valid or *Sahih* marriage is one which is absolutely in accordance with the law and is free from any defect whatsoever. In order to be a valid marriage, it is necessary that there should be no prohibition affecting the contracting parties. Prohibition may either be perpetual or temporary. The marriage is void, if the prohibition is perpetual but it is irregular, if the prohibitions are temporary.

(ii)Void Marriage

Void or *batil* marriage is one which is against perpetual and absolute prohibition and is, therefore, unlawful in itself and void *ab initio*. It is the semblance of marriage without reality. Thus marriage with mother, sister, mother-in-law, foster mother or any other woman is prohibited on the ground of consanguinity, affinity or fosterage is void; because the prohibition here is perpetual and absolute.[242] The issue of this type of union is illegitimate (*waladuz-Zina* or child of fornication) and no law can legalize them. In the like manner, a marriage with the wife of another or remarriage with a divorced wife, when the legal bar still exists, is void. As a void marriage is unlawful in itself, it does not create any mutual right and obligation between the parties. As for instance, there exists no right of dower, unless the marriage has been consummated. Similarly, mutual right of inheritance and the right of maintenance by the wife from the husband cease to exist in case of death of either of the party. The illegality of such unions commences from the date when the contracts are entered into and the marriage is considered as totally non-existing in fact as well as in law.[243] Where a man cohabits with a woman in whom he has no right or semblance of right, it is *Zina* (fornication); and he is liable to *hadd* or specific punishment.

(iii) Irregular or *Fasid* Marriage

An irregular or *fasid* marriage is one which is not unlawful in itself but is unlawful "for something else" as where the obstacle to intermarriage is temporary or relative or when the irregularity arises out of a defect in procedure of making the marriage contract, such as absence of witnesses. Thus the following marriages are considered irregular:

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242 Ameer Ali, Mahommedan Law, Vol. II, P. 302(1979).
243 Ameer Ali, Mahommedan Law, Vol. II, P. 312(1999).

a) A marriage contracted without required number of witnesses.[244]

b) A marriage with a woman without the consent of her guardian when such consent is considered necessary.

(c) A marriage with a woman during her *iddat* period.[245]

(d) A marriage prohibited on account of difference of religion.[246]

(e) A marriage with the fifth wife in the presence of four wives.[247]

(f) A marriage with a woman so related to the wife that if one of them had been a male, there could be no lawful intermarriage. This marriage is prohibited due to unlawful conjunction.[248]

(g) A marriage with a woman who is pregnant, when the pregnancy was not caused by adultery or fornication.[249]

The defects in the marriages of the above mentioned kinds may be removed; because these defects are not absolute, rather these are relative and can be removed so that the marriage may be considered a valid. In (a) and (b) the defects are accidental and procedural. In (c) and (g) obstactes disappear with the passing of the required period of waiting. In (e) and (f) defects can be removed by divorcing the wife who constitutes the impediments. In (d) the defect would disappear by acceptance of Islam.

Shiya Marriage

A brief discussion on Shiya law is made below. According to this law, a marriage, as mentioned earlier, is either valid or void. Under this system, a woman divorced thrice may marry another man and if they separate after consummation, the former husband can re-marry her. The law, however, lays down that this process can be repeated only twice and after the third or triple divorce, re-union is void under all circumstances. Thus a man cannot re-marry a woman whom he has divorced nine times. The issue of a void marriage is illegitimate, unless the connection is under semblance of right in which case the issue would be legitimate.

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244 Amer Ali, Mahommedan Law, Vol. II, P. 41.
245 Mahommedan Law, Vol. II, P. 65.
246 Mahommedan Law, Vol. II, P. 58.
247 Mahommedan Law, Vol. II, P. 62.
248 Ameer Ali, Mahommedan Law, Vol. II, P. 60.
249 Hedaya, P. 32.

Under this system, when a man marries a woman undergoing *iddat* and the marriage is followed by consummation, it would be treated as fornication and he can never marry her. In such a case, the prohibition is perpetual. A marriage contracted by a person suffering from a serious illness does not give the wife any right unless there has been consummation; so if he should die of that without consummation, it would have no effect and the woman would not be entitled either to dower or to inheritance.[250]

9. Legal Incidents of valid Marriage (*Sahih Nikah*)

A valid marriage results in some incidents or legal consequences. The important incidents are discussed below.

(i) The most important consequence of a valid marriage is providing maintenance (*nafaqah*) by the husband to the wife. This obligation commences from the conclusion of the marriage ceremony. In this connection the Quran declares:

"Provide for them, the wealthy according to his means and the poor according to his means; provision of a reasonable amount. This is an obligation for those who wish to do the right thing".[251]

Further, it has been said in the Quran:

"A man of means should spend (for his wife) out of his means while anyone whose income is more limited should spend some of what Allah has given him".[252] Maintenance includes food, raiment and lodging.[253] It is incumbent upon a husband to provide his wife with maintenance although he is poor, sick, and impotent or whether his wife is rich or poor, Muslim or otherwise, old or young, so long as she is able to fulfil the primary object of marriage.[254] Maintenance is due to the wife who refuses to follow her husband on a journey to a place which is three days' distance from that in which the marriage was contracted. She is also entitled to the same though she refuses to surrender herself to her husband on account of not receiving her dower from her husband.[255] Where a wife, after the marriage has been consummated, falls sick in

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250 Ameer Ali, Mahommedan Law, P. 355.
251 Al-Quran, 2 : 236.
252 Al-Quran, 65 : 7.
253 Neil Baillie, A Digest of Mahummadan Law. P. 441.
254 Hedaya, P. 142; Baillie, A Digest, P. 441.
255 Hedaya, P. 141.

either the husband's house or her father's house, she is entitled to maintenance even when the illness renders her unfit for sexual intercourse unless she has refused, without lawful reason, to surrender herself to her husband. He is also to provide maintenance to his wife even at the time of his undergoing a term of imprisonment although this imprisonment is for a debt due to his wife which he is unable to pay.[256]

The husband is bound to provide maintenance to his wife's personal servants, provided he is economically capable to do so. If the husband has children and one servant is not sufficient for their service, he must, if he is in easy circumstances, maintain two or more servants according to the needs of the children. A poor husband is not required to provide maintenance for his wife's servants.[257] The husband must provide a separate apartment for his wife's habitation. She is also entitled to clothing from the date of contracting a valid marriage. He is bound to provide her each year with two complete sets of clothing, at least one for summer and one for winter. The quality of the clothing is determined by the position of the husband and the wife and in accordance with local custom.[258]

A wife is also entitled to maintenance during the period of *iddat* in the following cases:[259]

(a) When she is repudiated under a revocable or irrevocable form, whether pregnant or not.

(b) When the marriage is dissolved by reason of an *Oath* of imprecation, or vow of continence[260] or when the wife is repudiated in *Khula* form, unless at the time of such *khula'* repudiation she renounces her right to maintenance.

(c) When, after conversion to Islam, she is separated from her husband consequent upon her husband's refusal to accept that faith.

(d) When the husband, on attaining puberty, exercises his right of option and dissolves the marriage.

[256] Neil Baillie, A Digest, P. 44.
[257] Baillie, P. 142.
[258] Nawab A.F.M. Abdur Rahman, Institutes of Mussalman Law. P. 101.
[259] Ameer Ali, Mahommedan Law, , P. 378.
[260] It means a vow of continence by the husband for refraining from any sexual intercourse with his wife for a period of four months.

(f) When the marriage is dissolved by reason of her husband's apostacy.

But she is not entitled to maintenance if the repudiation is induced by any of her fault. A man having several wives, some are slaves, they are all alike in respect of maintenance. A husband may refuse maintenance to his wife who is too young for sexual intercourse.[261] Also a sick wife whose marriage has not been consummated is not entitled to maintenance if she cannot be removed to her husband's house. If a wife be a disobedient or rebellious (*Nashizah*) and goes abroad without her husband's consent, she is not entitled to maintenance until she returns to her husband's house.[262] Again, maintenance is not due to a wife during the term of her imprisonment, though it be for a debt she cannot pay, unless it is the husband who has caused her arrest for debt due to himself. No maintenance, of any kind, is due to a woman observing *iddat* in consequence of husband's death, even if she is pregnant.[263]

Maintenance is to be provided to the wife in proportion to rank and circumstances of the parties.[264] Thus if both are wealthy, the husband must provide her in opulent manner; but if they be both poor, he is required to provide her in simple manner. If he be rich and she be poor, he is to afford her a moderate subsistence.

(ii) The second important legal consequence of a valid marriage is the payment of dower (*Muhr*) by the husband to the wife. 'Dower is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife'.[265] It is an obligation imposed by the law upon the husband as a mark of respect to the wife. Regarding the payment of dower the following opinion is note worthy:

"The payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and for the same

[261] Muhammad Alauddin Haskafi, The Durrul Mukhtar, PP. 318-19.
[262] Hedaya, P. 141.
[263] Hedaya, P.145.
[264] Hedaya, P.140.
[265] Abdul Kadir V. Salima, Indian Law Reports (I.L.R.): All 149 (1886).

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".[266] The payment of dower is, therefore, obligatory. The Holy Quran in this connection declares:

"Since you have thereby sought enjoyment with them, give them their marriage portions (dower) as is stipulated. Yet it will not be held against you should you come to terms about it even after what has been stipulated.[267] Further it has been said is the Holy Quran, "Give women their marriage portions with no strings attached. If they themselves give some of it back to you (waive some of it), then consume it with good cheer".[268]

A wife who has attained the age of discretion may validly agree to a reduction of her dower or she may remit the whole or make a gift of it to the husband whether the marriage has been consummated or not.[269] A husband may agree to increase the amount of dower. The amount of dower may be fixed or may not be fixed at the time of contracting marriage. According to Imam Aboo Hanifa, the minimum amount of dower is ten *dirham*, whereas according to Imam Shafei, there is no minimum fixed.[270]

(iii) The third incident that follows from a valid marriage is that the parties are entitled to the company of each other and to have sexual intercourse with due regard to health, decency, time and place. The wife cannot refuse her person to the husband without reasonable cause. It has been stated by the Prophet (Peace be on him) that when a man calls his wife to bed and she declines, angels curse her and Allah remains displeased with her.[271] If a man has two or more wives, it is incumbent on him to make equal treatment and an equal partition of his cohabitation among them. The Prophet (Peace be on him) said, "The man who has two wives, and who, in partition, inclines particularly to one of them, shall in the day of judgement incline to one side.[272] It is recorded by

[266] Hedaya, P. 44.
[267] Al-Quran, 4 : 24, see Irving and others, The Quran: Basic Teachings, P. 202.
[268] Al-Quran, 4 : 4.
[269] N. Baillie, A Digest, P. 120; see Hedaya, P. 45.
[270] Hedaya, P. 44.
[271] James Robson, Mishkat Al-Masabih, Vol. 4, P. 689. see Muhammad Ismail Bukhari, Sahih Al Bukhari, Tr. & ed. Muzammel Haq and others, Vol. V, P. 81.
[272] Hedaya, PP. 66-67.

Ayesha (R) that the Prophet (Peace be on him) made such equal partition of cohabitation among his wives. The judge (*Qadi*) may impose punishment on the husband who has evaded the order of the judge regarding partition and equality of treatment and again order him to do justly.[273] The husband, however, can guide the movements of the wife and exercise a reasonable control over her activities.

(iv) After the payment of the prompt portion of the dower, the husband has the right to forbid his wife to leave the house without his permission. He can also forbid her to visit and mix with strange women. He has the right to compel her to leave her father's house when she is adult. The husband can prohibit her relations residing in his house. Thus the husband is entitled to restrain the wife's movements in a reasonable manner and to exercise marital authority.

(v) A valid marriage establishes the mutual right of inheritance between the husband and the wife. This right has been recognised in the Holy Quran as:

> "In what your wives leave, your share is a half, if they leave no child. But if they (wives) leave a child, you get one-fourth, after payment of legacies and debts. In what you (husband) leave, their share is a fourth, if you leave no child; but if you leave a child, they get one eighth; after payment of legacies and debts".[274]

Thus the Holy Quran presecribes a definite share in the property for mutual right of inheritance between the husband and the wife.

'When a man has given his wife a revocable repudiation, whether it was given in health or in sickness, or with or without her consent and either of them happens to die before the expiration of her *iddat*, they are reciprocally entitled to inherit without any difference of opinion. Again, if a man in his death illness (*Marz-ul-maut*) has repudiated his wife irrevocably, or given her three repudiations and has then died while in her *Iddat*, she inherits from him in like manner'.[275] But the husband is not entitled to inherit from his wife if she dies before the expiry of the *iddat*, because it is he, and not she, is responsible for the rupture of conjugal rights.[276] If divorce takes place at the request of the wife, she loses her

[273] Baillie, A Digest, P. 190.
[274] Al-Quran, 4 : 11-12
[275] Neil Baillie, A Digest, , P. 279.
[276] Hedaya, P. 100.

right of inheritance.[277] The right of inheritance does not exist in any case after the expiry of the *iddat*.

(vi) Another incident of a valid marriage is that the prohibitions regarding marriage due to the rules of affinity come into operation. Valid marriage creates between each of them and certain relatives of the other partner a prohibited degree of relationship.[278]

(vii) Another incident of a valid marriage is that the wife is not entitled to remarry after divorce or death of the husband before observing *iddat*. Of course, she is not to observe *iddat* if divorce takes place before consummation or valid retirement. She can marry elsewhere immediately without waiting for a second. The Quran explicitely declares:

> "O you who believe, when you marry believing women and then divorce them before you have touched them, no period of *iddat* have you to count in respect of them (wives)".[279]

(viii) Lastly, the offspring born of a valid marriage are legitimate and as such they can inherit from both their father and mother. But if the marriage contract is dissolved by imprecation or *lian*[280] during the pregnancy of the wife, the issue of such pregnancy is considered illegitimate. A child declared illegitimate by the *Qadi* or judge is excluded from all rights of inheritance and forfeits its right to maintenance. However, in the following cases, a child is not declared illegitimate even though the husband and the wife have complied with the formalities necessary for the *oath* of imprecation and the judge has pronounced their repudiation:[281] (a) when the child is disowned after expiry of the prescribed periods; (b) when the child is disowned after having been formally or tacitly acknowledged by the husband; (c) when the child dies before the decree of separation, whether it is disowned

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[277] Hedaya, P. 100.
[278] Hedya, P. 54.
[279] Al-Quran 33 : 49.
[280] Lian or imprecation, in the language of the law, is testimony confirmed by oath and accompanied with imprecation. If a man brings a charge of adultery against his wife, he is either to retract the charge or confirm it by oath coupled with an imprecation in this form: "The curse of Allah be upon him if he was a liar when he casts at her the charge of adultery". The wife must then be called upon either to admit the truth of the imputation or she deny it on oath coupled with an imprecation in this form. "The wrath of Allah be upon me if he is truthful in bringing the charge of adultery which he has cast on me". If she takes oath, the judge or the Qadi must pronounce separation between the parties. This separation is treated as irrevocable divorce unless he retracts. see Sahih Al-Bukhari Tr. ed. Mozommel Haque and others, Vol. V, P. 135; Hedaya, P. 123.
[281] Abdur Rahman, Institute of Mussalman Law , P. 181-182.

before or after its death, or before or after the *oath* has been taken; (d) after judicial separation and declaration of child's illegitimacy, if the wife bears another child conceived at the same time. In this case the paternity of both the twins is established from the husband and the declaration of illegitimacy is cancelled. (e) when the child is disowned after a judicial decree establishing its paternity and (f) when either husband or wife should die, after the child is disowned but before the decree of separation.

The legal effects of a valid marriage have been pointed out briefly by Mahmood, J. in the leading case of *Abdul Kadir* V. *Salima* in the following language:

> The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarity with her with kindness and courtesy. It renders unlawful conjunction of two sisters (as wives) and of those who fall under the same category".[282]

10. Legal Incidents of *Fasid* (Irregular *Nikah*) Marriage

While discussing these incidents of irregular marriage, two principles emerge; (i) as between the parties themselves, the irregular union is a flimsy tie which gives very few obligations; (ii) but the issue of such union receives full legal status.

When an irregular marriage has been contracted but not consummated, it may be cancelled by either of the party. If the matter has been brought to the notice of the *Qadi*, it is his duty to separate them and now this power can be exercised by civil courts.[283] An irregular

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[282] Abdul Kadir V. Salima, ILR, 8 Allahabad, 149, (Full Bench), 1886.
[283] Baillie, A Digest, P. 156.

marriage creates no l legal effects before consummation. One of the parties may say "I haave relinquished you" or " I have set your way free" and the marriagege shall stand cancelled. This relinquishment may be done at any time without the consent and presence of the other. Opinion differs regarcrding the necessity of acquinting with fact to the other. According to oone opinion, it is a necessary condition for the validity of the relinquiishment, while according to another, it is no more necessary than in a casase of repudiation.[284] But mere abstention on the part of the husband to aapproach the wife is not sufficient for separation. He must expressly statete to the woman that the marriage is set a side.

When the *Qadi* or r Judge separates a man from his wife before cohabitation, on accounnt of their marriage being irregular, the woman is not entitled to any part of her dower, because, if the marriage is irregular, no obligatioon of payment of dower is involved in that contract.[285] In the likese manner, no dower is payable after *Khilwatus Sahih* or valid retiremeent on account of the irregularity of the marriage. The law, however, doloes not consider retirement as indicating the commission of the carnal act.[286] But if a man contracts an irregular marriage with a womasan and have carnal connection with her, in this case she is entitled to o dower, proper or specified. That is to say, if her proper dower (Muhr mithal) is greater than specified dower, still she is entitled to the specifiecd dower only and not to her proper dower, That means she receives propper or specified dower, whichever is less.[287]

Where a man has hhad carnal connection in a *fasid* marriage, it is incumbent upon the wiife to observe *iddat* after separation. In this case the date of *iddat* commences from the date of separation and not from the last date of carnal connection.[288] *Iddat*, on account of death, is not incumbent in the case of irregular marriage.[289]

A woman cannot contract a second marriage after she has been married irregularly until separatition has actually taken place or in case of the marriage has been consummated, until the termination of the period

[284] Baillie, A Digest, PP. 156-57.
[285] Hedaya, P. 52.
[286] Hedaya., P. 53.
[287] Hedaya, 53.
[288] Hedaya, P.53.
[289] Ameer Ali, Mahommadan Law, Vol. II, P. 303.

of probation (*iddat*).[290] Under this type of marriage, the wife cannot claim maintenance either during marriage or during its consequent *iddat*, even though there is an agreement for maintenance.[291] If a marriage is *fasid* due to the absence of witnesses, in this case only, the wife has a right to maintenance.

A *fasid* marriage is a connection between a man and a woman which, though not amounting to a lawful union, confers the status of legitimacy on the children of such union. The issue of a *fasid* marriage is, therefore, legitimate in every instance. Thus the *nasab* or paternal descent of a child born of an irregular marriage is established in the husband. The *nasab* is calculated from the time of consummation and not from the time of contracting marriage.[292] This is the opinion of Imam Muhammad. But according to Imam Aboo Hanifa and Aboo Yusuf, *nasab* would be calculated from the date of the marriage as in the case of a valid contract.[293] The latter opinion, it is submitted, is more acceptable in the sense that it is easier to calculate the date of marriage than the date of consummation. But if one is sure regarding the date of consummation, then it is better to accept the former view. The issue of *fasid* marriage can inherit from both his parents. An illegitimate child cannot be legitimate. In the proper sense, there in no legitimation under Muslim law. A child, in order to be legitimate, must be the offspring of a man and his wife or of a man and his female slave; any other offspring is the offspring of *Zina*, that is, illicit connection cannot be legitimate.[294] It is clear that the offspring of sahih, or *fasid* marriage is legitimate and all others are illegitimates.

Prohibition on account of affinity under *fasid* marriage is established only after consummation.[295] An irregular marriage does not create mutual rights of inheritance between the husband and the wife[296] whether the marriage has been consummated or not. Irregularity of the marriage is a good ground of defence to a suit for restitution of conjugal rights as it is necessary for marriage to be valid before the court can grant

[290] Ameer Ali, Mahommadan Law, Vol. II, P. 311.
[291] Baillie, A Digest, P. 157.
[292] Hedaya, P. 53.
[293] Baillie., A Digest,. P. 314.
[294] Habidur Rahman V. Altaf Ali (1921) 48. I. A. 114.
[295] Baillie, A Digest, P. 157.
[296] Baillie, P. 694, 710.

such a decree.[297] Decree for restitution of conjugal rights is discretionary with courts. The plaintiff, in order to succeed, must come to the court with clean hands. In order to entitle a husband to a restitution of conjugal rights, it is necessary to prove that the marriage is valid. The existence of a valid matrimonial relationship is, therefore, an essential condition for a decree in such suit. Restitution will not be allowed if the marriage is irregular or void. If a marriage is *fasid* on the ground of its having been contracted during *iddat*, the husband would not be granted a decree even though the marriage had been consummated.[298]

The law regarding remarriage in case of irregular marriage is that the wife can remarry after *iddat* on separation. In the case of an unlawful conjunction, remarriage cannot be contracted with one of the unlawfully conjoined women, until the *iddat* of the others or other has expired. But if the *iddat* of others has expired, the fact that the woman who is sought to be married is in her *iddat* would not matter. The following illustrations will make the point clear.

(a) A man marries two sisters and separates from them, he may not marry one of them till the *iddat* of both expires.

(b) In the above case if the *iddat* of one has expired, he may marry the other who is still in *iddat*.[299]

(c) 'A' marries two sisters 'M' and 'N'. The marriage with 'M' alone has been consu nmated. He may marry 'M' on separation, but he cannot marry 'N' until the expiration of the *iddat* of M.[300]

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[297] Faiz Badruddin Tyabji, Muhammadan Law, P. 49.
[298] Ahmadunnisa V. Ali Akbar, 1942, Pesh. 19.
[299] Baillie, A Digest, P. 33.
[300] Ibid.

Chapter Seven
Dower or Mahr

1. Definition of Mahr and its Importance

Mahr (Arabic word) is translated in English as dower or marriage portion. It is one of the incidents of *Nikah* or marriage. In pre- Islamic period the term *mahr* was used to signify gifts (*sadaka*) given to the parents of the wife but *sadaq* was a gift to the wife. Islam approved *sadaqa* or *Mahr* to be paid to the wife in case of regular marriage. Mahr is a real settlement in favour of the wife, a provision for a rainy day and socially, a check on the capricious exercise by the husband of his almost unlimited power to divorce.[1] The term *mahr* has neither been defined in the Al-Quran nor in the Hadith. But the jurists, scholars and judges have defined it in their own language.

Tyabji defined *Mahr* or dower as a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties, or by operation of law.[2] D.F Mulla defined it, " Mahr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage".[3] Justice Mahmood defined, " Dower is a sum of money or other property promised by the husband to pay or deliver to the wife in consideration of the marriage and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage".[4] Some jurists treat *mahr* as a consideration of the obligation imposed upon the husband as a mark of respect to the wife. *Mahr*, in fact, is payable by the husband to the wife both as consideration and a mark of respect.

The obligation and importance of the payment of mahr is found in Holy Quran and the Hadith. The Quran states," Give women (wives) their dower with no stinges attached. If they themselves (wives) give some of it back to you (waive it), then consume it (dower) with good

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[1] Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 133 (1993), Delhi.
[2] Faiz Badruddin Tyabji, Muhammadan law (1866), P. 170, Lahore.
[3] D.F Mulla, Mahomedan law, P. 245 (1993), Bombay.
[4] Abdul Qudir vs. Salima 8 all 149 (1886)