

***CRITIQUE OF THE CONCEPT AND PRACTICE OF NIKAHUL MISYAR FROM
CLASSICAL FUQAHA PERSPECTIVES***

BY

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DECLARATION

I solemnly declare that to the best of my knowledge that this thesis is a product of my effort coupled with the use of relevant materials, through the guidance of my supervisor.

Munir Sarki Abdullahi

APPROVAL SHEET

This thesis has been read and approved by the faculty of law, *Bayero* University, Kano as meeting the requirement for the award of master's degree in law.

Internal Examiner

Date

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Date

DEDICATION

This thesis is dedicated to the following people:-

1. My parent, who emphasized on the importance of education and help me award achieving my goals.
2. My wife, who has been proud, supportive of my work and has shared many uncertainties challenges and sacrifice for completing this thesis.
3. My son *Abdallah*, who has grown into wonderful 4 years in spite of his parent spending so much time away from him for our respective studies.

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TABLE OF CONTENT

CONTENTS

Title page	i
Declaration	ii
Certification	iii
Dedication	iv
Acknowledgement	v-vi
Table of content	vii-ix
Abstract	xii

CHAPTER ONE: GENERAL INTRODUCTION

1. Background of the study	1-6
2. Statement of problems	7-8
3. Research questions,	8
4. Aims and objective	8-9
5. Methodology	9
6. Scope and limitation	9
7. Justification of the study	9-10
8. Literature review	10-16
9. Organizational layout	17

CHAPTER TWO: MARRIAGE IN ISLAM

1. Introduction	18-22
2. Position of Marriage in Islam	22-24
3. Essential Elements of Marriage	24
a. Formula	24-26

b. Dowry	26-28
c. Parties	28-30
d. Consent of the Parties	30-32-
e. Publicity	32-34
f. Witnesses	34-36
g. Marriage Guardian	36-40
h. Marriageable Age	40-42
i. Prohibition of Temporary Marriage	42-43
j. Degree of Prohibition of Marriage	43-53
k. Equality	53-54
4. Rights and Duties of the Parties	54-58

CHAPTER THREE: POYGAMY IN ISLAM

1. Nature and meaning of polygamy	59-60
2. Legal basis of polygamy	60-62
3. Concept of justice in polygamy	62-68
a. Time division	
b. Conjugal rights	
c. Travel rights	
d. Spending and Clothing rights	
e. Gifts	
4. Classical Scholars Standpoints Toward polygamy.	68-71
5. Advantage and Disadvantage of polygamy	71-73

CHAPTER FOUR: NIKAHUL MISYAR (MARRIAGE OF CONVINIENCE)

1. Nature and meaning of <i>Nikahul misyar</i>	74-77
2. Reasons that led to its Emergence	77
3. Forfeiting/waiving Rights	77-78
4. Reclaiming the Rights	78-80
5. Scholars standpoints toward <i>misyar</i> marriage	80-87

6. Practice of <i>misyar</i> marriage	87-88
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7. Negative Effect of <i>misyar</i> marriage.	88-89
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CHAPTER FIVE: GENERAL CONCLUSION

1. Summary	90-96
2. Findings	96-97
3. Recommendations.	97-98
4. Bibliography	99-105

• <i>Ahlul Kitab</i>	People of the book (Jews and Christians)
• <i>Azzawaj</i>	Marriage
• <i>Dhimmi</i>	None Muslim
• <i>Fasid</i>	Irregular
• <i>Fatwa</i>	Legal opinion
• <i>Fuqaha</i>	Scholars
• <i>Hadith</i>	Action, saying or approval of the Prophet(PBUH)
• <i>Haram</i>	Unlawful
• <i>Ibadat</i>	Worship
• <i>Iddah</i>	Waiting period
• <i>Ijbar</i>	Power of guardian to decide whom his ward to marry
• <i>Ijab</i>	Offer
• <i>Kafa'ah</i>	Compatibility
• <i>Li'an</i>	Imprecation
• <i>Makruh</i>	Detestable
• <i>Mandub</i>	Recommended Act
• <i>Mu'amalat</i>	Worldly affairs
• <i>Mubah</i>	Permissible Act
• <i>Mufti</i>	Jury
• <i>Mushrik</i>	Polytheist
• <i>Muharram</i>	Someone that you cannot marry
• <i>Muhrim</i>	Person in a state of pilgrim
• <i>Nafaqa</i>	Maintenance
• <i>Nasab</i>	Relation
• <i>Nikah</i>	Marriage
• <i>Qubul</i>	Acceptance
• <i>Sadaq</i>	Dowry
• <i>Sidq</i>	Truthfulness

• <i>Seegah</i>	Formula
• <i>Sadaq-Mithl</i>	Dowry of her equal
• <i>Shari'ah</i>	Islamic Law
• <i>Sunnah</i>	Recommended Act of Worship
• <i>Sayr</i>	Travel
• <i>Wajib</i>	Obligatory
• <i>Waliy Mujbir</i>	Coercive Guardian
• <i>Waliy ghair Mujbir</i>	Non Coercive Guardian
• <i>Waleema</i>	Feast
• <i>Yusr</i>	Easiness
• <i>Zina</i>	Fornication

ABSTRACT

Islamic law considers marriage as a formal binding contract which is an integral part of religion; that outlines the rights and responsibilities of the couples, upon satisfying the essential ingredients laid down by the Shari'ah. Marriage is a bond that ties a man and woman into a lifelong relationship of love, compassion and mutual understanding. Misyar marriage 'convenience marriage' or 'Travelers marriage' is a form of marriage in which the wife sacrifices some of her rights, such as maintenance, fixed duration and living together with husband. Muslim scholars have divergent opinions on this form of marriage. Some of them supported it, on the ground that it will be a solution to some social problems, while others strongly oppose it, as it contradict the objectives of marriage in Islam. The present study therefore, aims at exploring the real status of misyar marriage in the texts of primary sources of Shari'ah, the practice of the Companion and various fatwa of the Muslim Jurists. These will be analyzed in the light of the current realities and situations prevailing in many Muslim countries. The method adopted in undertaking this research is doctrinal method, and the approach of the study would be a critical approach in dealing with issues. It is the finding of this research that the practice of misyar marriage is often different from original intent of accepting it. Therefore, this research recommends that this institution should not be allowed to get it way to Nigeria considering its negative effects to the society.

CHAPTER ONE

GENERAL INTRODUCTION

BACKGROUND OF THE STUDY

Marriage is a universal institution which has been the foundation of the society throughout history. Its origin can be traced to the first ancestors of mankind that are Prophet *Adam Alaihissalam* and his wife *Hauwa'u* (Eve).

Islam regards marriage as a cornerstone and bedrock of the society and it is the only way to build families. The prophet, peace be upon him, insisted upon his followers to marry, where he was reported to have said:

“O you young men those among you who can support a wife should marry, for it restrains eyes (from casting evil glance) and preserves immorality. But he who cannot afford it should fast, for it is a means of controlling the sexual desire”¹

The strong emphasis that Islam has put on marriage may be seen more clearly in the context of the objective that marriage is meant to achieve. In common with other system, Islam regards marriage as a means to emotional and sexual gratification; as a mechanism of tension reduction, legitimate procreation and social placement². It is also a means of living in peace and tranquility according to the *Qur'anic* provision, 30:21 in which Allah the Most High says:

“And among His signs is this, that He created for mates from among yourselves, that you may dwell in tranquility with them, and He has put affection and mercy between

¹ Dr Martiji. M, Sahih Muslim Vol 2 , Darel El Aker Beyrouth Liban 1993. Hadith no 1400R2 P 340.

² Abdal Ati .H. The family structure in Islam, Islamic publication berue, Lagos, 1979 at p 54

your (hearts): Verily in that are indeed signs for a people who reflect”³

Therefore, the above verse clearly indicates that Islam considers marriage as one of the most important institution as well as religious duty that safeguard morals; it does not in any way recognize celibacy. The Prophet said:-

“...whereas I pray and sleep too; I fast and suspend observing them; I marry women also. And he who turns away from my sunnah, has no relation with me”⁴

Marriage is a social necessity because through it families are established, and the family is regarded as the fundamental unit of Muslim society. And it is the only means of engaging into legitimacy between man and woman⁵

Like other contracts, marriage comprises of offer and acceptance, witnesses for the purpose of publicity as marriage should not be kept secret⁶.

Furthermore, every Muslim whether male or female is competent to contract marriage and cannot be given in marriage without his or her consent by any relatives including the parents.⁷ This is based on the *hadith* of the holy Prophet peace be upon him where he says:

“A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except with her permission is sought. The companion asked O Allah messenger! How can we know

³ Ali A.Y, The Holy Qur'an, English Translation with Original Arabic Text Kitab Bhavan, New Delhi (India) 2004 p 436.Q30:21

⁴ Supra note 1 Hadith No 1401 p 340

⁵ Concept of Marriage available at www.islamawareness.net last visited on 27th July, 2015

⁶ Marriage, Death time and Rizq are fixed available at www.cssforum.com last visited on 7th January, 2013.

⁷ ibid

her permission? He said her silence indicate her permission”⁸

The remaining elements of a valid marriage include *sadaq* (dower), *waliy* (guardian) and that the parties must not be within the degree of prohibition.

The position of marriage under the Shari’ah depends on the circumstances of each case. It is regarded as *mandub*, that is recommendable act for getting reward and no punishment whatsoever if he chooses to keep away from it.⁹

Marriage, in certain circumstances, is *wajib* (obligatory) something legally binding or a duty that Muslim has to fulfill if he or she is not capable of restraining himself from Zina or fornication, in spite of his being capable of providing maintenance and paying dower to a woman.¹⁰

Marriage is *haram* or forbidden to man if he does not possess the mean to maintain his wife and children, or if he suffers from illness serious enough to affect his wife and his progeny¹¹. Marriage is detestable (*makruh*) for a man who possess no sexual desire at all or who has no love for children, or who is afraid of transgressing the limit of Allah the most high.¹²

The *Qur’an* and the *sunnah* have enjoined kindness to women. It is thus the husband’s duty to consort with his wife in an equitable and kind manner. A specific consequence of this divine command is that the husband is responsible for maintenance of his wife, a duty which he is enjoined to discharge cheerfully without injury. The wife’s right to maintenance is established by the authority of the holy *Qur’an*, a *sunnah* and *Ijma* (unanimity of the jurist)¹³ In a *hadith* narrated from Abu *Hurairah* Allah Messenger (SAW) was reported to have said:

⁸Khan M.M, The Translation of Sahih Al-bukhari Arabic-English Vol 7, Kitab Bhavan Publishers, New Delh, 1987 Hadith No 67 p 51

⁹ Ambali, M.A, The practice of the Muslim Family Law in Nigeria, (2003) Tazama Publishing Co. zaria, p 146

¹⁰ *ibid*

¹¹ Doi, I.A, shariah the Islamic Law (1984) Taha Publishers, London p 119.

¹² *ibid*

¹³ *Supra* note 2

“Whoever believes in Allah and the last day should take care of the women”¹⁴

Notwithstanding the above position, there are circumstances under Islamic Law which are not directly and categorically found in the primary sources, but introduced in Arabian countries and Asia, after their *Muftis* (Islamic scholars) permitted it. The system later became common in the Persian Gulf countries and some Muslim countries.

Nikahul Misyar is described as a form of marriage in which the wife waives some of her rights, including the right to have the husband living with her in the same house or even maintenance¹⁵

Under this type of marriage a man is allowed to marry a woman, but the wife is not bound to live with him permanently. After the *Misyar* has been conducted, the wife can live at her parent's house, and her husband will be visiting her according to predetermined schedule.¹⁶ In other words, the wife continues to carry out separate life from that of her husband, living in her home. But her husband has the right to go to her home or the resident of her parents where she is often supposed to reside, at any hour he wants. The couple can then appease in a licit way their legitimate desires.¹⁷

There are several reasons that have led to the emergence of this type of marriage, some of which are as follows:-

1. Increase in the number of single women who are unable to get married, because young men are put off marriage due to the high cost of dowries and cost of the marriage generally.¹⁸ This is due to the fact that in most

¹⁴ Sahih Bukhari Hadith 1858

¹⁵ Al-hakeem M., *Misyar Marriage Gaining Prominence Among Saudi* (2005) available at www.gulfnews.com/article last visited on the 12th September, 2013.

¹⁶ What's the deal with misyar? available at www.muslimvillage.com last visited on 12th September, 2012

¹⁷ Temporary marriage Saudi Arabia available at www.AlsaudiArabia.com last visited on 12th September, 2012

¹⁸ Comparative index to Islam: Misyar Marriage available at www.answerislam.org last visited on 7th January, 2013

of the Arabian countries where this marriage emanates the dowry paid by most men is very exorbitant and, hence many of them cannot afford it.

2. The need of some women to stay in their family house either because they are the only taking care of their family members, or because the women has handicap.¹⁹ And her family do not want the husband to be burdened with something he cannot bear, they stays in touch with her without having to put too great burden on the husband.
3. The need to conceal the second wife.²⁰ This is because in some cases the husband may want to conceal his second marriage from his first wife for the fear of consequences which may lead to the end of their marriage. So they enter into such marriage secretly keeping it away from their family as well as the surrounding communities.
4. Those wealthy men while on vacation also enter into such marriage in order to have licit sexual relation without committing *zina*.²¹ After the vacation some husbands keep the wives for the next vacation living together with their parent, and sometimes at the end of the vacation the husband will give her some money and divorce her.²²

Muslim Jurists differ on such marriage. Some are of the view that it is permissible while others hold that it is detestable (*makruh*); to some it is even *haram* (unlawful).²³

One of the major problems with this type of marriage is that the wife may reclaim her rights after giving up such rights, now what of if the husband fails to grant her such right? How can she reclaim her right? What is the basis and authority for that?

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

²² What is misyar?available at [www askimam. Org](http://www.askimam.Org) last visited on 1st August, 2013.

²³ Where do I seek misyar marriage?available at www.answers.yahoo.com last visited on 5th January,2013

Another problem is that more than 95% of the husbands in such marriages are already married and keep them secret from their known wives; they also keep it secret from the surrounding communities, because of the fear of consequences that may even lead to the dissolution of their earlier marriages.

Another problem is that, this type of marriage contradicts the hadith which provides that the difference between the lawful (marital union) and the unlawful is publicity.

By keeping the arrangement secretly also this type of marriage has no expectation of having children, because the spouses try to avoid it notwithstanding that it is one of the objectives of marriage because it is the only means of preservation and continuation of human race. This was emphasized by the Holy Prophet (SAW) in a *hadith* where he says:-

“Marry and multiply so that I can be proud with you large number in the Hereafter”²⁴

In Nigeria particularly in northern part of the country, something that looks like *nikahul misyar* has been in practice from the time immemorial, which is known as *auren dauki sandarka* in Hausa language; but with fewer problems than that of *nikahul misyar*. This arrangement serves the purpose of some women particularly wealthy women and widows, who have their own residence.

2.0 STATEMENT OF PROBLEMS

Since *misyar* marriage is contemporary issue, and not practiced in the time of the Holy Prophet and the earlier generation. Contemporary Muslim Jurists gave different stand on it. There are several opinions ranging from the view that it is permissible, to the view that it is detestable (*Makruh*) that is not allowed, to the view that it is prohibited. Those in support of the concept are of the view that

²⁴ Sunan Abu Dawud, Book 11, Kitab nikah, Hadith no 2139

the practice meets the basic requirements of legal marriage under Islam and helps in solving many social problems. They buttressed their position with, *hadith* of the holy prophet which says:

The conditions that are most deserving of being fulfilled are those by means of which intimacy becomes permissible for you, and the Muslim are bound by their conditions.

Others denounce the practice, saying it is unlawful because it does not meet the marriage requirements as stipulated by *Shari'ah*. Since it goes against the spirit and objectives of marriage which is to establish a long term relationships and it could result to serious moral and social problems. They buttressed this position with Qur'an 30 verse 21. The questions are:

Whether or not *Misyar* marriage is legal or not? Whether the concepts violate the wife's legitimate right?

The second problem is that, as mentioned earlier, the basic feature which distinguishes *Misyar* from standard form of marriage is that the spouses, and more specifically the wife, give up one or several of her rights voluntarily and the women in *Misyar* marriage may later reclaim her rights that she willingly gave up. She is entitled to reclaim such rights including that the husband provide for her financially or demand that she move in with husband at his residence. This issue raises more subtle point of law.

Now the questions are:

What is the legal value of the wife renunciation to some of her right?

How can she reclaim such rights?

The third problem is that wealthy men while on vacation enter *Misyar* marriage, and usually ends up in divorce, as a result of which the women are cautious of getting pregnancy, therefore there is no expectation of children in

such Now how can this situation be reconcile with *hadith* of the Holy Prophet which says that “get married and multiply so that I will be proud of your large number in the next world.

3.0 RESEARCH QUESTIONS

Based on the above prepositions this thesis aims at answering the following questions:

- Whether or not *Misyar* marriage is lawful under Islamic law?
- What are the positions of classical *fuqaha* on the practice of *misyar* marriage?
- Whether or not the practice undermines the institution of polygamy?
- Whether or not the concept of *Nikahul Misyar* reduces the institution of marriage to merely fulfilling one’s desire?
- Whether or not *Misyar* marriage contradicts the objectives of marriage in Islam?
- Whether or not *Misyar* marriage is beneficial to the Muslim society?

4.0 AIMS AND OBJECTIVES

The aims and objectives of undertaking this study are:-

1. To examine the legality or otherwise of *misyar* marriage under Islamic Law
2. To identify the problems and challenges regarding the practice of *misyar marriage*.
3. To see whether the practice may be a substitute to polygamy
4. Whether the practice will aid in solving social problems.
5. To make recommendations.

5.0 **METHODOLOGY**

The method to be adopted in this research is doctrinal, arm chair methods. Primary and secondary sources of *Shari'a* will be the source of the writer, in analyzing and comparing nature and practice of *misyar marriage*. Various works of scholars, expert and academics will also be used as a source of data in discussing the practice. References will also be made to online sources, as well as journal articles, textbooks, newspapers and magazines.

6.0 **SCOPE AND LIMITATION OF THE STUDY**

The scope of this study is to cover the practice of *nikahul misyar* under the Islamic Law. The study will comprehensively discuss issues related to *Nikahul misyar*, such as rational behind the concept, its legality or legal basis, giving up right, reclaiming the rights and criticism against the concept. The research will be limited however, to comparing the practice with polygamy with a view to identify whether the practice undermines the institution of polygamy and marriage generally.

7.0 **JUSTIFICATION OF THE STUDY**

Nikahul misyar (marriage of convenience) is a contemporary issue which generates controversy and subsequent debates among religious scholars around the globe.

The study became necessary because the phenomenon of *nikahul misyar* started in Saudi Arabia in 1996 by the fatwa of *Sheik Abdul'aziz Ba'az*, later legalized in Egypt by the fatwa of *Sheik Muhammad Tantawi* in 1999. The practice became common in Gulf countries and now is spreading to the remaining Sunni Muslim countries, due to the fact that now a day's world is turning to global village; there is instantaneous movement of information from every quarter to every point. Even in Nigeria even though it is hard to be established, but some prominent scholars already gave their respective views regarding the practice of *nikahul misyar*. Therefore the research foresee that in

no time the practice may come to Nigeria having regard to the fact that physical distance is even less now a days as a result of globalization.

Therefore this study will help Muslim of Nigeria to understand the nature of *nikahul misyar* and its consequences. In other word the study will aid Muslim of this country to have an insight on the practice of *nikahul misyar*.

The thesis will make contribution to the academic in theoretically shaping and developing literature regarding Islamic family Law.

8.0 **LITERATURE REVIEW**

A good number of classical Muslim Jurists have written on *nikahul misyar* as a concept. In which they have different view point toward it. Some prominent Jurists favored this kind of marriage; others opposed it vehemently saying that it contradicts the objective of marriage in Islam.

Significant number of Jurists support, though not preferred *nikahul misyar*, permit it for necessity. They include *Shayk Yusuf Al Qaradawi*, *Sayyid Tantawi*, Prominent Saudi lawyer *Abdullahi Bn Manie*, *Sheik Abdul'aziz Al Ba'az*, *Shayk Sa'ud Shuraym*, *Yusuf Al Badri*, *Naseer Fareed*, *Muhammad Bn Adam Al Kauthari* to mentioned but a few.

Shayk Yusuf Al Qaradawi claimed that *misyar* marriage should be viewed as a form of legal relationship between men and women regardless of any description attached to it. He buttressed his position with juristic rule which said "what matters most in contract are motive and meaning, not the wording or structure" In determining the legal nature of this marriage, we should not judge things according to names, for as we know, people feel free in naming or describing something. Stipulating certain details in the marriage contract on both sides is acceptable. For example, some scholars maintained that a woman has the right to determine the timing of marriage; i.e it can take place at a day

or night, however, she can also waive this right. Therefore, based on what has been mentioned, we can state that *misyar* marriage or something in similar form has been in practice from time immemorial. It also serves the purpose of some women who for instance may be rich but who happen to be unable to marry at proper time. He added that if in *misyar* marriage all the Islamic requirements are met, then the marriage is valid. These requirements are offer and acceptance from parties, dowry, consent of the guardian; he concluded if the contract wins these elements no one has the right to sanction it as unlawful.²⁵

This fatwa rest on the premise that when the contract is consented by both parties within the limits set out by the religion, such contract is then rendered legitimate and binding. Yet the problem is that his fatwa makes no reference to unequal bargaining power of the parties, considering the fact that the women have little power to insist on any condition being stipulated in the contract. This fact can easily be inferred from the fact the woman agree or submit to the marriage silently, without protest to the marriage that provide her with fewer rights than those in standard marriage, is a clear of little bargaining power as a contracting party.

Sayyid Muhammad Tantawi is of the opinion that according to Islam, a marriage was solemnized once *ijab and qubul*, *Sadak* (dowry), and public proclamation were indorsed and there was no coercion. If the two parties mutually agree to absolve their entitlement under normal marriage, a man and woman can live harmoniously as husband and wife under *misyar*. He further opines that with *misyar* marriage, divorcees or widows can continue to take righteous path consummated by their husband. He added that that *misyar* wife agrees not ask for financial material support as she is financially independent,

²⁵ Fatwa concerning *misyar* available at www.Islamonline.Net last on 9th January, 2013,

adding that the husband must visit her at least once a week to meet her sexual needs.²⁶

Considering *Tantawi's* position; his argument rest on the premise that the husband must visit his wife at least once a week to appease their sexual needs. Yet the position of marriage in Islam is not only for sexual gratification, there is need for wife to share the roof with her husband and enjoy his guardianship. And what will be the fate of this marriage if the husband fails to visit the wife once a week as demanded in his fatwa?

Mohammad bn Adam Al-kawthari in his fatwa related to *misyar* from *Darul ifta*, Leicester United Kingdom, opines that *Hanafi* view relating to *misyar* is more details than others. He translated *misyar* to be travelers or marriage of convenience and is not found in the Qur'an, *sunnah* or classical works of Islamic Jurisprudence. He further defines *misyar* as official marriage contract between man and woman with condition that the spouses give up one, two, or several of their right by their own free will. He re-iterated that as for the ruling concerning such marriage, there are two issues to be considered and they are validity and permissibility, and the second issue is appropriateness.²⁷

Now taking his fatwa into consideration, he argued that regarding the ruling of *misyar* marriage three issues need to be consider, these includes validity, permissibility and appropriateness. This can be a bit confusing how can something suitable and permitted in law be invalid and vice versa. The three words may be used interchangeable because, the words are synonyms.

The three (3) scholars *Bn Manie*, *Al Kubaisi* and *Nasr Fareed* gave their various *fatwas* regarding *misyar* marriage on the same issues. That is giving up and retraction of rights.

²⁶Tantawi, M, Fatwa regarding misyar in the Federal Territory Mosque ,Kuala Lampur(2006) available at www.Dailyexpress.com, last visited o 20th October,2013

²⁷ Al kawthari, M.A,(2008)at www.darulifta posted on 21st August,2008, last visited on 20th September,2013.

According to *Sheik Abdullah Bin Suleiman Bin Manie* *nikahul misyar* is legal since it meets the requirements for a lawful marriage under Islam. What distinguishes this kind of marriage from others is that the wife voluntarily waives her right of having the husband live with her in the same house and paying for her necessary expenses. She agrees to have the husband visit her at any time day or night, at time convenient to them. He said the conditions agreed by the wife do not affect the validity of the marriage and the wife can still demand her full rights, including having the husband live with her and provide for her expenses.²⁸

Shayk Ahmad Al-Kubaisi in his fatwa regarding *misyar* marriage says that, *Misyar* is correct *islamically*, it also compromises some values. He re-iterated that *misyar* can solve the high rate of spinsterhood. The only difference with normal marriage is that the woman abandons voluntarily her right to housing and financial support; there is nothing wrong with relinquishing one's own rights. *Misyar* marriage became popular to protect widows from committing sin he added.²⁹

Equally *Nasr Fareed Wassel* former Grand *Khadi* of Egypt, his *fatwa* on *misyar* marriage centered on the issue of giving up the right by the wife, he stated that a woman can legitimately give up her rights at the time of the marriage if she so wishes, owing to the fact that she has private means or that her father intend to continue to provide for her needs. But, in the event of change of circumstances, she can assert all the rights which the law confers to her in her capacity as a wife like *nafaqa* because these are in alienable right within the framework of marriage.³⁰

Shayk *Manie* and Fareed agree that the wife can still demand her full rights, including the husband to live with her and provide for her expenses. This can

²⁸ Shayk Abdallahi Bn Manie available at www.scrbd.com last visited on the 4th October, 2012.

²⁹ Misyar marriage enrage Gulf women available at www.middleeastonline.com last visited on the 29th September, 2015.

³⁰ Available at www.Islamwatch.org last visited on 12th September, 2013

be a bit confusing, how can she come back to demand what she willingly gave up. Another loop hole of his fatwa is its inability to provide the means and manner of reclaiming such rights.

Equally, their various *fatwas* failed to discuss the implication of abandoning such rights, because relieving man from the responsibilities may destroy the fundamentals of the family. The rights which would be abandoned by a wife in this kind of marriage are essential to build a stable family.

Shayk Ibn Ba'az was asked about *misyar* marriage; he said that, this kind of marriage where the man marries a second, third, or fourth wife, and the wife is in a situation that compels her to stay with her parents or one of them in her own house, and the husband goes to her at various time depending on the circumstance of both. What is the Islamic ruling on this type of marriage? He replied that there is nothing wrong with that, if the marriage contract fulfill all the conditions set out by *shari'ah*, which is the presence of the *wali*, consent of both partners and the presence of two (2) witnesses of good character to the drawing up of the contract. And both partners being free of any impediment, because of the general meaning of the words of the prophet peace be upon him, "the condition that are most deserving of being fulfilled are those by which intimacy becomes permissible for you and Muslims are bound by their conditions" if the woman agrees to stay with her family or that her share of the husband's time will be during the day not the night, or on certain days or on certain nights, there is nothing wrong with that, so long as the marriage is announced and not hidden.³¹

Equally *Sheik Abdal'azeez Al Sheik* was asked about legality or otherwise of *nikahul misyar*, he took the same position with *Shayk Ba'az*, and replied that, the conditions of such marriage are that the two partners should be identified and give their consent and there should be a guardian and two witnesses. If

³¹ Fatwa Ulama Al balad AL haram and Jareedah al Jazeera issue no 8768 Monday 18th Jummada AL Oula 1417 AH.

the condition are met and the marriage is announced, and they do not agree to conceal it either the husband, wife or their guardian, and he offered a *waleemah* or wedding feast, then the marriage is valid and you can call it whatever.³²

The irony of their line of reasoning is that their *fatwas* fail to consider the need of approaching women with honorable intentions and terms which is very fundamental in Islam. Because even if the marriage contract satisfied the condition mentioned above by the Sheik *Ba'az* and Al *shayk*, it cannot be considered as valid if the parties contracted such marriage with intention of divorce. Islam does not in any way recognize temporary marriage; marriage needs to be permanent with a view to build families the bedrock of Islamic society.

The opponent of *nikahul misyar*, on the other hand reject it on the ground that it contradicts the objectives of marriage in Islam, they include *Muhammad Nasurraddeen Albanny*, *Muhammad Salih Bn Uthayeen*, *Professor Jaburi* etc.

Sheik Albany when asked about *nikahul misyar* he disallowed it on the ground that the absent of the husband in the matrimonial home will be negatively reflected in his children's attitude and upbringing.

Considering *Albanny's* position even not for the sake of children there is need for the husband to be present because women too need companion of a man, that they will always share the hope and dreams with, so when he is absent she will feel neglected and this will negatively affect her religious commitment, obedience, chastity and modesty. And even if he is always present is it possible for him to be with them without any responsibility? The woman still bears the responsibility of feeding, sheltering, clothing and rearing of the children? The roles of the couples in marriage are very clear, the man maintains the family and the woman takes care of them.

³² Sheik Abdul'aziz Bn Baz, available at www.theguardian.com last visited on the 13th August, 2015

According to *Shayk Muhammad Bn Salih Al Uthaymeen*, it was permissible then he stopped saying that because of the negative effect, as it was poorly applied by some wrongdoers.³³ He considers that it should be opposed because it has been turned into a real merchandised that is being marketed on a large scale by marriage agencies; with no relation to the nature of the Islamic marriage.³⁴

Considering *Uthaymeen's* position he opposed *nikahul misyar* on the premise of its poor application by wrongdoers and turned into a real merchandised by some agencies. But one cannot condemn an act completely on the ground of its wrongful application alone; one has to go further to give credible and cogent reasons backing his position with reliable authorities, because there is a difference between something acceptable or permitted in law and applying something poorly by wrongdoers.

Having considered various attempts by different Islamic scholars regarding *misyar* marriage, it is clear that the concept is contemporary issue, which generated controversy and subsequent debates at all level of the society and among religious scholars. Therefore undertaking this research become necessary in order to determine the legality or otherwise of *nikahul misyar*.

9. ORGANAZATIONAL LAYOUT

Chapter one as an introductory chapter considers issues such as background of the study, statement of problems, research questions, aims and objective, methodology, scope and limitation, justification of the study, literature review and organizational layout.

Chapter two, deals with marriage in Islam generally, where issues such as the concept of the family, position of the marriage in Islam, essential elements of

³³³³ Available at www.americanbedu.co/2008/06/17 last visited on 18th December,2013.

³⁴ Supra note 8

marriage, formula, witnesses, dowry, consent of parties, marriage guardian, marriageable age, publicity, marriage must be between man and woman, parties must not be within the degree of prohibition, equality, parties must not be in ihram, bride must not be married, marriage must not be for certain period of time, rights and duties of the parties.

Chapter three will discuss polygamy, where issues such as nature and meaning of polygamy, legal basis of polygamy, concept of justice in polygamy, classical scholar's stand point on polygamy and advantage/disadvantage of polygamy

Chapter four will discuss *Nikahul misyar* generally, where issues such as nature of *nikahul misyar*, reasons that led to its emergence, giving up the right, reclaiming the right, classical Muslim Jurist stand's points on *misyar* marriage, practice *misyar* marriage and its negative effect.

Chapter five is the general conclusion deals with summary, findings, recommendations and Bibliography.

CHAPTER TWO (2)

MARRIAGE IN ISLAM

INTRODUCTION

Marriage is a sacred institution built upon a reasonable presumption of comfort, happiness and love which is contractual in nature with all its ingredient or constituent elements between man and woman of complete legal capacity. Islam encourages and urges men to marry; every Muslim who can support a wife to get marriage. Marriage according to Islam is the fundamental institution which aims at establishing a family, the first unity of society.³⁵

The word marriage (Nikah) literally; means joining together. Technically it means a religious legal contract that regularizes the sexual relationship between man and woman, establishes lineage of their progeny and creates civil rights and obligation between them.³⁶

Marriage in Islam is intended to achieve many objectives the most important of which is tranquility, peace and co-operation in fulfilling the divine mandate. Islam being a natural way of life takes into accounts all of genuine instinct such as physical, spiritual, intellectual, emotional etc.³⁷

Although fulfilling sexual gratification is one of the purposes of marriage, but it is not the sole one. Marriage is a social contract with wide and varied responsibilities and duties. The woman is a spiritual and moral being who is entrusted to man on the sacred pledge to which Allah is made witness. The wife is not only means to provide pleasure to the man, but to co-operate with him in making life better to the family and society in general.³⁸

³⁵ Marriage as an essential institution available at www.amualumni.8m.com/marriage last visited 9/8/13

³⁶ Tanzil ur-rahman, D.A, Code of Muslim Law Vol.1 (1977),Pakistad Hamdard Academy P 17

³⁷ Al Qaradawi. Y, The Philosophy of Marriage in Islam, 2012 available at www.irfi.org last visited on the 4th April, 2013.

³⁸ Iqbal, M.S, The Family Laws of Islam, Adams Publishers, New Delhi, 2005. P 54

The importance of marriage in Islam is apparent and clear throughout the Qur'an, which describes the marriage relationship as one of the signs of Allah where Allah the most high says;

And among His signs is this that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He put love and mercy between your (hearts): verily in that are signs for those who reflect.³⁹

From the above verse, it is clear that male and female are created from single soul; they are the progeny of Adam. Therefore the purpose of marriage is the union of the two souls. Allah the most high further says:

“They are your garments and ye are their garments. Allah knoweth what ye used to do secretly among yourselves...”⁴⁰

Also in various hadith the prophet Muhammad (PBUH) emphasizes the importance of marriage, for example prophet (PBUH) is reported to have said;

Whoever among you is able to marry, should marry, and whoever is not able to marry, is recommended to fast, as fasting will diminish his sexual power.⁴¹

In another hadith the prophet (PBUH) said:

“...so he who does not follow my tradition in religion, is not from me (not one of my followers)”⁴²

³⁹Supra note 3 Qur'an 30:21 page 436

⁴⁰ Qur'an, 16:72 Translated by Abdullahi Y Ali, page 289

⁴¹ Supra note 8 hadith no 2 page 3

⁴² Supra note 8 hadith no 1 page 2.

Islam considers marriage as a contract because it cannot be concluded without consent of the parties involved, where the holy Qur'an refers marriage as **aqd** that is contract. It has also been specifically referred as a strong covenant, where Allah the most high says:

“And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant.”⁴³

Therefore Islam holds that the marriage institution is comprised of both ibadat (worship) and Mu'amalat that is worldly affairs,⁴⁴ and there are certain objectives for the attainment of which marriage has been institutionalized. The most important of these are as follows:-

1. Protection of human moral

One of the most important moral values in Islam is the purity of both individual and society as a whole.⁴⁵ Islam regards marriage as a means of fulfilling the natural need of human beings both physical and emotional. Extra marital relations are categorically condemned and prohibited in Islam.

The result of this restriction is the creation of society whose morals are protected. It is for this reason that marriage has been described as an **ihسان** in the holy Qur'an. **Ihsan** means to construct a fort. Thus marriage is such a strong fort that protects the moral of man.⁴⁶ The holy Qur'an after describing certain prohibited degrees of women says:-

“...Except for these, all others are lawful, provided ye seek (them in marriage) with gift from your property, desiring chastity not fornication...”⁴⁷

In another verse Allah the Most High says:

⁴³ Q4:21, Translated by Dr Taqi,uddin Muhsin Khan, King Fahad Complex, Madina, KSA.

⁴⁴ Supra note 36 page 20

⁴⁵ Islamic Marriage System available at www.islam.org/books last visited on the 22nd August,2015

⁴⁶ Supra note 31

⁴⁷ Q4:24 Translated by Abdullah Yusuf Al, Nasri for Kitab Bhavan, New Delhi India, 2004,P 91

“... wed them with leave of their owners, according to what is reasonable: they should be chaste not fornicators, nor taking adulterous..”⁴⁸

In yet another verse Allah the Most High said:

“...lawful unto you in marriage are not only chaste woman among the people of the book, revealed before your time...”⁴⁹

Looking at the above verses it is clear that the most important thing about marital relationship in Islam is the preservation of morality and chastity. Marriage is great medicine fornications, falling to sins and crimes. In a related hadith Abdullahi Bn Mas'ud reported that the Messenger of Allah said marriage guard private parts from committing sexual intercourse.⁵⁰

2. Establishment of Islamic society

Another objective of marriage is the establishment of a responsible and morally upright society. It is obvious that lineage, family and society can only be established if there is procreation, and such can only be sustained through marriage relationships among Muslims Ummah.⁵¹ Allah the Most High has made marriage institution as a means of sustaining the continued existence of human generation. To this end almighty Allah says:

“We did send messengers before thee, and appointed for them wives and children: and it was never the part of a messenger to bring a sign except as Allah permitted (or commanded) for each period is an appointment”

In a related hadith the Prophet has called his followers to marry and procreate so that their number increases, and it would be of proud to him on the Day of Judgment. However, this call is not absolute because pious son is one of the recurring charities in Islam; therefore to achieve this there is need of making recourse to their moral upbringing.

⁴⁸ Q4:25

⁴⁹ Q5:5

⁵⁰ Sahih Bukhari, Hadith no 4 page 4.

⁵¹ Muhammad Bn Arifin and Magaji Chiroma, “Quality Versus Quantity of Children Toward Achieving the Objective of Marriage in Islamic Family Law” available at www.ijhssi.org, vol 3 issue6 June 2014 last visited on 22nd Aug,2015

3- Love and affection among spouses.

Another objective of marriage is harmonious companionship which is created upon mutual love and affection among both sexes. This objective can only be accomplished when the spouses as a result of mutual love get happiness and satisfaction. Allah the most high in the holy Qur'an says:

“It is He who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love)...”⁵²

Therefore, it is clear that lack of love and affection among the spouses is the worst mischief which creates other mischief, which will negatively affect other individual of the society. A dispute of two persons becomes the dispute of two (2) families and if the solution is not found and separation took place between the spouses the families disconnected.

POSITION OF MARRIAGE IN ISLAM

Muslim jurist expresses their divergent opinions regarding the Islam's position on marriage; they have interpreted the Qur'an to mean that marriage is a religious duty, moral safeguard as well as a social necessity. As a religious duty it must be fulfilled; but like all other duties in Islam, it is enjoined only upon those who are capable of meeting the responsibilities involved.⁵³ Allah the most high says:

“Marry those among you who are single and virtuous ones among your slaves, male or female: if they are in

⁵² Q7:189 Translated by Abdullahi Yusuf Ali , Kitab Bhavan, New Delhi, India P 182.

⁵³ Shayk Basyouni, W, Fiqh of Love-Marriage in Islam, Almagrib Institute, 2012.

poverty, Allah will give them means out of His grace: for Allah is Ample-giving, and He Knoweth all things.”⁵⁴

Therefore, the position of marriage in Islam goes with five rules of Shari’ah that is Fard (obligatory), Haram (Forbidden), Makruh (Detestable), Mustahab (Recommanded), and Nafl (Supererogatory).

Marriage is obligatory for a man or woman who is not capable of restrain himself from adultery, and he is capable of coping with financial responsibilities of marriage that is payment of dower and maintenance of the wife and children.⁵⁵

However, according to imam Malik it is obligatory for a Muslim to marry even though he may be in position to earn his living on the following three conditions:-

1. If he fears that by not marrying he will commit fornication (Zina)
2. If he is unable to fast to control his passion or that he can fast but his fasting does not help him to restrain from adultery.
3. He cannot even find a slave girl or an utterly poor girl.⁵⁶

While Hanafi School; considers marriage obligatory, on the following four conditions.

- 1- If a man is sure that he will commit zina if he fails to marry.
- 2- If he cannot fast, or even if he can fast, it does not help him to control his passion. If fast help him, he must fast rather than marry.
- 3- If he cannot possess slave girl.

⁵⁴ Qur’an 24:32 Abdullah Y. Ali

⁵⁵ Supra note 9 p 143.

⁵⁶ Ibid

- 4- If he is able to pay dower (mahr) and is capable to earn lawful livelihood. If he is not capable to earn livelihood lawfully it is not obligatory for him to marry.⁵⁷

Marriage is recommendable to a person who has the means of marriage and capable of controlling his sexual urge.⁵⁸

Marriage is *mubah* (permissible) for a person who can control his sexual urge and does not hope for offspring and marriage will keep him away from his devotion to Allah.⁵⁹

Marriage is *Makroh* (detestable) to a man who possesses no sexual desire and at the same time marriage will prevent him from performing his religious obligation.⁶⁰

The strongest opinion is that marriage is considered as a recommended act, but is subject to the circumstances of each particular situation, and its ruling may fall into over categories of acts depending on the specific circumstances. For those who do not have the means to get marriage, it is recommended that they should observe voluntary fasts based on the hadith of the holy prophet (PBUH).⁶¹

ESSENTIAL ELEMENTS OF A MARRIAGE IN ISLAM

It is clear then, that the holy Qur'an described marriage as a solemn covenant between Allah and human parties as well as between parties themselves. If the marriage is to be consummated and become valid as mentioned earlier certain conditions must be satisfied. Some of the conditions pertain to the contract

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ El-Imairi, M.T, Islamic Personal Status, Monograph, P 2

⁶⁰ Ibid

⁶¹ Sahih Bukhari, Hadith no 3, P3.

itself while some to the contracting parties.⁶² Muslim Jurists differ over these conditions but some may be considered as follows:

a. Offer and acceptance (ijab and qubul)

For a marriage to be contracted there must be a direct, unequivocal offer followed by acceptance thereof. Both proposal and acceptance must be explicit and oral if the contracting parties are present. Otherwise written form may substitute the oral one.⁶³ The offer usually comes from the bride's side and the acceptance from the groom's side. In certain circumstances the reverse will be the case, where the offer comes from groom and the bride's side accepts.⁶⁴

According to Imam Malik and Imam Hanafi any words that imply marriage as long as the both parties and witnesses understand the words to means marriage is acceptable.⁶⁵ They based their opinion on the following authorities:

“...and any believing woman who gives herself to the prophet, if the prophet wishes to wed her; – this only for thee, and not for the believers (at large)....”⁶⁶

They also rely on the following hadith;

“Go, I marry her to you for that much of the Qur'an which you have”⁶⁷

Imam Hambali and Imam shafi'i are of the view that marriage will be acceptable only if the following words from Qur'an are used: An Nikah and Az-zawajj).while Imam Hanafi and Imam Malik allow the offer acceptance to be given in any language.⁶⁸ The following are the conditions of offer and acceptance:

⁶² Supra note 2 p 60

⁶³ Ibid

⁶⁴ Supra note 51 p 24.

⁶⁵ Ibid

⁶⁶ Qur'an 33:50 Translated by Abdullahi Y. Ali P. 458.

⁶⁷ Supra note 8 hadith no 24.

⁶⁸ Supra note 51 p 25

- 1- Offer and acceptance must be done in one sitting; ulama said that if there is a long break, then it is not acceptable.⁶⁹
- 2- The acceptance must correspond to the offer.⁷⁰
- 3- The contract must be done deal at that moment; any condition regarding the future cannot be regarded as an acceptance.⁷¹

It should be noted that a person cannot accept the offer by saying; “I accept Insha Allah”. The majority of the scholars are of the view that this created doubt; therefore the whole seegah must be repeated.⁷²

If the parties to a contract or either of them be dumb or deaf, the offer and acceptance may be made by signs and gestures. The signs, however, must be such that it becomes clear to parties that they being bound to each other in the relationship of husband and wife.⁷³ If the parties to a marriage contract or either of them be dumb or deaf and be present in the marriage congregation and make offer or acceptance in writhing, same will be acceptable.⁷⁴

b. Dowry (Mahr)

Islamic law refers dowry as “*sadaq*”, which derived from “*sidq*” meaning truthfulness and sincerity. ⁷⁵According to the holy Qur’an the *mahr* is given as a free gift by the husband to the wife at the time of contracting marriage. Islam has honored the woman, and given her the right of ownership, and imposed on man to give her dowry as her due right. ⁷⁶ This is based on the following verse:

“...give them their dowry for the enjoyment you have of them as a duty; but if, after a dower is prescribed, ye agree

⁶⁹ ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Supra note 36 p 60

⁷⁴ ibid

⁷⁵ Supra note 9 p.162

⁷⁶ At-Tuwairij, M.B, The Book of Nikah, King Fahad National Library, Riyadh, 2000, P 17

mutually (to vary it), there is no blame on you, and Allah is All-knowing All-wise.”⁷⁷

Dowry can take the form of money or kind. Every lawful object⁷⁸ that is of value may be fixed as dower. Accordingly cash, merchandise, goods, immovable property, shares or dividend e.t.c may be settled as dowry provided the property be such that it is certain, lawful and is capable of being taken into possession.⁷⁹

There is no limit, however, to set as a maximum for dowry. It would be a valid dowry to teach his bride how to read the holy Qur'an. This principle is base on the *hadith* where Prophet (PBUH) says:

“Go I have married her to you teach her of the Qur'an”⁸⁰

Most of the Jurists are of the view that even the teaching of the Qur'an can serve as dowry for contracting marriage. It is on the basis of this *hadith* that *Imam Shafi'I* and many other look upon accepting wages for teaching the Qur'an quite lawful. *Imam Abu Hanifa* differs and states that since it is permissible to contract marriage without fixing any dowry, though it is not desirable, in the same way the marriage in the above mentioned case had been contracted under an abnormal condition. He added that teaching of the holy Qur'an is not a *mahr* but a religious duty which was assigned to him.⁸¹

According to *Imam Zahiri*, *imam Hanafi* and *Imam Shafi'I*, the lowest amount for dowry is ten (10) dirham or any object of equal value. While according to *Imam Malik*, the lowest amount of dowry is three dirham.⁸²

⁷⁷ Qur'an 4:24 Translated by Abdullahi Y. Ali, p 91

⁷⁸⁷⁸ Thus, wine or pig cannot be fixed as a dower.

⁷⁹ Supra note 36 p 218

⁸⁰ Supra note 1, hadith no 1425R1 p 357

⁸¹ Ibid, Sahih Muslim, Foot note 2 p 357

⁸² Supra note 36 P.219

There are two (2) kinds of dowry, and they are: specified and proper or unspecified dowry.

Specified dowry is the one which is specified at the time of the marriage contract between the parties, and it is of two kinds Prompt and deferred dowry.⁸³

Prompt dowry is the one which is promptly paid at the time of the marriage contract or is payable promptly on demand, while deferred dowry is not paid at the time of the marriage, but payable as result of death or divorce.⁸⁴

Proper dowry or *Sadaqul-Mithl* (dowry of her class) is the dowry of a woman which is determined on the basis of the woman's conditions, status, parents, and colleagues.⁸⁵

In determining proper dowry; regard shall be had to the dower settled upon other member of her father's family such as father's sister, her own sisters, and her paternal first cousin sisters' e.t.c⁸⁶ while according to *Imam Malik*, the assessment of woman for dowry of her equal is not determined by her people but based in this respect on her worth as a woman, her beauty, position and wealth.⁸⁷

Where there is dispute among the spouses over the size or the nature of the dowry, the husband's word under oath would be considered, but if they disputed whether she received it or not, the wife word would be considered unless the other spouse produce a proof to the contrary.⁸⁸

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Supra note 9 p 168

⁸⁶ Supra note 36 p 219

⁸⁷ Supra note 9 p 168

⁸⁸ Supra note 30

c. Parties

Allah has created man and woman accompany for one another, and so that they can procreate and live in peace and tranquility according to commandment of Allah and the direction of His messenger (PBUH). Based on this Allah the Most High says:

And among His signs is this that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He put love and mercy between your (hearts): verily in that are signs for those who reflect.⁸⁹

Allah the Most High further says:

“And Allah has made you your mates of your own nature, and made for you, out of them sons, daughters, and grandchildren, and provide for you substance of the best: will they then believe in vain things, and be ungrateful to Allah’s favour⁹⁰

In another verse Allah the most high says:

“O mankind! Fear guardian Lord , who created you from a single person, created out of it, His mate and from them twain scattered (like seed) countless men and women;-fear Allah, through whom ye demand your mutual right, and be heedful of the wombs (that bore you): for Allah ever watches over you.⁹¹

⁸⁹Supra note 3 Qur'an 30:21 Translated By Y Ali page436

⁹⁰Qur'an, 16:72 Translated by Abdullahi Y Ali,page 289

⁹¹Qur'an 4:1

Based on the above verses and so many others, a lot of interpretations have been given to marriage. Marriage as a social contract is essentially a civil bondage between a man and woman that makes intimacy, mutual joy and satisfaction permission.⁹² To some it is a binding contract, final and permanent agreement between two parties, a man and a woman.⁹³ While some see it as contract between men and woman, to live as husband and wife.⁹⁴ Therefore, it is clear that the parties to a marriage contract must be man and woman. Equally under the *Maliki* School of thought, for a marriage to be considered as valid one, the couple must be ascertained as male and female.

Base on this, certain relationships such as homo sexuality (Sexual relationship between men) and lesbianism (sexual relationship between women) are all forbidden in Islam, and so it is an essential requirement of a valid marriage that one party be a male and the other be a female.⁹⁵

d. Consent of the Parties

In Islam the man has the right to choose his wife, and the wife has the right to choose her husband, even though a young girl might not have enough experience to choose the right man. No woman can be forced to marry a particular man without her consent, this is her right which must be respected and honored by the Muslim society.⁹⁶ Thus the consent of the women whether previously married or not is essential for marriage. In the case of virgin it is the duty of the father or the guardian to consult her observing silence. But in the case of woman previously married (widowed or divorced) she has been given more right to express her consent than that of her guardian.⁹⁷ In a *hadith* narrated by *Abu Huraira*, Prophet (peace be upon him) said:-

⁹² Ahmad, K. Family Life in Islam, Islamic foundation, 1994 P 29

⁹³ Islamic marital jurisprudence available at www.wikipedia.org/islamic visited on 18/8/2013

⁹⁴ *ibid*

⁹⁵ Hussain, J. Islamic Law and Society: An Introduction, Federation Press Sydney, 1999 p 61

⁹⁶ *Supra* note 38, p 68

⁹⁷ *ibid*

“A matron should not be given except after consulting her; and a virgin should not be given in marriage except after her permission” the people asked “O Messenger of Allah! How can we know her permission? He said “Her silence indicates her permission.”⁹⁸

In another *hadith* narrated by *Khansa Bint Khidam Al-Ansariya* that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to the Messenger of Allah (PBUH) and he declared that marriage invalid.⁹⁹

According to *Imam Shafi’I*; in a marriage of virgin contracted by her father or grandfather, her consent is not necessary. But if the marriage of a virgin contracted by any other person other than her father or grandfather, her consent is necessary.¹⁰⁰

Consent may be express or implied, a mere smiling, laughing, maintaining silence or weeping saliently by a virgin may amount to implied consent. And Muslim Jurists recognize the application of the principle of implied consent only in the case of a Virgin, and in the case of a matron her express consent is required.¹⁰¹

It is important to note that consent must be obtained voluntarily; coercion or deception in obtaining consent shall vitiate the marriage contract and it shall be deemed to be *fasid* (irregular) until it is ratified afterwards.¹⁰²

e. Publicity

⁹⁸ sahih Bukhari hadith 67 p 51-52

⁹⁹ Sahih Bukhari, hadith no 69 p 52

¹⁰⁰ Supra note 36 p 67

¹⁰¹ Ibid P 68

¹⁰² Ibid p 69

The mutual consent of both parties to live as husband and wife alone does not constitute a marriage. Marriage must also be publicized widely.¹⁰³ Marriage in Islam should be known to the public and it is this publicity that differentiates marriage from fornication.¹⁰⁴ This is based on the *hadith* of the prophet (PBUH) which says:

“Publicize the marriage, and hold it in the masjid and beat duff for it.”¹⁰⁵

In yet another *hadith*, the messenger of Allah said:

“The Distinction between lawful and unlawful is the duff and voice”¹⁰⁶

Any agreement to keep the marriage secret invalidates the contract in the opinion of some Jurists. While others maintain that; the contract is valid but the secrecy is non religious and reprehensible.¹⁰⁷ Moreover, to enhance publicity in a marriage contract the Prophet (PBUH) recommends marriage feast or *waleema*. This principle is based on the *hadith* where Prophet said:

“Have a banquet, even if with only one sheep” ¹⁰⁸

It is a practice of *sunnah* to slaughter one sheep or lamb or more depending on financial conditions. It is unlawful to be wasteful in the *walimah*. And the person who is invited to a feast should gratefully accept that and should not reject it without valid reason; this is based on the *hadith* narrated by *Abdullahi Bn Umar* where Prophet (PBUH) said:

“If anyone of you is invited to walima (wedding banquet) he must go for it (accept the invitation)”¹⁰⁹

¹⁰³ Supra note 2, P 60

¹⁰⁴ Supra note 46

¹⁰⁵ Jami- At-Tirmidhi, Volume 2, Book 6, Hadith no 1088

¹⁰⁶ Ibid hadith no 1087

¹⁰⁷ Supra note 2, P 60

¹⁰⁸ At Tirmidhi hadith no 1093

¹⁰⁹ Sahih Bukhari Translated by MM Khan, hadith no 1857, p 897.

In another *hadith*, Prophet (PBUH) said:

“When any one of you is invited to a feast, he should accept.”¹¹⁰

It is permissible to respond to an invitation by a *dthimmi*¹¹¹ to a *walimah* provided it does not involve unlawful things such as consuming wine, swine flesh or the like.¹¹² And if invited person happens to be observing obligatory fast, he may attend the *walimah* and supplicate Allah for the hosts and leave. This is based on the *hadith* where Prophet said:

“If anyone of you is invited, he should accept (the invitation). In case he is fasting, he should pray (in order to bless the inmates of the house)...¹¹³

Walimah or feast is highly recommended. According to *Imam malik* the *walimah* should be after consummation, and majority of the scholars accepted this view.¹¹⁴ The worst *walima* in the eyes of *Shari’ah* is the one in which one rich men are invited, and the poor are ignored. This principle is based on the *hadith* where Prophet (PBUH) said:

“...the worst kind of food is the wedding feast to which the rich are invited and the poor are ignored...”¹¹⁵

Finally, beating the tambourine during the *walima* (wedding feast) is allowed with view of enhancing publicity in the marriage contract.¹¹⁶

f. Witnesses

The next requirement for the validity of marriage contract is the witnesses. Islam requires the presence of witnesses at the marriage congregation and hearing of the proposal and acceptance of the marriage contract by them at the

¹¹⁰ Supra note 1, hadith no 1430, p 368

¹¹¹ Non Muslim

¹¹² Supra note 51

¹¹³ Supra note 1, hadith no 1431

¹¹⁴ . Dr Iqbal sham, S, Some Aspect of Marriage and Divorce in Muslim Family Law, available at www.iiste.org/journal/index.php last visited on the 18th October, 2015.

¹¹⁵ Supra note 2, hadith no 1432, P 368.

¹¹⁶ Sahih Bukhari, Chapter 49, Hadiith no 77.

meeting or gathering. And there are three (3) aspects of this, first the presence of the witnesses, number of the witnesses and thirdly is the competency of the witnesses to hear proposal and acceptance made.¹¹⁷

Opinions differ on the validity of marriage contracted in the absence of witnesses. The *Hanafi's* and *Shafii's* and *Hambali's* schools consider the presence of witnesses as an essential condition of a valid marriage. *Imam Malik*, however is of the opinion that the presence of witnesses, at the time of the marriage is not an essential condition of its validity provided the marriage is duly publicized.¹¹⁸

According to *Hanafi* School, marriage between Muslims cannot be contracted, except with two (2) witnesses, both of them should be free, sane, adult Muslim men or one Muslim man and two Muslim women.¹¹⁹

According to *Imam Maliki* the presence of witnesses at the time of the marriage is not necessary. He maintains that it is the publicity which is the condition for the validity of marriage. If marriage contracted with presence of witnesses but with condition that the marriage contract shall be kept secret, such marriage shall be unlawful. And if the women marries without witnesses with condition that marriage shall be given publicity, it shall be lawful.¹²⁰ *Imam Malik* view is based on the two (2) tradition of the holy prophet. First that the prophet has prohibited the contracting marriage secretly, and the second is that Prophet said announces marriage even by means of a tambourine.¹²¹

With regard to the number of witnesses, the holy Qur'an lays down rule where Allah the Most High says:

¹¹⁷ Supra note 36, P 76

¹¹⁸ Ibid.

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

“O ye who believe ! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah taught him, so let him write: Let him who incurs liability dictate, but let him fear Allah, his Lord and not admonish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate let his guardian dictate faithfully. And get two witnesses out of your men. And if there are not two men, then a man and two women...”¹²²

The above verse has been revealed in respect of financial transactions to be completed in the future and provides directives regarding witnesses. The Jurists have derived from this verse that the requisite number of the witnesses at a marriage contract.¹²³ According to *Imam Hanafi*, the presence of two males or one male and two females witnesses and their hearing of offer and acceptance at the time of marriage is essential.¹²⁴

Regarding the competency of witnesses, some scholars are of the view that a witness must be free, sane, adult and a Muslim. To some a witness may be non Muslim where the bride belongs to the people believing in a revealed Book (Jews or Christian).¹²⁵

g. Marriage Guardian (WALI)

Guardian simply means a person who is authorized to give girl or boy in marriage.¹²⁶ Marriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interest and right of

¹²² Qur'an 2:282, Translated by Abdullahi Y. Ali.

¹²³ Supra note 36 P 80

¹²⁴ Ibid.

¹²⁵ ibid

¹²⁶ Zubair, A. Wilatat I.e (COERCIVE GUARDIANSHIP) in Islamic Marriage, Islamic International Contact, Lagos, Nigeria, 1992 P 4

women usually, in the marriage contract.¹²⁷ Marriage guardianship is an authority of father or nearest male relative over minor, insane, or in experienced persons who need protection or guardianship in the marriage contract.¹²⁸

A marriage guardian should be a free Muslim who is competent to run his affairs by himself. A non Muslim is not qualified to be a Waliy for a Muslim woman no matter how closely related they are.¹²⁹ His additional qualifications even though are not compulsory include pity and uprightness.¹³⁰

The general view is that minor, insane, and inexperience persons of either sex must have marriage guardian. But different positions have been taken by different school of thought, on whether or not a woman who is an adult and of sound mind can contract her own marriage.

Under the Shari'a the position of guardian of marriage generated a considerable divergence of opinions among the Muslim Jurists. The controversy is on whether the guardian is one of the ingredients of a valid marriage contract or not? In other words, should a marriage constituted without a guardian be held legal and binding? On this issue opinion of Muslim Jurists have been divided into four as follows:

The first group opines that guardian is one of the conditions of the validity of the marriage contract. This opinion is attributed to Imam Ali Bn Abi Talib, Umar Bn Khattab, Bn Mas'ud, Abu Huraira, Sayyidina Aisha, Imam Malik, Imam Shafi'i, Ahmad Bn Hambal and others. They buttressed their position with following:

“When ye divorce women, and they fulfill the term of their (iddat), do not prevent them from marrying their former husbands...”¹³¹

¹²⁷ Supra note 2, P70

¹²⁸ ibid

¹²⁹ Supra note 9 P 147

¹³⁰ ibid

¹³¹ Q2:232

They opine that the instruction in the verse is directed to the guardians. They contended that if the guardians have no authority at this perspective they would not have been refrained from preventing their ward that may like to go back to their former husbands.¹³²

The group equally relies on the verse where Allah the Most High says:

“...Nor marry your girls to unbelievers until they believe a slave who believes is better than an unbeliever...”¹³³

On this verse they opine that the verse announces a restriction to the guardian from marrying their wards to unbelievers until they believe. This also establishes their authority on their wards otherwise they would have not been restricted to conduct such marriage. ¹³⁴

The second group is of the view that guardianship is not among the conditions of marriage. This opinion is attributed to Abu Hanifa, Al Sha’abi and others. They opine that it is permissible for a woman to contract her own marriage without any guardian if it is to an equal to her in social status. They buttressed their stand with verse where Allah says:

“...there is no blame on you if they dispose of themselves in a just and reasonable manner...”¹³⁵

According to the group the verse permits woman to contract her own marriage. Similar situations where Qur’anic verse assigns to woman the discharge of their affairs are used as proofs to their claim.

The third group opines that guardianship is among the conditions of validity of marriage if the ward is a virgin. But if she is a matron the guardianship is not condition. This opinion is attributed to Zahiri School, and they supported their position with hadith mentioned in page 31, foot note 98.

Finally the fourth group opines that the guardianship is complimentary to the contract and its being missing cannot invalidate the marriage. This opinion is

¹³² Supra note 126, p 6

¹³³ Q2:221

¹³⁴ Supra note 126, p 6

¹³⁵ Q2:234

attributed to Qasim of Maliki School; they contended that the provision of guardian is a recommended act.¹³⁶

Islamic law arranges the order of hierarchy to follow in assuming the role of guardian in marriage. Top on the list is the son followed by the grandson. Next to them is the father who takes precedence over her germane brother.¹³⁷ In the case of minors, insane or virgin, the authority of guardianship vested on the father or nearest male relative.¹³⁸ It is to be noted that *Ibn Rushd* says that *Imam Malik* gives priority to the father over the son when it come to issue of guardianship.¹³⁹

It is important to note that according to custom and tradition in Nigeria it is difficult for the son to act as *wali* or marriage guardian in the presence of his father without his father's permission.

There are two (2) types of marriage guardian and they are *waliy mujbir* and *ghair mujbir*.¹⁴⁰

Waliy mujbir : is a guardian who has the power of *Ijbar*. *Ijbar* is the right of guardian to decide whom his ward should marry with or without her consent.¹⁴¹

Waliy ghair mujbir: simply means marriage guardian who has no power of *Ijbar*. He is a guardian who represents a woman at the making of her marriage contract but after her complete consent has been sought and obtained.¹⁴²

¹³⁶ Supra note 126, p 10

¹³⁷ Supra note 9, 148

¹³⁸ Supra note 95

¹³⁹ Supra note 36 page 50

¹⁴⁰ Supra note 57, P 47

¹⁴¹ Ibid

¹⁴² Ibid

According to *Imam Malik*, *Wali Mujbir* can be a father or his executor that is testamentary guardian. The executor cannot give out that daughter in marriage unless with *mahr* of her equal.¹⁴³

Imam shafi'i, rejects issue of testamentary guardian as **waliy**, and opines that **wali mujbir** is limited to the father and father of father only.¹⁴⁴ The father may impose his power of **ijbar** on his under mentioned daughters:

1. A woman who has never married i.e. a virgin daughter, it does not matter whether she is minor or an adult. It also makes no difference whether she is still virgin or she has lost her virginity as a result of fornication or any other cause.¹⁴⁵
2. A daughter who has ceased to be a virgin as a result of a valid marriage but there was separation as a result of death or divorce before she attains the age of puberty.¹⁴⁶
3. A virgin whose marriage is contracted and she remains a minor while she has not spent up to one year in the matrimonial home.¹⁴⁷
4. His adult daughter married or not, adult or minor who is an insane.¹⁴⁸
5. The father may impose his power of **ijbar** on his son if there are some benefits.¹⁴⁹

It should be noted that the right of the father in his role as **waliy** (guardian) to decide whom his daughter should marry does not allow him to compel her to marry man who suffers from diseases that affect reproductive organ system¹⁵⁰ and also sexually transmitted such as HIV etc

h. Marriageable Age

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Supra note 74

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Supra note 57

¹⁵⁰ Supra note 74

The issue of marriageable age has generated controversy and debates in Nigeria, and also among Muslim scholars around the globe. What is regarded marriageable age differs, and marriage of a minor is quite common among Muslim communities. In most of Muslim communities when opportunity arose to make an advantageous arrangement through marriage, it was taken up regardless of the age of the intended couple, and the practice of child marriage was also fortified by the desire of Muslims to ensure that girls are protected by marriage from immorality. And this is traced from the holy prophet (PBUH) who married Aisha (R.A) at the age of six and taken her to live with him when she was nine or ten.¹⁵¹

Islam has laid down no age limit for puberty, for it varies with countries and races due to climate, heredity, physical and social conditions. Those who live in cold region attain puberty at much later age as compared with living in hot regions.¹⁵²

The four *sunni* Imams agree that the minors may be contracted into marriage by their guardians. This view is based on the *hadith* where Aisha reported that Allah's Messenger married her when she was a minor.¹⁵³ However, some Jurists of *Hannafi* School, such as Imam Ibn *Shubramah* and *Abu Bakr Asim* have forbidden the contracting of marriage of minor. They argue that if marriage contract had been lawful before the minors attaining the age of puberty there could be no need of the verse where Allah the Most High said:

“Make trials of orphans until they reach age of marriage; if then find sound judgment in them; release their property to them...”¹⁵⁴

The other argument advanced against the lawfulness of the minor's marriage is that a marriage is based on necessity and a minor is under no necessity for contracting marriage. The purpose of marriage contract is the fulfillment of natural passion and also lawful procreation. The minor, has no power of

¹⁵¹ Supra note 95, p 62

¹⁵² Supra note 1, P 353, foot note 2.

¹⁵³ Supra note 1, hadith no 1422

¹⁵⁴ Qur'an 4:6, Translated by Abdullahi Y. Ali

carrying either of the two purposes, and is under no necessity for contracting marriage.¹⁵⁵

According to Imam Malik, Imam Shafi'i, Imam Abu Hanifa and many other Jurists of Iraq and Hejaz, when the girl attains puberty she has every right to get dissolution of marriage.¹⁵⁶

According to Imam Shafi'i marriage in childhood is not something appreciable. It was under exceptional circumstance that Sayyidina Aisha was married to the Prophet (PBUH). Like all acts of the holy Prophet (PBUH) even this marriage had a divine purpose behind it.¹⁵⁷

While other jurists who are convinced with child marriage; rely besides the tradition relating to Aisha, on the following verse of the holy Qur'an, Allah the Most High says:

“Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubt, is three month, and for those who have no courses (it is the same): for those who are pregnant, their period is until they deliver their burdens: and those who fear Allah, He will make things easy.”¹⁵⁸

According to them, the above verse lays down the period of idda of those divorced women whose menses stopped due to advanced age, as well as those whose menses due to minority have not yet commenced. They further contend that the legal basis of and the occasion for a term of probation arises only because of the valid marriage contract. If the marriage contract of a child or minor was invalid there would not have been any rationale behind indicating the term of probation after divorce in the case of minor (wife)¹⁵⁹

¹⁵⁵ Supra note 36, p 184

¹⁵⁶ Supra note, p 35, foot note 2

¹⁵⁷ ibid

¹⁵⁸ Q65:4

¹⁵⁹ Supra note 36 p 185

Child marriage has now been forbidden absolutely in some countries like Pakistan and India,¹⁶⁰ and they have legislated to provide minimum age of marriage. Example minimum age of marriage in Pakistan is 18years for the male and 16years for the female, while in India 21years for the male and 18years for female.¹⁶¹

However in Nigeria even though the Child Right Act has been introduced, and the provisions of sections 21, 22, 23 and 31 of the same Act provide for the minimum age of marriage, but such Act did not see the light of the day. Because the 1999 Constitution empowers the National Assembly to promulgate law only regarding to the formation, annulment and dissolution of marriage other than marriages under Islamic law.¹⁶² Based on this Muslims are still following the basic position of Islamic Law in relation to the marriageable age. For those who frown upon the idea of child marriage in Nigeria, it is important to note that child marriage has been well endorsed throughout the world just recently, in California the legal age for marriage is 12years old,¹⁶³

i. Marriage must not be on Temporary Basis

Marriage must be intended to be a permanent life union. Hence; any condition or stipulation by which the parties seek to set a time limit to their union render the whole contract nullity. Temporary marriage is a contract between man and a woman to enter into a marriage contract for a specified period of time. The man in that kind of marriage must agree to pay the wife certain amount for her agreement, no witness to the contract and the woman cannot inherit the man, although children have normal rights of legitimacy.¹⁶⁴

j. Degree of prohibition of marriage

¹⁶⁰ Supra note 96 p62

¹⁶¹ Supra note 51 p 30

¹⁶² Schedule II, Part I, Item 61 of the 1999 Constitution.

¹⁶³ ibid

¹⁶⁴ Supra note 95, p 74

The capacity to marry requires that there should be no legal disability or bar to the union of the parties. They should not be within the prohibited degrees or so related to or connected with each other as to make their union unlawful.

Marriage prohibitions are divided into (2) permanent and temporary prohibition. Permanent are of three (3) kinds and they are:

1. Prohibition on account of consanguinity
2. Prohibition on account of fosterage
3. Prohibition on account of affinity

1. **Prohibition on Account of Consanguinity** – this prohibition is founded on account of blood relationship (*Nasab*). There are certain blood relations which are considered prohibited in Islam as long as marriage is concerned. Therefore, marriage with mother, daughter, sister, aunt, and niece, however high or low in decree is absolutely prohibited.¹⁶⁵ It is prohibited to contract marriage with ones illegitimate child or his or her descendents.¹⁶⁶ But jurists differ on this, according to Imam Malik this relationship does not create prohibition considering the fact that no child can be attached to the father unless there is a legal relationship. They buttressed their position with verse where Allah the Most High said:

“Prhibited to you (For marriage) are: your mothers, your daughters, your sisters, your father’s sisters, your mother’s sisters, your brother’s daughters, your sister’s daughters...”¹⁶⁷

Therefore based on the above verse, jurists are of the opinion that a man is not allowed to marry his ascendant how high so ever as well as his descendent how low so ever.

¹⁶⁵ Supra note 36. P 84

¹⁶⁶ Ibid

¹⁶⁷ Q4:23

2. **Prohibition on Account of Fosterage:** This prohibition arises out of fosterage that is the marriage with foster mother and foster sisters is absolutely prohibited, and the prohibition by fosterage is permanent like that of consanguinity¹⁶⁸ This is based on the following saying of the holy prophet:

“For foster suckling relations make all those things unlawful which are unlawful through corresponding birth relations”¹⁶⁹

Thus, a man is unlawful to marry his foster mother and also his foster sister by reason of clear text of the holy Qur'an where Allah says:-

“Forbidden to you (your marriage) are ... your foster mothers (who gave you suck), foster sisters...”¹⁷⁰

From the above verse, the Qur'an mentions only foster mother and foster sisters as forbidden, the holy Prophet included all other woman who are unlawful through blood relationship.¹⁷¹ Therefore man is prohibited from marrying a woman who suckled him during his childhood; because she is in the position of his mother. Thus prohibition also applies foster mother's mother, the mother of her husband, her sister and her husband's sister and her female descendents how low so ever.¹⁷²

3. **Prohibition on account of Affinity:**

The prohibition of marriage on ground of affinity has been established by the holy Qur'an where Allah the Most High says;

¹⁶⁸ Supra note 36 p84

¹⁶⁹ Sahib Bukhari, hadith no 36 p 24.

¹⁷⁰ Q4:24

¹⁷¹ Supra note 9 P 158

¹⁷² Supra note 9, p 158.

Forbidden to you (for marriage) are ... your wives mothers, your step daughters under your guardianship, born of your wives to whom you have gone in, but there is no sin on you if you have not gone in them (to marry their daughters), the wives of your sons who (spring) from your own loins and two sisters in wedlock at the same time except for what has already passed verily Allah is of forgiving most merciful.¹⁷³

From the above verse, the following persons are prohibited by reason of affinity wife's female ascendant how high so ever and descendants how low so ever, If the marriage has been consummated male ascendants or descendants wives.

Temporary Prohibition

Married woman, this is governed by the verse of holy Qur'an where Allah the most high says;

Also (prohibited are) women already married except those whom your right hand possess. Thus hath Allah ordained for you...¹⁷⁴

Therefore based on the above verse women that are already married are prohibited for a man other than their husband.

I. A woman serving iddah

Contracting marriage by a woman after separation from her husband as a result of divorce or death while she has not completed the mandatory waiting period (Iddah) is known as marriage during iddah. Such marriage is null and void. This is based on the verse of the holy Qur'an where Allah says;

"There is no blame on you if ye make an indirect offer of betrothal or hold it in your heart. Allah knows that ye cherished them in your hearts: but do not make a secret contract with them except that you speak to them in terms

¹⁷³ Q4:23

¹⁷⁴ Q4:24

honorable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah knoweth what is in your hearts, and take heed of Him; And know that Allah is oft forgiving. Most forbearing.”¹⁷⁵

II. A Muslim Man and Woman Not Allowed Marrying a Non Muslim

Muslim man is prohibited to marry polytheists (Mushrikah), but is permitted to marry a Kitabiyah (woman from the people of the book (Ahlul Kitab) which is usually interpreted as being a woman from Jewish or Christian communities.¹⁷⁶ This is based on the provision of the holy Quran where Allah the most high says:

“Do not marry unbelieving woman till they believe: a slave woman who believe is better than disbelieving woman, eventhough she allure you...”¹⁷⁷

In another verse Allah the most high says:-

... (Lawful to you in marriage) are not only chaste women who are believers, but chaste women among the people of the book, revealed before your time....”¹⁷⁸

The above concession of marrying Ahlul Kitab is only applicable in the case of Muslim man. A Muslim woman is prohibited from marrying anybody except a Muslim. This is based on the provision of the holy Qur'an where Allah the most high says:

“O you who believe! When there come to you believing women refugees, examine (and test) them, Allah knows best to their faith , if ye ascertain that they are believers, then send them not back to the disbelievers. They are not

¹⁷⁵ Q2:235

¹⁷⁶ Supra note 95, p 63.

¹⁷⁷ Q2:221

¹⁷⁸ Q5:5

***lawful (wives) for the disbelievers nor are the disbelievers
lawful (husbands) for them¹⁷⁹***

Ibn Abbas was asked what if a pagan or a Christian woman becomes a Muslim while she is the wife of non Muslim under the protection of a Muslim government. He said if a woman embraces Islam before her husband by short while, she will by no means remain as his wife.¹⁸⁰

Ata was asked about a woman from pagans who had a treaty with Muslims: she embraced Islam, and during her Iddah, her husband embraced Islam too could he retains her as his wife? He answered No, unless she is willing to re-marry him with new Sadaq.¹⁸¹ And according to Mujahid if the husband embraces Islam during the iddah of his wife, he can re-marry her.¹⁸²

III. *Marrying Two Sisters Simultaneously*

Marrying two sisters at the same time, or the woman and her maternal or paternal aunt is not allowed. However when the wife has died, or divorced, her husband may marry her sister or her aunt. Allah the most high says:

***... and two sisters in wedlock at the one and same time,
except for what is past; for Allah is oft forgiving most
merciful.¹⁸³***

As mentioned earlier the above verse prohibited joining two (2) sisters. Then the Prophet (PBUH) was reported to have said:

***“One should not bring together a woman and her father’s
sister, nor woman and her mother’s sisters in marriage”¹⁸⁴***

¹⁷⁹ Q60 v. 10

¹⁸⁰ Sahih Bukhari, Chapter 20, P 157.

¹⁸¹ ibid

¹⁸² ibid

¹⁸³ Q4 v 23

It should be remembered that father's sister includes the sister of grandfather and great grandfather and mother's sister include grandmother's sister or even great grandmother's sister.¹⁸⁵

There is a consensus among Muslim Jurists that the two women with this relationship cannot be combined in marriage. The wisdom behind it is that this relation has the sweetness and sanctity of mother and daughter and should in no case be marred with spirit of rivalry that is found among co-wives.¹⁸⁶

It is prohibited for a man to marry a sister of his divorced wife if the divorce is revocable until the Iddah expires. Imam Abu *Hanafi* and Ahmad Ibn *Hanbal* are of the view that such marriage is void even if the divorce is irrevocable, while Imam *Malik* and *shafi'i* are of the view that he can marry the sister during the *Iddah* if the divorce is irrevocable.¹⁸⁷

IV. ***Woman Divorced for the Third Time***

It is not permissible to marry a woman who has been divorced for the third time until she is married to another man and he has a sexual intercourse with her, and then abandons her, and he complete her iddah, then it becomes lawful to him. This principle is based on the verse where Allah the Most High says:

“A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness...”¹⁸⁸

In another verse Allah the most high says;

¹⁸⁴ Sahih Muslim, hadith no 1408, P 347.

¹⁸⁵ Ibid, see page 347 foot note 1.

¹⁸⁶ ibid

¹⁸⁷ Supra note 34

¹⁸⁸ Q2: 229

“So if a husband divorces his wife (irrevocably) he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they re-unite...”¹⁸⁹

In a related *hadith* reported by Aisha (RA), the Messenger of Allah said: “Do you wish to return to Rifa’a. You cannot do it until you have tasted his sweetness and he (*Abdul-Rahman*) tasted your sweetness...”¹⁹⁰

Therefore based on the above cited authorities woman who is divorced for the third time cannot re-marry the husband until she marry to another man and the marriage is consummated, and thereafter if there is separation either by death or by divorce, they can re-unite again.

V. Marriage in a State of Ihram

A person in the state of Ihram can neither contract his marriage nor contract it for another person. This is based on the *hadith* where Prophet said:

“A Muhrim must neither marry, nor arrange the marriage of another one, nor shall he make proposal for marriage.”¹⁹¹

However, according to some Jurists it is permissible for a Muslim to enter into a contract of marriage with a woman who is in the state of ihram.¹⁹² They buttressed their position with *hadith*, where *Ibn Abbas* reported that:

“Apostle of Allah (SAW) married Maimuna in the state of ihram”¹⁹³

But the predominant view is that Prophet (PBUH) forbids it. Based on this some Jurists are of the view that one must avoid marrying in the state of

¹⁸⁹ Q2: 230

¹⁹⁰ Sahih Muslim, hadith no 1433, P 369.

¹⁹¹ Sahih Muslim, hadith no 1409

¹⁹² Supra note 36, P 177

¹⁹³ Sahih Muslim, hadith 1410.

ihram; but if it becomes indispensable, one is allowed to marry but should not cohabit it in that state.¹⁹⁴

Finally, there is consensus of opinion that the cohabitation by a man with his wife during the state of *Ihram* is prohibited.¹⁹⁵

VI. ***Woman Who Involved in Li'an (Imprecation)***

Li'an arises when the husband accuses his wife of adultery and he does not have evidence to prove such accusation. He can support the accusation by taking an oath four times, and by calling imprecations upon himself in case of falsehood on his part. Then the wife denies the accusation by taking four oaths, and calls imprecations upon herself in case of falsehood on her part. The marriage is thereby dissolved and the couple can never be re-married to each other.¹⁹⁶ On this point Allah the Most High says:

“ And those who launch a charge against their wives, and have (in support) no evidence but their own,-let one of them testify four times by Allah that he is of those who speak the truth.”¹⁹⁷

In a *hadith* narrated by *Abdullahi*, *Al ansari* man accused his wife of committing Zina (adultery). The Prophet (SAW) made both of them take an oath of *li'an* and separated them from each other.¹⁹⁸

If a dumb man accuses his wife of an illegal sexual intercourse by means of writing, pointing or giving a clear sign, then he is like the one speaks, for the

¹⁹⁴ Ibid, p 349

¹⁹⁵ Supra note 36, p 177

¹⁹⁶ Supra note 77, P 33.

¹⁹⁷ Qur'an 24:6

¹⁹⁸ Sahih Bukhari, hadith no 226, p 172.

Prophet permitted the use of gesture in performing the orders prescribed by Allah.¹⁹⁹

Some scholars are of the view that li'an is not permissible to be carried out through gesture. But if someone expresses his decision to divorce his wife by means of writing, pointing or nodding it is permissible.²⁰⁰

VII. Fifth Wife

Islamic law allows Muslim male to have up to four wives. Therefore a Muslim male should not marry more than four wives at a time.²⁰¹ This is based on the provision of the holy Qur'an where Allah the Most High says:

“if ye fear that ye shall not be able to deal justly with the orphan, marry women of your choice, two or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one or which your right hand possess. That will be more suitable, to prevent you from doing injustice.”²⁰²

Therefore based on the above verse marriage contract with a fifth woman during the subsistence of marriage with four wives is void marriages. And marrying another woman during the iddah of the fourth one where the divorce is revocable is disallowed. *Imam Malik* and *Shafi'i* are of opinion that if the divorce is irrevocable the husband can replace another wife during her *Iddah*, while others such as *Imam Ahmad* holds that she cannot be replaced until on completion of her *Iddah*.²⁰³

VIII. Marriage with a Pregnant Woman

There is a consensus among Muslim jurists on the point that the marriage contract with a woman validly pregnant that is by her husband or master if she

¹⁹⁹ Sahih Bukhari, Chapter 25, P 168

²⁰⁰ ibid

²⁰¹ For more discussion on this issue, see chapter three (3) of this thesis.

²⁰² Q4:3

²⁰³ Supra note 36, p.152

be a slave is void.²⁰⁴ The rationale behind this prohibition is that intercourse with pregnant woman will create difficulties in assigning fatherhood to the offspring and his status in society.²⁰⁵ This prohibition is based on the *hadith* reported by Abu Darda related from the Prophet (PBUH) that he came upon a woman who was in an advanced stage of pregnancy at the door of tent. He (the holy Prophet) said: Perhaps he (the man accompanying her) intends to cohabit with her. They said: yes. Thereupon Allah's Messenger (PBUH) said: I have decided to curse him with such a curse as may go along with him to his grave. How can he own him (the children to be born) and that is not lawful for him, ..

IX. Compatibility in Marriage:

It has been considered as an essential for marriage in some Muslim societies that the husband must be compatible to his wife in term of social status. Literally *Kafa'ah* means equality in marriage.²⁰⁶ It has been discussed by Muslim jurists and there are proponent and opponent of the concept. And even among the proponent there are divergent opinions as to what constitute the element of *Kafa'ah*.

According to Imam Abu Hanifa, the elements are: Islam, lineage (*Nasab*), Freedom, Profession, and character. While according to Imam Malik it is enough for a man to be equal to woman only in piety and freedom from defect.²⁰⁷

Some Jurists disagree with rule of *Kafa'a* on the ground that the holy Qur'an unequivocally states as follows:

“The Believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive mercy.”²⁰⁸

In the past this rule of equality was considered to be of great importance, and the wife relatives were entitled to reject marriage on this ground.²⁰⁹ Equality

²⁰⁴ ibid p.167

²⁰⁵ Sahih Muslim, foot note 2, P 376

²⁰⁶ Supra note 2 p. 84

²⁰⁷ Supra note 36, p 203

²⁰⁸ Q49:10 Translated by Abdullahi Y. Ali.

was required by all schools of thought in a matter of religion, meaning that both parties must be Muslims, though not necessarily following same *madhhab*.²¹⁰

In some Muslim countries equality in marriage is still considered as great importance.²¹¹ However in Nigeria, the application of the rule of *kafa'at* is very rare, but it cannot be denied that social equality in marriage is to some extent essential to the happiness of the spouses.

3. RIGHTS AND DUTIES OF THE SPOUSES

Marriage as a formal binding contract involves rights and responsibilities; therefore in Islam both men and women have rights and duties when they enter into a marriage contract. This is based on the verse of the holy Qur'an where Allah the Most High says;

..... And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree over them and Allah is exalted in power, Wise.²¹²

Therefore husband and wife have an important role to play in the formation of the family. This is why Islamic law has paid special attention to their functions, rights and duties. Some of these rights and duties are as follows:

Maintenance (Nafaqa) – This is one of the fundamental rights of woman in a marriage contract. It is the duty of the husband to support his wife and their children. In legal terminology maintenance (*Nafaqa*) refers to provisions for

²⁰⁹ Supra note 95, p 69.

²¹⁰ ibid

²¹¹ These countries include Egypt, Jordan, Morocco, Syria etc.

²¹² Q2 v. 228

necessities of life to wife in consideration of reserving confining for the husband.²¹³

This duty of the husband to maintain his wife arises out of the following verses of the holy Qur'an.

a. Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.²¹⁴

In another verse, Allah the most high says

Let the women live (in iddat) in the same style as ye live, according to your means, annoy them not, so as to restrict them. And if they are pregnant, then spend (your sustenance) on them till they deliver their burden: and if they suckle you (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf.²¹⁵

Therefore maintenance includes food, clothes, shelter and other things which are necessary for the livelihood and comfort of woman.²¹⁶ If the husband is a stingy, his wife is entitled to take enough from his property to support herself and her children. This is based on the *hadith* of the holy prophet (PBUH) where the wife of a man named Abu Sufyan told the Prophet that although her husband was rich, he did not give her sufficient to live on. The prophet told her

²¹³ Supra note 114 p. 256

²¹⁴ Q65 v 7

²¹⁵ Q 65 v 6

²¹⁶ Supra note 36, p 258

she could take enough for their living expenses from his funds without his consent.²¹⁷

The grounds of maintenance under Islamic law are three, and they are marriage, consanguinity and ownership. Therefore the husband's liability to support his wife is created by marriage. The other ground is of consanguinity which makes it obligatory upon the parents to maintain their children and aged parent. Then the third ground of maintenance slavery,²¹⁸ a man who owns a slave has the duty to maintain him by feeding, housing and clothing according to his ability.²¹⁹

However; according to Muslim Jurists, the husband, is not liable to maintain his wife in the following circumstances.

- a. Where the wife voluntarily foregoes or gives up her right.
- b. If a wife is disobedient, such as going out without the husband's permission, denying him his conjugal right etc.

However, the wife will not be held disobedient if he leaves her matrimonial home as a result of the husband's ill treatment.²²⁰

- c. The wife is not entitled to maintenance if she is travelling without her husband's permission, except if she is travelling with a *Muharram* for Hajj, for the first time.²²¹
- d. When the wife is in prison, but in the case her husband's imprisonment she shall not be deprived of her maintenance.²²²

B. **HOUSEHOLD AND CHILDREN PROTECTION**

Taking of the household and children is normally regarded to be the primary responsibility of the wife; the husband is equally enjoined to assist his wife in

²¹⁷ Supra note 95 p 77

²¹⁸ Supra note 36 p.259

²¹⁹ ibid

²²⁰ Supra note 95 p.77

²²¹ Ibid

²²² Ibid

so doing. The Prophet Peace Be upon Him used to mend his own clothes and help his wives in the house.²²³

C. *SEXUAL RELATIONSHIP*

Both husband and wife are entitled to a satisfactory sexual relationship with each other. The spouses should never refuse each other, since this intimacy is only permitted to married couples. This is based on the *hadith* reported by *Abu Huraira* where Prophet said:

“By Him in whose hand is my life when man calls his wife to his bed, and she does not respond, the one who is in heaven is displeased with her until her husband is pleased with her.”²²⁴

The jurists unanimously agree that a wife is at fault if she refuses to sleep with her husband. And *Mauduodi* is even of the view that it is form of cruelty for a man to deprive his wife a sexual relations.²²⁵ So husbands and wives by entering into marriage relation secure each other’s chastity and comfort. This is based on authority where Allah says:

“Permitted to you on the night of the fasts, is the approach to your wives. They are your garments and ye are their garments...”²²⁶

D- *MUTUAL CARE AND CONSIDERATION*

Spouses should not mal-treat each other, and be patient with each other even if you dislike something from each other, the holy Qur’an says;

“O ye who believe! You are forbidden to inherit women against their will. Nor should you treat them in harshness....”²²⁷

²²³ Supra note 95, p79

²²⁴ Sahih Muslim, hadith no 1436R2, p 372.

²²⁵ Abul, Aala M.” The Laws of Marriage and Divorce’s Islam, 1982 p.17

²²⁶ Q2: 187

If the wife is disobeying her husband's instruction the holy Qur'an is clear that the husband should admonish her; if this fails, then he may separate from her in bed: then he may take step of beating her (but lightly, if it is useful)²²⁸

A dutiful wife should be careful to please her husband as much as she can. She should not allow into the house anyone her husband does not approve of, she should not obey anyone who contradicts his order unless his orders are contrary to Islam, and she should not refuse to share his bed.²²⁹ Sexual act is the right of the husband and the woman cannot deny him this right without any valid reason for it. If the husband is denied this opportunity, there is likelihood of his going astray and resorting to immoral practices for his sexual satisfaction. The same is the right of the woman also.²³⁰

E. INHERITANCE

Husband and wife have the right to inherit each other. This right emanates from the wording of the holy Qur'an, where Allah the Most Merciful says;

“In what your wives leave, your share is a half, if they have no child, if they leave a child, you get a fourth; after payment of legacies and debt. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth, after payment of legacies and debt...”²³¹

F. GUARDING SECRET

²²⁷ Q4:19

²²⁸ Q4:34

²²⁹ Supra note 95, p78

²³⁰ Sahih Bukhari, Chapter 20, P372, foot note 1

²³¹ Q4:12

It is the duty of the wife to guard the secret of her husband, therefore it is the right of men over his wife as described by Allah the Most High thus:-

.... and guard in the (husband's) absence what Allah would have them guard...²³²

A woman is a man's garment just as a garment is closest to man, so is a woman close to him. A husband and wife are companions to each other, and they may come to have access to the secret of each other. Therefore Islamic law makes it binding upon spouses to guard the secret of each other, and in no circumstance they may tell them to others. This is based on the hadith reported by Abu Huraira, where Prophet (PBUH) said:

"The most trusts in the sight of Allah on the Day of Judgment is that a man goes to his wife and she goes to him (and the breach of this trust is) that he should divulge her secret"²³³

CHAPTER THREE

POLYGAMY IN ISLAM

INTRODUCTION

Polygamy is a form of marriage recognized in **Islam**. It is a practice of having more than one wife at a time. This practice has been with society from time immemorial. Islam did not invent the system of polygamy; it existed long before the coming of the Islam. When Islam came the system was assimilated, modified and reformed. First of all Islam put a limit to the number of wives that person can have at one time. Equally Islam put stringent condition on a person who wanted to marry second wife, to the extent that he must be able to maintain the family and deal with both on the basis of justice and fairness.

By so doing, Islam curb the pre-Islamic form of marriages, the situation that paved way to a man to have many wives and also a revolving door policy where

²³² Q4:34 Translated by Abdullahi Y. Ali, P 92

²³³ Sahih Muslim, hadith no 1437R1, P 372

two or three were divorced, they will be replace with others in few month. This sort of barbaric was what Islam tried to eliminate through making manageable arrangement that was subject to limitations, and equally requiring equal treatments among the wives.

Islam also tried to regulate polygamy as a practice that has social benefit in many situations, and elevate the status of man and the woman.

MEANING OF POLYGAMY/POLYGyny

Polygamy simply means having more than one mate at the time,²³⁴ Whereas, Polygyny is defined as state or practice of having several wives at the same time.²³⁵ However, the two are use interchangeable by the contemporary jurists to mean the state of having more than one wife.

The holy *Qur'an* allows men to marry two, three or four wives, but if they fear that they will not be able to deal with them justly, they should go for one.²³⁶

Therefore, polygamy is a right or privilege given only to man. Islam permitted women to have only one husband at a time.²³⁷

LEGAL BASIS FOR POLYGAMY

The main authority permitting the practice of the polygamy by a *Muslim* revealed after the battle of *Uhud*, in which many *Muslims* were killed leaving widow and orphans, whom their due care remained on the Muslim survivors.

Allah the most high says:

“If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four, but if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice.”²³⁸

²³⁴ The New Webster's Dictionary of the English Language International Edition, p 778

²³⁵ Ibid p 779

²³⁶ Supra note 3 Q4:3

²³⁷ Supra note 9 p 172

²³⁸ Supra note 3 P11

The above verse allows man to marry two, three, or four wives at a time, and advised to marry one if he cannot deal justly with more than one wife. This mean that the first leg of the verse sets the maximum number of wives that the man is allowed to marry. While the second leg direct a Muslim in case of being afraid of not being able to deal with justice and maintain equality among the wives to marry only one.²³⁹ This clearly indicates that Islam does not encourage all men to marry more than one woman, but such option is permitted to those who can fulfill the condition stipulated by the above verse.

Some Muslim scholars interpret Q4:3 to mean that polygamy is lawful only if there is fear of injustice to the orphans, but it is forbidden if the husband is not sure of treating his wives equitably.²⁴⁰

They also interpret the second verse i.e. Q4:129 to mean that the men will not be able to achieve equity among his wives; therefore polygamy is unlawful since equity is the condition precedent.²⁴¹

This interpretation seems to have been associated with two factors; the first one is that the institution of polygamy has been abused and displaced. While the second factor is how Muslims are becoming increasingly sensitive to western criticism of polygamy.²⁴²

However, the classical position which is predominant among the contemporary scholars is that, that permissibility of polygamy is established by the Qur'an, *sunnnah* of the holy Prophet, and consensus of the *Muslim* jurists. And equally polygamy was initially permitted to prevent injustice to women, particularly female orphans.²⁴³

There is a consensus among the Muslim Scholars that; this verse limits the number of wives, and prohibits the keeping of more than four wives at the same time.²⁴⁴ The interpretation of Q4:3 borne out of the tradition of the holy Prophet (PBUH) where it was narrated by the Imam Ahmad on the authority of

²³⁹ Supra note 38 p 92.

²⁴⁰ Supra note 2 p 118

²⁴¹ ibid

²⁴² ibid

²⁴³ ibid

²⁴⁴ Supra note 9 page174

Ibn Umar that *Ghailan Ibn Salamah Ath Thaqafi* embraced Islam, and he had ten wives, thereupon the Messenger of Allah (PBUH) asked him to choose only four out of them (to remain as his wives) and then divorce the others.²⁴⁵ Equally *Sayyid Abul Ala Maududi* Tafsir Ibn Kathir cited the case of *Naufal bn Mu'awiyah* who was ordered by the Holy Prophet, to divorce one out of his five wives when he embraced Islam. The above *hadiths* clearly show how the companions with more than four wives embraced Islam. They choose four each and divorced the remaining. The *hadith* interpret Q4:3 that the number of wives in polygamy is limited to four only.²⁴⁶

It is the unanimous view among the Muslim Scholars that it is impermissible to anyone except for the Messenger of Allah (PBUH) to join in marriage more than four wives at a time.²⁴⁷ However, there is a sect amongst the Shiites who makes it permissible for one to marry up to nine (9) wives. This group interpret the word WA to mean AND instead of OR, therefore the group allows man to marry two, three and four, when added together you may have nine. But, this was uniquely particular only to Prophet (PBUH).²⁴⁸

CONCEPT OF JUSTICE IN POLYGAMY

As mentioned earlier Polygamy in Islam is permitted with certain limitation put on it. The holy Qur'an gives condition for the practicing of polygamy, the condition is that the man getting married to two or more wives must be able to do justice among them.²⁴⁹ Muslim jurists are in agreement that justice among the wives is the condition precedent for the practice of polygamy. However they differ on what constitute justice in polygamy.

²⁴⁵ Ibn Kathir, A.H, The Exegesis of the Holy Qur'an Translated by Muhammad Al Shariff (2006) Vol II, Daral kotob Al-ilmiyah, Lebanon page 7.

²⁴⁶ Maududi S.A, Tafhim Al Qur'an-The Meaning of Qur'an available at www.englishtafsir.com last visited on the 20th August, 2015

²⁴⁷ Ibid page 6-7

²⁴⁸ Ibid page 7

²⁴⁹ Supra note 311

Justice simply means fairness, just behavior, or the quality of being fair and reasonable.²⁵⁰ According to *Tanzilul-rahman* it means “equality or equity” which is maintaining equality of treatment among the wives.²⁵¹

Muslim Jurists are in agreement that, the justice referred in Qur’an verses dealing with polygamy relate to confidence on the part of man that he will be able to deal equitably with his two or more wives in a matter of food, drink, housing, clothing, other expenses, as well as in the division of his time between the wives.²⁵² However, some Scholars have misinterpreted the verses in order to support monogamy and the abolition of polygamy. *Allah* the most high says

“Ye are never able to do justice between wives even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in air). If ye come to a friendly understanding, and practice self restraint, Allah is oft forgiving, most Merciful.”²⁵³

Ubaydah Assalmani and *Ibn Abbas* (R.A) stated that the equality spoken in the above verse refers to love and affection.²⁵⁴

From the above verse Allah has made it clear that the husband cannot keep equality between two or more wives because they themselves cannot be equal in all respects. It is too much to demand from husband equal treatment to a beautiful and ugly wife, to a young wife and to an old wife, to healthy wife to an unhealthy wife. These and like things naturally make husband more inclined toward one wife than toward the other. In such cases Islam does not demand equal treatment in affection and love. What it only demands is that wife should not be so neglected.²⁵⁵ The fact that man has no real control over love and affection is supported by number of *Qur’anic* verses:

²⁵⁰ Oxford Dictionary available at www.oxforddictionaries.com last visited on the 20th September, 2015.

²⁵¹ Supra note 32 p 92.

²⁵² Al Qaradawi, Y. Halal and Haram in Marriage (Articles and Essays) available at www.zawaj.com last visited on the 13th September, 2015.

²⁵³ Q4:129

²⁵⁴ Dr Bilal P, Polygamy in Islam, International Publication House, Riyadh, 2005 p 63

²⁵⁵ Maududi S.A, Tafhim Al Qur’an-The Meaning of Qur’an available at www.englishtafsir.com last visited on the 20th August, 2015.

“O ye believe! Give your response to Allah and His Messenger, when He calleth you to that which will give you life; and know that Allah cometh in between a man and his heart, and it is He to whom ye shall (all) be gathered”²⁵⁶

In another verse Allah the Most High says:

“And (moreover) He hath put affection between their hearts: not if thou hadst spent all that is in the earth, couldst thou have produced that affection, but Allah Hath done it: for He is exalted in might, Wise”²⁵⁷

An explanation of this fact can be seen from the *Hadith* narrated by Ibn Abbas (RA) in which he said:

“Umar entered upon Hafsa and said, O my daughter! Do not be misled by the manners of her who is proud of her beauty because of the love of Allah’s Messenger (PBUH) on her.” By her he meant Aisha (RA) Umar added “then I told that to Allah’s messenger (PBUH) and he smiled (on hearing that)”²⁵⁸

In another *Hadith* Aisha (RA) stated:

“Allah Messenger used to divide his time equally among us and would pray, ‘O Allah, this is my division in what I possess, so please do not hold me to blame for the division of affection which only you control”²⁵⁹

From the above cited authorities, it is clear that love and affection is destined by Allah and cannot be forced to appear where Allah has not willed it. However man has been instructed to divide his time and wealth equally among his wives.

TIME DIVISION

²⁵⁶ Q8:24

²⁵⁷ Q8:63

²⁵⁸ Supra note 8 hadith no 145 p 108

²⁵⁹ Sunan Abi Dawud, (Eng Translation), vol 2, page 572.

The division of time according to Islamic law is generally made according to the nights, due to the fact that night is usually the time which mankind relaxes from work and take rest.²⁶⁰ This is based on the *Qur'anic* verse where Allah the most High says:

“...He makes the night for rest and tranquility, and the sun and moon for the reckoning (of time)...”²⁶¹

Thus a man married to more than one wife should divide the nights among his wives while the day is his to earn a living.²⁶² Man should divide his time equally among his wives, so if he spends one, two night with his first wife, he must spend same amount of time with each of his wives. The fact that days are counted as well as nights is based on the *hadith* in which *Saudat* was reported to have given her day to *Aisha* (RA).²⁶³

A man who has four wives must allot to each wife one night out of four or some multiple of the ratio mutually agreed upon.²⁶⁴ Equal division of time must be made for women unable to have sex as a result of sickness, menstruation and woman whose menstrual cycle ceases.²⁶⁵ Husbands are also required to divide their time equally even if they themselves are sick as long as the wives demand it. This is based on the *hadith* where Allah's Messenger visited all of his wives in turn when he was sick and would ask, where shall I be tomorrow?²⁶⁶

CONJUGAL RIGHTS

This right is compulsory to be shared among the wives unless the husband has a valid reason for abstaining. This is based on the *hadith* where Prophet (PBUH) said:

“O Abdullah! Have I not been informed that you fast all the day and stand in prayer all nights? I said yes, o Allah's Messenger!

²⁶⁰ Supra note 254p 65

²⁶¹ Q6:96

²⁶² Q 78 v 11 where Allah says “And made the day as a means of subsistence”

²⁶³ Supra note 8 hadith no 104.

²⁶⁴ Supra note 354 p 68

²⁶⁵ Ibid p 69

²⁶⁶ Supra note 8 p 107 hadith no 144.

He said “Do not do that! Observe the fast sometimes and also leave them (the fast) at other times, stand up for the prayer at night and also sleep at night. Your body has right over you, your eyes have a right over you and your wife has a right over you”

Therefore, the wife has right to enjoy the complete sex considering the fact that Allah the most high described men and women as protective garments for one another; therefore it is unfair for a man to deny wife if she need him.²⁶⁷

A husband may go to all his wives and has sexual intercourse with them in one day. This is based on the *hadith* where *Anas bn malik* reported that Prophet (PBUH) used to have sexual relation with all his wives in one night, and at that time he had nine wives.²⁶⁸

Furthermore a man may take the permission of his wives so as to stay in the house of one of them and treated during sickness, and if he is allowed by them they have no right to reclaim their lost tunes.²⁶⁹

TRAVEL RIGHTS

This is another right need to be shared among the wives. When the husband wishes to travel and want to take one of his wives, he can choose among them by drawing lots as all the wives have equal right to travel with him if they wish. This principle is based on the Prophetic tradition narrated by *Aisha* (RA), wherein she said:

“Whenever the Prophet (PBUH) intended to go on a Journey, he drew lots among his wives so as to take one of them along with him...”²⁷⁰

The husband is not required to make up the time spent on the trip for wife or wives who did not travel regardless on the length of the trip. The only exception is where he travels with one wife without drawing lots; in such circumstances he has committed sin and is obliged to make up the time he resided overnight

²⁶⁷ Q2:187

²⁶⁸ Supra note 8 p 108 hadith no142

²⁶⁹ Supra note 8 p 107 hadith no 144

²⁷⁰ Ibid p 103 hadith no 138.

with her on the road.²⁷¹ However, if the husband travel with two wives he has to treat them equally in all aspect that humanly possible.²⁷² If the wife whose lot comes up decides to give her lot to another, she may do so with the permission of the husband.²⁷³

Furthermore, it is allowable for the wives to agree to one of them going without drawing lots because they may give up their rights.²⁷⁴

SPENDING AND CLOTHING RIGHTS

Equality among wives with respect to spending and clothing is not obligatory once the husband has provided each with basic necessities. He does not have to treat his wives equally in spending and clothing if he does what he is required for each of them. Example man who had two wives has the right to give one more than the other with regard to spending and clothing, if the other is financially sound.²⁷⁵

ACCOMMODATION/HOUSING RIGHTS

This is also one of the matrimonial rights of the wife under Islam, this means the husband should prepare for his wife accommodation according to his means. This is based on the Qur'an verse where Allah the most high says:

“Lodge them (the divorced women) where you dwell according to your means”²⁷⁶

It is preferable that each wife to have separate accommodation in which the husband visits her.²⁷⁷ A husband should not accommodate his wives in the same house unless there is an agreement to that effect, because living together constitutes a hardship on them due to the natural jealous which are likely to arise among them.²⁷⁸

²⁷¹ Supra note 254 p.81

²⁷² ibid

²⁷³ ibidS

²⁷⁴ This is based on the hadith where one of the wives of the Prophet gave up her turn to another.

²⁷⁵ Fiqh of the Family-Plural Marriage and Fair Treatment of Co wives available at www.islamqa.com last visited on 23rd September, 2015.

²⁷⁶ Qur'an65 v 6

²⁷⁷ Supra note 254

²⁷⁸ Supra note 254 p.80

It is permissible for the husband to have separated living quarters for himself as well as his wives and each wife visit him during her respective day and night.²⁷⁹

GIFTS

Personal allowance are not a requirement according to the Islamic law; however, if the husband decides to give one of his wives an allowance, he should give the others same.²⁸⁰ Similarly, gifts should be balanced. If the husband buys earring for one and the other has no desire for earrings, he should give cost of the earrings to her or buy her something else of equivalent value.²⁸¹

It should be noted that spending for the children is not included in the division of wealth among the wives.

CLASSICAL SCHOLARS STAND POINTS ON POLYGAMY

Polygamy generated heated debates in Islamic law discourse. Even though the status of polygamy is clearly stated in the primary sources of *shari'ah*, yet its practice have frequently caused disharmony in our societies. Notwithstanding most earlier Jurists did not challenge polygamy as a legal conjugal relationship, they based their argument for polygamy on the authoritative text, and did not consider the consequences of polygamy felt by women in their real lives as a cogent reason to question its validity.²⁸² In fact, it is only in the recent time that some modernist *Muslims* and feminists appealing to redress the status of polygamy because of its negative impacts on the women.

Some scholars are of that polygamy is the general rule while monogamy is the exception. They buttressed their position with Q4:3 which allows Muslim man to marry two, three and four except if he cannot do justice among them, then he can marry one.

²⁷⁹ Ibid p 80

²⁸⁰ Supra note 254 p 84

²⁸¹ ibid

²⁸² Dr Badawi J.” Polygamy in Islam” available @ www.isqr.org/polgamy.htm, last visited on 2nd October,2015.S

While some scholars view monogamy as a general rule while polygamy is the exception. This group is of the opinion that a man should marry one wife except there is a good reason of marrying more than one wife. Such reasons include fear of injustice to the orphans, or war that caused the demise of men and leaving a large number of widows in the society, illness, barren of the existing wife or inability of the existing wife to perform her responsibilities toward her husband. They further argued that Q4:3 revealed after what had happened in the battle of *Uhud* when Muslim men were killed, leaving behind many widows and orphans.²⁸³ They further argued that Prophet *Muhammad* (PBUH) was monogamous throughout fifteen years of his marriage with *Khadija* (RA), and his plural marriages after her death. According to them a man wants to take second, third or fourth wife should have sufficient income and assets to make financial provision for them. He must be capable of treating them equally, and good reason for wanting to take additional wife, such the first wife is too old, unsoundness of a mind e.t.c and he must obtain the consent of his first wife.²⁸⁴

Dr Badawiy Jamal argues that it is evident that the general rule is monogamy however; permission to practice limited polygamy is only consistent with Islam's realistic view of nature of man and woman and the various social needs, problems and culture variations. There is no doubt the second marriage legally married and treated kindly is better off than a mistress without any legal right or security. There is no doubt that the legitimate child of polygamous father, who enjoys all the rights and privileges of son or daughter, is far better than the unwanted child.²⁸⁵

It is fair to say polygamy may be harmful in many respect. Islam however does not regard polygamy as a substitute for monogamy. Realizing its disadvantages Islam allows it under strict condition and when no better alternative is available. This is actually consistent with general rule of Islamic law. "The

²⁸³ Abdal'ati Hamudallah

²⁸⁴ Hussen J. "Islamic law and society: An Introduction", Federal Press, Sydney, 1999, p 72.

²⁸⁵ Supra note 36

lesser of two evils” This means that if harm is certain, and if there is no way to avert such harm unless some other harm is done, then it is better to cause the lesser harm in order to avoid greater.²⁸⁶

Another scholar *Sayyid Muhammad Rashid Rida*, a learned scholar of Egypt, holds that polygamy, in view of possibility of mischief arising there from, must be put a stop to. He added that Islam, indeed, empowers the Imam from to stop people from committing an act, which though legal has the possibility of creating mischief.²⁸⁷

From the western viewpoint the idea of polygamy is shocking. The idea that a man can have four wives while a woman can only have one husband is contrary to ideal of the equality of sexes.²⁸⁸

Responding on this point, *Al-Qaradawi* argues that westerners are free to have any number of girl friends without restriction and without any legal or moral accountability, either in respect of the women or the children. She may bear as a result of this irreligious immoral plurality of extra marital relationships. Let the two alternatives be compared and see which of the group is correctly guided.²⁸⁹

Abdul’ati Hamudallahi opined that the status of polygyny in Islam is no less than that of permissible act. And like any other act lawful in principle, it becomes forbidden if involved unlawful things or leads to unlawful consequences such as injustice.²⁹⁰ While according to *Ambali*, Qur’an 4:3 lead to the conclusion that Qur’an allows both polygamy and monogamy. It only lays down regulations for whichever an adherent Islam chooses. The ultimate goal is justice but the means of achieving it in the monogamy family may and does differ from the way to attain it in the allowed form of polygamy.²⁹¹

²⁸⁶ Ibid

²⁸⁷ Supra note 36 p 93

²⁸⁸ Supra note 36 p 74

²⁸⁹ Supra note 35

²⁹⁰ Supra note 2 p 118

²⁹¹ Supra note 9 p 174

Some *Muslim* countries have now prohibited the practice of polygamy,²⁹² and others require the man to seek the permission from the courts designed for that purpose.²⁹³

Example of such provision is Section 23 of the Islamic Family Law (Federal Territory) Act of Malaysia 1984, which provides that no man is permitted to contract polygamy marriage without permission of the court. An application must be filed with court setting the grounds upon which the proposed marriage is alleged to be just and necessary, the applicant's financial standing, the number of the defendants and whether he has obtained the consent of the present wife or wives. Then the court will summon the existing wife or wives to attend the court session in camera, and the court may grant the application if the applicant satisfied the following conditions:

1. That there is just and necessary reason for the proposed marriage because of circumstances such as physical infirmity, unfitness for sexual relations, avoidance of decree for restitution or insanity.
2. That the applicant has sufficient means to be able to support all the existing and intended defendants.
3. That the applicant would be able to accord equal treatment to all his wives as required by Islamic law.
4. That the proposed marriage would not be the cause of harm to the existing wife or wives according to what is normally recognized by Islamic law , affecting a wife in respect of religion, life, mind or property.
5. That the proposed marriage would not directly or indirectly lower the standard the standard of living that the existing wife or wives or defendants have been enjoying where the marriage did not take place.

²⁹² For example countries like Syria and Tunisia.

²⁹³ Such countries include Iraq Pakistan and Morocco.

Looking at the above stringent condition contained in the Family Law of Malaysia, it is extremely difficult to satisfy the court all the above conditions, therefore polygamous marriages are rarely approved in Malaysia.²⁹⁴

ADVANTAGE OF POLYGAMY

Polygamy has its advantages and disadvantages. And some of the disadvantages include: less time since the husband must share his time among his wives, less attention, unshared love, less guidance because the husband spends less time with the children. Others include less money saved since the money must be shared among the wives. However, the advantages of polygamy include the followings:

- a. If the wife is a barren, and the husband at the same time is aspiring to have children, in such situation instead of man to continue suffering from the deprivation of fatherhood for life or divorce his barren wife and get married to another who is not a barren. In this situation polygamy would have the disadvantage of solving the problem of the husband and preserving their marital relationship.²⁹⁵
- b. Islam recognizes marriage as the only means of satisfying sexual need. Therefore, in a situation where the woman is not ready to satisfy the sexual need of her husband, as a result of menstruation, pregnancy, delivery or illness a man, polygamy may be an alternative. Instead of man to divorce the wife or secretly take for himself one or more illicit sex partner. Polygamy gives man an opportunity to have another woman that will take care of his need and the need of his children. While the existing wife may retain her marital status and continue to enjoy the protection of her husband.²⁹⁶

²⁹⁴ Supra note 254 p 73

²⁹⁵ Polygamy in Islam available @ www.Islamology.com last visited on the 2nd October,2015.

²⁹⁶ Ibid

- c. In some societies polygamy is a social and economic necessity, because in some very poor society infant motility is very high. Equally, in some areas children are the source of additional labor for earning capacity of the family. Therefore to have more children under these two circumstances would require the practice of polygamy.²⁹⁷
- d. The institution of polygamy also takes into consideration that men have greater sexual desire than that of woman. And in most cases the man may find it tedious to be satisfied by one wife only, because men have natural desire to have more than one wife.²⁹⁸
- e. There is also a time when women outnumber men for example after the battle of *uhud* in which many men were killed. In such a situation it is in the interest of society and women themselves that they become co-wives to a man instead of spending their entire lives without marriage.²⁹⁹
- f. On the part of the woman, polygamy give her opportunity to do something when it is not her turn, such as conducting research , *ibadat*, or even time to rest.³⁰⁰
- g. Polygamy also assists in increasing population of the Muslim *Ummah*, which the holy prophet will be proud of in the hereafter.³⁰¹

Therefore looking at the advantages and disadvantages of the polygamy, it is clear that the disadvantages are not exclusively to polygamy, they can be found in monogamy also for one reason or the other. Therefore by this obstacle the advantages of the polygamy outweigh its disadvantages.

²⁹⁷ *ibid*

²⁹⁸ *Supra* note 38

²⁹⁹ *ibid*

³⁰⁰ Badamasuiy J “Polygamy under the Islamic law: An appraisal of the Law and Practice” P 11

³⁰¹ *ibid*

CHAPTER FOUR (4)

NIKAHUL MISYAR

MEANING AND NATURE OF NIKAHUL MISYAR

The phenomenon of *Nikahul Misyar* or Marriage of Convenience has been spreading throughout Sunni Muslim world.³⁰² *Misyar* marriage or marriage of convenience or traveler's marriage³⁰³ is a marriage where a man who is usually but not always marries another woman, on the condition that the woman would sacrifice her rights of accommodation and distribution of days and night among wives.³⁰⁴

To some scholars, this practice is an unthinkable act; yet to some it is better than loneliness, but in what is otherwise a conservative culture, misyar marriage goes against the grain.³⁰⁵

Nikahul misyar (marriage of convenience) is often assumed to have originated in *Saudi Arabia* and *Egypt* for many years. It was legalized in Saudi Arabia by

³⁰² Doe S (2008) "Misyar Marriage as Human Trafficking in Saudi Arabia"Global Tide: Vol 2, Article 1. Available at www.digitalcommons.pepperine.edu/globaltides/vol2/iss1/1.

³⁰³ Also referred as summer, pleasure, non binding or temporary marriage.

³⁰⁴ Spupa note 24.

³⁰⁵ Misyar marriage has become common available at www.arabNews.com. Last visited on the 12th September,2015

fatwa issued by *Shayk Abdal Aziz Bin Baz*, and was officially legalized in Egypt by the fatwa of Egyptian *Sunni Imam Sheik Muhammad Sayyid Tantawi*.³⁰⁶

According to *Khalid M.M*, the marriage has been practiced since 1825,³⁰⁷ though this claim is hardly to be established.

Misyar in Arabic is derived from “**Sayr**” means, Travel and translates it into English as Traveler’s Marriage, Passer by marriage. The word “*Misyar*” may also be derived from “**Yusr**” means, easiness or facilitation; as this is intended to ease the financial burden of the couple.³⁰⁸

Misyar Marriage is a kind of marriage that according to some scholars it fulfills all the requirements of marriage, such as *Ijab* and *Qubul* (offer and acceptance), witnesses, guardian, *kafa’ah* (compatibility) and a fixed amount of dower.³⁰⁹

Misyar marriage can also be described as a legal frame work in which couple is united by the bond of marriage, based on the usual Islamic marriage contract but without the husband having to take the usual financial commitments with respect to his wife. The latter exempts him from some of them by clause of the marriage contract through which she gives up some of her rights such as cohabitation with husband, the equal division of the nights between all the wives in the event of polygamy, the residence, the subsidy of maintenance etc³¹⁰

According to the nature of this institution, after the marriage , the wife continue to carry out a separate life from that of her husband living in her home or parent’s home providing for her needs by her own means. But the husband has the right of going to her home or to her parent’s residence, where she is residing at any hours of the day or night whenever they want, depending

³⁰⁶ Comparative index in Islam “*Misyar* Marriage” available at www.answerislam.info/index/M/Misyar.html.

³⁰⁷ Khalid M.M, *Urfa and Custom in Common and Islamic Law Marriages*, JLSR Vol 1, No 1, 2009-10, Gillan Law Collage, Pakistan.

³⁰⁸ Arif A, “*Zawaj al Misyar: Ruyah Islamiyyah*”, *Tajdid*, Malaysia, No 13 February 2003 p. 127.

³⁰⁹ *Ibid* p 128.

³¹⁰ Supara note 24.

on their arrangement. The spouses can then appease their sexual desire in a legal way.

However, in certain circumstances, only one right is relinquished by the spouses, such as living together, but the husband is still required to provide housing for the wife and maintain her financially, while in other instance, the wife give up all her rights including housing, equal division of days and nights etc, sexual intimacy is excluded.³¹¹

Misyar marriage is seen as a legitimate means of sexual gratification for young people whose resources are too limited to settle down in separate home, or of those that passed the customary age of marriage, or divorced or widowed who have their own financial resources but cannot, or do not want marry again according to the usual formula and elder people who have not tasted the joy of marriage.

There are several reasons that led to the emergence of this marriage institution, and the most prominent ones are:-

1. Increase in the number of unmarried women as a result of economic reality. There are several men who cannot afford to support women or family, or even pay for the formalities and expensive dowers of women. A *misyar* marriage allows man to marry a girl who then stays with her parent. The bride's parent feed and maintain her, they meet on accession for their marital relations.³¹²
2. Some women need to stay in their family, due to any of the following reasons:-
 - a. Because some women are the only care givers of their parent due to extreme old age or illness.
 - b. Some women have a physical disability; their family does not want their husband to be burdened with such disability

³¹¹ Supra note 18

³¹² Supra note 35

- c. Some widows who have children, and they cannot move with them to the new husband's house. *Misyar* marriage may be an alternative to them.
3. In most cases a husbands conceal their second marriage from their first wives, for fear of the consequences that may affect their relationship.³¹³
4. Wealthy men while on vacation enter *misyar* marriage as means of legitimate sexual gratification without committing the sin of adultery. They travel to poor countries and meet middlemen who arrange the marriage online.

According to the proponent these are the prominent reasons that led to the emergence of this institution.

FORFEITING/WAVING RIGHTS IN NIKAHUL MISYAR

The basic feature which distinguishes *Nikahul Misyar* from standard form of marriage is that the spouse, more specifically the wife waives one or more of her rights. Scholars agree that a wife may give up her right to her husband, some of his wives or all the wives if the husband agrees. This principle is based on the following authorities.

Sayyidina Aisha (may Allah be pleased with her) relate that *Saudat bnt Zam,a* (may Allah be pleased with her) gave her right of spending the day with Messenger of Allah to Aisha, and so the Messenger of Allah peace be upon him.³¹⁴

In another *hadith Sayyidina Aisha* (may Allah be pleased with her) relates that in his death sickness, the Messenger of Allah peace be upon him used to ask where will I be tomorrow? Where will I be tomorrow? Wanting the day of Aisha.

³¹³ Supra note 18 visited on 30th October, 2013.

³¹⁴ Supra note 8 hadith 139 p 107

His wives gave him permission to be where ever he wished, so he was in Aisha room until he passed away.³¹⁵

The **shayk** of **Al-Azhar Muhammad Sayyid Tantawi** opines that Islamic law confers on the parties the right to set up in the contract certain stipulations relating to their reciprocal rights and obligations. When the parties agree; within the framework of **nikahul misyar**, that the woman will wave some of the rights the law confers on her.³¹⁶

Likewise, the former **Mufti** of Egypt **Nasar Fareed Waseel** opines that the woman can legitimately wave some of her rights at the time of the marriage if he so wishes. He re iterate that such waiver does not affect in any way the rights of children who could be born from this union, such as paternity, the financial responsibilities of father for his children, or the lawful rights of the wife and children to their share of inheritance.³¹⁷

It should be noted that it is not correct for the wife to wave her rights in exchange of wealth. However if it is exchanged for other than wealth, such as trying to please her husband, it is allowed. This position is based on the **hadith** reported by **Aisha** (RA) in which she said:

“Allah’s Messenger was displeased with his wife Safeeyah bint Huyay, because of something that she had done wrong. Safeeya asked Aishah if she would accept one of her days in order to make the Prophet (PBUH) pleased with her and Aisha agreed. When Safeeyah’s day came, Aisha took a scarf dyed in saffron and sprinkled water on it so that its perfume would spread, tied it around her head and came and sat next to the Prophet (PBUH). The Prophet (PBUH) said, Go away from me Aisha for surely it is not your day. She replied, this is Allah’s favour which He gives to

³¹⁵ Ibid hadith no 166 at page 105.

³¹⁶ Khalid, C. “Misyar Marriage(English)/Marriage misyar (Francais) 2006 available at www.marriagemessyar.com last visited on 3rd july.2015

³¹⁷ Available at www.Islamwatch.org last visited on 12th September,2013

whomsoever He pleases. Then she told him about Safeeya's bargain with her and he immediately became pleased with Safeeyah."

RECLAIMING OF RIGHTS BY THE WIFE

Despite the fact that Islamic law allows wife to waive her rights the wife can reclaim at any time such rights she give up at the time of establishment of the marriage contract.

According to some scholars like *Abdullahi bn Manie*, the wife can reclaim at any time as she fit, and require her husband to give her all her rights including that the husband live with her and provide her financial needs.³¹⁸

Also according to *Imam Haskafi*, if the wife grants her rights of spending time with the husband to her co-wives, then this is valid , but she has the right to reverse her decision in the future if she so desires.³¹⁹

Professor Yusuf *Al-Qaradawi* is of the opinion that he does not encourage this marriage based on the issue of reclaiming the right, even though he recognized it as legal if it fulfills all the requirement of marriage. He added that the clause of reclaiming the right should not be included within the marriage contract, but be subject of simple verbal agreement.³²⁰

The learned *Sheik Manie* is of the opinion that *Misyar* wife may reclaim her rights and the man has discretion to either grant them or in the alternative divorce her. Now the question is that how can she come back and reclaim what she freely, and what will be her basis of reclaiming the right,

Even though most of the scholars cited the case of *Sayyida Sauda* who agreed and give up her right of spending night with prophet to Aisha (*Radhiyallahu*

³¹⁸ Available at www.answering Islam. Org. last visited on 5th November,2013.

³¹⁹ *ibid*

³²⁰ *ibid*

anha), according to some writers opine that the reason *Sawdah* gave up this right was her age. She was old and, recognizing the prophet fondness for Aisha, gave up her nights to Aisha voluntarily.

This issue of reclaiming right is one of the features that distinguish *nikahul Misyar* from standard form of marriage as mentioned earlier, but it has no legal backing. Is it legitimate for a Muslim to include in a marriage contract; a provision which have no legal standing? For these reason Professor Yusuf Al-Qaradawi observes that he does not promote this type of marriage, although he recognized it to be legal, since it fulfill all the requirement of standard marriage contract. He states his preference that the clause of reclaiming right need not be included within the marriage contract, but be subject of a simple verbal agreement between the parties.³²¹

SCHOLARS' STAND TOWARDS MISYAR MARRIAGE

Since *misyar* marriage is contemporary issue, contemporary scholars gave different viewpoints towards it. Some prominent scholar favored this kind of marriage, while others opposed it on the ground that it contradicts the objectives of the marriage in Islam.

According to the proponent, *misyar* marriage plays a role in solving the problems of some women in Muslim countries, especially the spinsters, divorcees and widows. Therefore a significant number of scholars support rather prefer this marriage. Some other scholars though not preferred this marriage but permitted it for necessities. They include *Shaykh Yusuf al-Qaradawi*, *Wahbah al-Zuhayli*, *Sayyid Tantawi*, *Abdullah Mani* of Saudi Arabia, *Shaykh Su`ud ash-Shuraym* (Imam and Khatib of Masjid al-Haram), *Yusuf al-Badri* (Egyptian Shaykh and a Member in the Supreme Council of Islamic Affairs), *Nasr Fareed Wassel* (former Mufti of Egypt), *Arif Ali Arif*

³²¹ Supra note 24.

(Professor of *Fiqh* and *Usul*, International Islamic University, Malaysia), *Shayk Gharabawi* etc.³²²

Even though *Misyar* marriage was permitted by the Muslim Scholars, yet it was never without criticism from the side of the opponents.

In April, 2006, Islamic Jurisprudence Academy in its 18th meeting at *Makkah* Saudi Arabia gave its sanction finally to *Misyar* marriage provided that it meets all requirements of marriage in Islam.³²³

Shaykh Yusuf al-Qaradawi claimed that majority of scholars are in favor of *Misyar* marriage. He adds that during International *Fiqhi* convention in Doha, Qatar, more than 20 prominent Islamic scholars gathered there and almost all of them agreed to the validity of *Misyar* and that it has no legal problems. The two or three scholars, who stood against it, also did not claim that it was *haram*; but they feared that it may lead to *haram* acts and social problems, which is why they preferred it to be invalid.³²⁴

He further claimed *Misyar* marriage meets all the requirements of *shari`ah*, which is why it cannot be said illegal. He adds that “what matters most in contracts are motives and meaning, not the wording or structure” He asserts clearly that though it is within the legal frame of Islam, it is not the preferred option of marriage³²⁵

Shaykh of al-Azhar Sayyid Tantawi , opined that *Misyar* marriage is perfectly legal, if it meets all the requirements of *shari`ah*. When the parties agree, within the framework of the marriage "*Misyar*", that the woman will give up some of the rights the law confers to her as a wife, this is perfectly legal, if that is her will freely expressed. “*Misyar* marriages are appropriate for women who like to be on their own, living together with their children.”³²⁶

³²² The Star on line available at www.thestar.com.my/news/story last visited on the 20th September, 2015.

³²³ Hussain S, “Al Misyar Marriage available at www.aawsat.com/english/news.asp last visited on the 2nd October, 2015.

³²⁴ Supra note 403 p 154.

³²⁵ Supra note 24

³²⁶ Supra note 25

Shaykh Abdallah Bn Suleiman Al Manie opined that *misyar* marriage is legal since it meets the requirement of a lawful marriage under Islam. He adds that the condition agreed by the wife does not affect the validity of the marriage, and the wife can still demand her full rights, including having the husband live with her and provide for her expenses.³²⁷

Egyptian *Shaykh Yusuf Al Badri*, a member in the High Council of Islamic Affairs currently living in Pakistan, nothing is wrong with the *misyar* as long as it meets all Islamic requirements for a marriage which are the couple's agreement, the presence of the woman's agent (*wakil*) and two witnesses. Whether the man has the intention to leave his wife and move to another country, or not, it is still an Islamic marriage.³²⁸

Finally, *Sheikh Gharabawi*, maintains that this type of marriage did exist during the Prophet's time.³²⁹

The proponent of this practice justified their position by saying that the *Misyar* marriage meets all *shari`ah* requirements as detailed above, i.e. *Ijab* (offer of marriage) and *Qabul* (acceptance of the offer), two witnesses, dower, guardians' consent and *kafa'ah* (compatibility) of the couples. Apart from that, the wife consented to sacrifice some of her rights such as *nafaqah* (expenses), accommodation, equal division of time between spouses.

The origin of sacrificing one's rights can be traced back to the life of the Prophet as one of his wives, *Saudat bint Zam`ah*, (R.A.) foregoes her day to 'Aisha (**R.A.**) to please the Prophet (PBUH), as she knows that 'Aisha was the

³²⁷ Supra note 27

³²⁸ Yomna Kamel and Rasha Mehyaar "Yet another marriage without strings" available at www.metimes.com/storyview.php last visited on 4th October, 2015.

³²⁹ *ibid*

most favorite wife of the Prophet. The Prophet accepted her offer, and gave ‘Aisha two days in rotation, the day of ‘Aisha and the day of *Saudat*.³³⁰

The proponent equally relies on the verse of the holy *Qur’an* where Allah the most high says:

“if a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange amicable settlement between themselves; even though men’s soul swayed by greed. But if you do good and practice self restraint, Allah is well acquainted with all that ye do”³³¹

Another ***hadith*** could be found from the ***Tafsir*** of the above verse

Abu Dawud At-Tayalisi recorded that ***Ibn Abbas*** (RA) said, “Sawdah feared that the Messenger of Allah might divorce her and she said, ‘O Messenger of Allah! Do not divorce me; give my day to Aisha.’ And he did, and later on Allah sent down this verse. *Ibn ‘Abbas* said, “Whatever (legal agreement) the spouses mutually agree to is allowed.”.³³²

Urge for motherhood is another pressing reason to justify *Misyar* marriage. We see many women in today’s material world opt for artificial impregnation with the hope of becoming mothers and rearing children. The children are Allah’s blessings; without whom life turns into hell. If *Misyar* marriage could help millions of women worldwide to fulfill their desire of motherhood, why should we prevent them from this blessing?³³³

The proponents of *Misyar* also stress that this is to accept the lesser evil from the two evils. The first evil is, to be deprived from maintenance from husband and equal just distribution of days and nights. The other evil is, remaining

³³⁰ Supra note 8 hadith 139

³³¹ Supra note 3 Q4:128 p107

³³² Tafseer Sura An nisa Aya 128 available at www.versebyversequranstudycircle.worldpress.com/2012/12/05 visited on the 3rd October,2015.

³³³ Supra note 320 p 138

unmarried forever, either for missing the train of marriage, or being divorced or widowed. This may lead to *Fitnah* of moral decay especially when she is young or female urge is intense with her. So, she should have the right to choose the lesser evil and accept the marriage of *Misyar*.

Solving the social problems of increasing number of unmarried women is the prime and the most significant reason to justify the *Misyar* marriage.

The opponents of *Misyar* reject this type of marriage as it contradicts with the very objectives of marriage. They call it as a 'Part-time marriage', 'legal prostitution', 'sex only marriage' etc. The scholars include Muhammad Nasiruddin Albany, Muhammad Salih bin al-Uthaymin', Prof Jaburi, Muhammad al-Zuhaili, Prof Soad Ibrahim of al-Azhar University, 'Umar Sulaiman al-Ashqar, Professor Saniya Saleh of American University Cairo, Shayk Ibrahim Muhammad and also the Fatwa committee of Al-Azhar.³³⁴

Shaykh Albany disallowed *misyar* marriage for two reasons:

1. its contradict the objective of marriage, i.e. peace and tranquility of mind,
2. this marriage may negatively affect children, their training and Education because the father is far away from his family and rarely comes to them. Albany stresses that the prime objective of marriage is mentioned in the Qur'an where Allah most high says:

“And among His Signs is this that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts). verily in that are signs for those who reflect”³³⁵

He further asserts that the marriage is intended to achieve chastity and live virtuously. However, *Misyar marriage* only focuses on merely fulfilling one's sexual desire. Allah the most says:

³³⁴ Supra note 320

³³⁵ Supra note 3 Q30:21 p 436

“(Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time, when ye give them their due dowers, and desire chastity, not lewdness, taking them as lovers. If anyone reject faith, fruitless is his work, and in the hereafter he will be in the ranks of those who have lost (all spiritual good)”³³⁶

Albany also explains that the prohibition of this marriage comes from an external reason, which is exactly similar to ‘cheating in business dealing’ or ‘praying in a land that is usurped illegally.’³³⁷

The former *mufti* of Egypt Nasr Fareed Wassel also reiterated the problem of taking care of children from this marriage. The children may develop serious psychological trauma in a home, from which the father is always absent. The problem gets even worse if the woman is abandoned by the man with no apparent means of subsistence as usually it occurs.³³⁸

As for *Ibn Othaymin*, he recognizes the legal validity of *Misyar* marriage from the legal standpoint, but considers that it should be declared invalid because it has been turned into real merchandise that is being marketed on a large scale by “marriage agencies”, with no relation to the nature of Islamic marriage.³³⁹

The Fatwa committee of al-Azhar also disapproves of this marriage, for it is against Islamic system of marriage. It denies the rights of women accorded in Islamic law of marriage. It was non-existent in the earlier generation. Without a settled family, the man is not financially or socially committed to his *Misyar* wife/wives in different countries. They said: “We do not approve of this

³³⁶ Ibid Q5:5 P 116

³³⁷ Al Zawaj bi Niyyat al Talaq wa Zawaj al-Misyar available at www.saaaid.net/Doat/ehsan/9.htm last visited on 4th September, 2015.

³³⁸ Nikah Misyar available at Wikipedia, the free encyclopedia last visited on 4th October, 2015.

³³⁹ *ibid*

marriage, and we don't recognize the marriage contract, if it exists at all. Also, we don't recognize the divorce.³⁴⁰

According to Prof. *Soad Ibrahim*, Professor of Jurisprudence at *Al-Azhar* University this type marriages do not fulfill Islam's aims of marriage, which are forming a settled family surrounded by care and love. He further asserts that even if some few *shayks* accept it, *misyar* marriage is still disapproved by the majority of scholars. It creates many social problems, especially for children who are not emotionally supported by their *misyar* father.³⁴¹

The opponents of *misyar* marriage disapprove this institution on the ground of its negative impacts on society, culture and religion. Though these scholars did not see any problem in term of validity, but its hidden objective is to betray one party or the other.

Its contradiction to the spirit and objectives of Islamic marriage is another reason to reject it. In Islam, marriage is not only for sexual gratification. It is lifelong relationship founded on love, mercy, peace, tranquility of mind and raising a family with children. In *Misyar* marriage, many of these objectives are missing. Marriage is an in depth relationship – not just copulation. Why more women are willing to forgo what is theirs just to be called or falsely feel married? It turns women simply a cheap object of fulfilling sex. As such, many describe *Misyar* marriage as the woman giving herself for free. If the women are cheaply available, why should one go for normal marriage, where a man has to take care of the whole family throughout his life? “Why buy the Cow when the Milk is free?”³⁴²

Misyar marriage leads to a degradation of men's morals, resulting in an irresponsible behavior towards their spouses. Based on the experience of the "*Misyar* marriage agencies", the man who resorts to the "*Misyar*" marriage is

³⁴⁰ Supra note 320.

³⁴¹ ibid

³⁴² Somayya J, “Misyar Marriage-a Marvel or a Misery? Arab News 5th June, 2005 available at www.arabsnews.com last visited on the 1st October, 2015.

usually married to a first wife with whom he shares a residence, and to the financial needs of whom he provides.³⁴³

Increasing rate of divorce in *Misyar* marriage is another reason to reject it. Considering the fact that this type of marriage ends up sooner or later in divorce, because when the wife is no longer needed by the husband she may find herself abandoned. It has been noticed that almost 80 percent of *misyar* marriages end in divorce.³⁴⁴

Creating a generation of fatherless children is another reason for its disapproval. Suppose if the *Misyar* marriage produces children, what should be the fate of those children. They would be suffering from psychological trauma due to continuous absence of their fathers. The situation becomes even worse if the family abandoned by the husband.³⁴⁵

PRACTICE OF NIKAHUL MISYAR

According to the proponent of this institution, the primary need of *misyar* marriage is to provide avenue of solving problem of spinsterhood, widows and divorcees, however this institution has been abused by the people. The practice tuned to be an easy way of sexual gratification without string attached to it.

Wealthy men on vacation enter into *misyar* marriage, they believe that this allow them to have sexual relation with another women without committing the sin of adultery. They travel to poor countries, such as Egypt or Syria, and meet middlemen and arrange the marriage for them. Some arrange *misyar* marriage online. The middle men bring some girls and they pick the one they like most. The families of the girl agree to the arrangement because of the money and the hope that their girl will have some fun and visit places that she can only dream about i.e. luxury hotels and Restaurants. They also hope some gift at the end of

³⁴³ Supra note 31

³⁴⁴ Supra note 31

³⁴⁵ *ibid*

the vacation that the rich husband will give her some money or precious gifts and divorce her.³⁴⁶

The wealthy men get *misyar* wives preferably the young ones to accompany them in summer trips and excursion. There are some people who would conduct the marriage for the couple and equally prepare the divorce papers together.³⁴⁷

Major proportions of the husbands in *misyar* marriage are already married.³⁴⁸ Therefore *misyar* marriage usually practiced as polygamous marriage, they keep the arrangement secretly from their existing wives as well as the surrounding communities.³⁴⁹ Many matchmakers confirmed that secrecy remain a prime condition in *misyar* marriage. Sometime text messages being sent to mobile phones announcing the availability of young women willing to undertake *misyar* marriage with slogan “We guarantee you complete secrecy.”³⁵⁰

Marriage brokers advertise through online websites with attractive statements³⁵¹ they advertise to customer in the following words:

“Please fill out the following form so that we can serve you better. Remember, we are here to meet all your needs. Our motto is All Fun, no responsibility.” The form will make provision of the type of women they are willing, her complexion, height, weight, address, her current job and the right to be waived and so on. ³⁵²

NEGATIVE EFFECT OF MISYAR MARRIAGE

³⁴⁶ Comparative Index to Islam: Misyar marriage available at www.answerislam.info/index/M/misyar last visited on the 3rd October, 2015.

³⁴⁷ Ibid.

³⁴⁸ Supra note 397.

³⁴⁹ Misyar Marriage: Prostitution and Betrayal of the Female Gender available at www.ukessays.co/dessertation last visited on 5th October, 2015.

³⁵⁰ Women and Muslim Family in Arab States: Comparative Overview of Textual Development and Advocacy, Amsterdam University Press, 2007 P 102.

³⁵¹ Misyar marriage: Prohibition does not eliminate promiscuity available at www.almuslimah.com last visited on 5th October, 2015.

³⁵² Marriages Unlimited available at www.arabnews.com last visited on the 5th October, 2015.

Notwithstanding the fact that the proponents of *misyar* marriage see it as perfectly legal, and the wife can reclaim at anytime the rights which she has waived at the time of the contracting the marriage, many other scholars are against this marriage because it contradicts the spirit of Islamic law marriage and has perverse effects on the woman, her family and community in general.³⁵³

Misyar marriage leads to a degradation of men's morals resulting in an irresponsible behavior toward their spouse. Based on experience majority of the men who resort to the *misyar* are already married men with their first wives, with whom they shares residence and provide for them all financial needs.³⁵⁴ These men run away from responsibilities regarding the second wife as if she were only a legal sexual partner, he always thinking of bringing this relationship to an end by mere act of repudiation at any time.³⁵⁵

Since *misyar* husbands usually refrain from telling their first wife of their second marriage, the relationship within the couple is distorted, resulting at times major complications which end in divorce when it comes to the notice of the first wife at any time.³⁵⁶

As to the second wife, her status is devalued, because she does not have any right on her husband, be it over the time he gives her, his presence at home, or his financial contribution to help her cover her own needs.³⁵⁷

³⁵³ www.metimes.com/artcles/normal fatwas committee of Al azhar against misyar last visited on 3rd January,2014.

³⁵⁴ Jobarti, s, misyar marriage or marvel misery available at www.arabsnews.com last visited 26th January,2014.

³⁵⁵ www.alarabiyya.net/article last visited on 26th January,2014.

³⁵⁶ ibid

³⁵⁷ ibid

CHAPTER FIVE

CONCLUSION

SUMMARY

Islam teaches us that Allah created everything in pairs, male and female, and assigned for each of them roles and responsibilities. Accordingly Allah the Most High stated in the Qur'an.

“Men are the protectors and maintainers of women, because Allah has given one more (strength) than the others, and because they support them from their means. Therefore the righteous are devoutly obedient and guard in (the husband’s) absence what Allah would have them guard.....”³⁵⁸

In yet another verse, Allah the Most High says:-

“And among His signs is this that He created for you mates from among yourselves that ye may dwell in tranquility with them...”³⁵⁹

³⁵⁸ Qur'an 4:34

³⁵⁹ Qur'an 30:21

Based on the above authorities, it is clear that Islam has set out certain roles to a man, as that of maintainer and protector; whereas the woman is a figure standing beside the man and relies upon him for financial support. This role of woman involves certain amount of submission and obedience to man. The view of Islam towards the role of the spouses is in this way in contrast to that of *misyar* marriage. The running away of men from natural responsibilities within the family is a symptom of irreligious.

wife and family are trust from Allah the Most High, and He mentions in the Qur'an that believers should not betray Allah and His messenger. Looking for loopholes to escape responsibilities may amount to the betrayal of this trust.

Permitting *misyar* marriage by some Muslim countries has serious implications in the socio-cultural life of the people and their outlook toward women. Considering the fact that the fundamental rights of women were neglected, *misyar* marriage appears to be easiest way of conjugal relationship in which men drop most of their responsibilities and women most of their rights.

However, there is no harm for man to marry a self supporting or wealthy women who is ready to assist him, if such an arrangement is mutually agreed upon, as the holy Prophet first wife *Khadija Bnt Huwailid Bn Assad* aided him in this way. But such arrangement need not to be permanent because the woman's right to maintenance cannot be cancelled completely.

In Islam marriage is not only for sexual gratification. It demands an established settle relationship among the couple. The needs to share same roof of a house, but *misyar* wife agree right from the beginning to abandon rights. When we encourage women to abandon their rights afforded them by Allah the Most High, are we not in danger of doing far more damage to the Islamic society? Even though, the proponent of this marriage opine that woman may reclaim

her rights at anytime, yet a woman contracted in such marriage would be unlikely to pursue her rights, being either persuaded of the benefit of the arrangement, or expecting divorce if she sought to challenge her husband.

Misyar marriage made it easier for irresponsible individual to enter relationship that is supposed to be based on credibility, reliability and respect. It has become a sex only marriage or even temporary solution to lust. Many resorts to it because it is easy, free enjoyment no string attached. Many rich men could find partners for their entertainment for a particular trip. Once the trip is over, the *misyar* marriage is over. This practice undermines the institution of marriage making it for mere satisfaction of passion.

As mentioned earlier wealthy Muslim and tourist regularly on vocation to exotic places marry women according to Islamic rites; in such cases the notary simultaneously prepare the papers of marriage and those of divorce together to save time, which clearly shows that *misyar* marriage is a temporary marriage.

Temporary marriage according to the unanimous view of sunni scholars is prohibited. They rely on the following verses.

“Who guard their modesty”³⁶⁰

And also

“Except with those joined to them in the marriage bond, or (captives) whom their right hands possess,-for (in their case) they are free from blame”³⁶¹

From the above two (2) verses, the women with whom sexual intercourse has been permitted are only wife and slave girl those your right hand possess. And sexual intercourse with any other women apart from the two (2) mentioned above is illegal. Scholars equally relies on the *hadith* where *Aliyu Bn Abi Talib*

³⁶⁰ Qur'an 23:5 Translated by Abdullahi Y Ali.

³⁶¹ Qur'an 23:6 Translated by Abdullahi Y Ali

(may Allah be pleased with him) said that Allah's messenger on the day of *khaybar* forbidden forever the temporary marriage and eating of domestic asses.³⁶²

Misyar marriage is conducted secretly, with promise to keep the arrangement secretly from their existing wives as well as the surrounding communities. In most cases, the permission from *Wali* or guardian is not sought for. Many confirmed that secrecy remain a prime condition in *misyar* marriage. Men look for *misyar* much more than women, especially older rich men. The basic requirement for a men looking for a *misyar* is that he does not want his wife or her family to know anything about the *misyar* marriage.

The man appears with sweet words to win her heart, and if she agrees, she is married in *misyar* way with agreement that the marriage would be kept secret from others especially the former wife. If the matter is known, he just deserts her or grants her divorce. In return the man does not lose anything, but the *misyar* wife has to suffer the trauma of deceitful marriage. Sometimes, if the former wife comes to know the *misyar* marriage, she gets furious, and as a result the husband has to choose either to divorce her and abandon the children, or just divorce the *misyar* wife. In most cases, the husband chooses the second option resulting to the victimization of the *misyar* wives.

Islam does not recognize such marriage if they were kept secret. Islam made announcement of marriage obligatory, and equally recommended Muslim *ummah* to celebrate marriage and announce it by playing a duff and showing joy, members of the families and that of the community should participate in the celebration of the marriage. This is based on the *hadith* of the holy Prophet (PBUH) which says:-

³⁶² Supra note 1 hadith 1407R1..

“The distinction between lawful and the unlawful is the Duff and the Voice”³⁶³

In yet another hadith the Messenger of Allah (PBUH) said:

“Publicize the marriage, and hold it in the Masjid and beat Duff for it”³⁶⁴

Islam added some conditions to marriage in addition to the contract to eliminate any resemblance between it and certain form of prostitution and adultery, these conditions are:

1. Announcing marriage either by having witnesses, or by avoiding secrecy or both³⁶⁵
2. Permission of woman guardian must be sought and obtain³⁶⁶
3. Also Islam encourages celebrating marriage contract even by playing a duff, announcing it with loud voice and holding *walimah*.³⁶⁷
4. The dowry.
5. Prohibiting the woman from concluding her marriage.³⁶⁸

Therefore, the rationale behind prohibiting these acts is that it would be exploited in committing adultery under the guise of marriage.

According to *Shaykh Tantawi* and *Yusuf Al Oaradawi*, major proportions of men who take spouse within the regime of *misyar* marriage are already married men.³⁶⁹ They resort to *misyar* marriage instead to marry their second, third or fourth wife within the regime of polygamy and assume important financial responsibilities. *Misyar* is very often polygamous. In regular polygamy all wives have exactly same rights over the husband, be it financial or time spent together, but in *misyar* marriage the wife does not enjoy the right of equal

³⁶³ Jami At Tirmidhi, Volume 2, Book 6, Hadith 1087.

³⁶⁴ Ibid hadith 1088.

³⁶⁵ Dr Iqbal S. Some Aspect of Marriage, Divorce in Muslim Family Law available at www.

³⁶⁶ ibid

³⁶⁷ ibid

³⁶⁸ ibid

³⁶⁹ Supra note 423.

treatment with co-wives. Based on this many see *misyar* marriage in many ways similar to the man and his mistress in the western world. Since there is consensus among the Muslim jurists that Muslim man is permitted to marry up to four wives, there is no need of *misyar* marriage.

Man has been instructed to take care of his wives in an equitable manner, and the implication is that wife should be accorded best possible treatment, and he should not maltreat her even if he find that he dislikes her. Allah the Most High says:-

“O ye who believe ! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them-except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be ye dislike a thing, and Allah brings about through it a great deal of good”³⁷⁰

In *hadith* narrated by *Abu Huraira*, Allah’s messenger (PBUH) said whoever believes in Allah and last day should take care of the women.³⁷¹

Furthermore, some Scholars are of the view that taking care of women stops only; when she is disobedient, refusing the husband intercourse or any other emotional satisfaction or going out without the husband’s consent. It also stops when they separate in manner they cannot renew the marriage within the period of *iddah* e.t.c.³⁷²

Moreover, according to the proponent of this marriage, the conditions agreed to waive by the wife do not affect the validity of the marriage, and the wife can still demand her full right including having the husband live with her and provide for her expenses. The husband is free to agree to her term or opt for divorce. They relied on Q4:128 and the *hadith* of *Saudat* mentioned above.

³⁷⁰ Qur’an 4:19 Translated by Abdullahi Y Ali.

³⁷¹ Supra note 8 *hadith* 1858

³⁷² Supra note 9 p 188

Therefore the above mentioned verse was frequently interpreted and giving advantage to husband, most of the Muslim scholars ruled that in cases where husband is fed up with the wife, and is trying to divorce her she is allowed to make concessions in order to continue to live with him by giving up some rights. The reason given for husband getting fed up with the wife, include the wife getting old e.t.c.

It is significant to note that the reason why *Saudat* (RA) gave up her nights to Aisha (RA) was because of her old age, and she realized the Prophet fondness on Aisha, she gave up her night to Aisha willingly. But the Prophet (PBUH) still maintained and took care of *Saudat* in every respect, and in his own house. Equally the concession permitted women to make by the above verse; is during the subsisting of the marital relationship when the husband is fed up with his wife, trying to divorce her, and not before or during the concluding of the marriage contract.

According *Shayk Yusuf Al-Qaradawi* this type of marriage typically practiced by Professionals and financially independent women. If woman is a rich or Professionals, she does not need financial support, it is a way for rich women to separate sexuality from obligation.

However history recorded that, the holy Prophet (PBUH) married *Sayyada Khadijah Bnt Khuwailid* when she was financially independent. But they shared same roof and same house.

FINDINGS

In the light of the above discussion, my findings during the research work are clearly outlined below:-

1. It is the finding of this thesis that *misyar* marriage is lawful notwithstanding its negative effect, if it meets the essential conditions of a valid marriage, especially if is not made in secret, in contemplation of divorce or just as a solution to sexual lust.

2. Another finding is that, it is an attempt to promote monogamy that led to the introduction of marriage practices such as *misyar* marriage, resulting to higher divorce rate, broken families and children growing up without fathers.
3. It is also the finding of this work that, though *misyar* marriage is permitted by the Muslim jurists to solve some social problem, but now a days the practice of this marriage is often different from original intent of permitting this institution.
4. Another finding is that *misyar* marriage would result in tarnishing the bond of marriage, granting women no right and status, and undermining the institution of the marriage in Islam.
5. Another finding of this thesis is that, instead of solving social problems, this institution of marriage would result in increasing social ill and unrestrained prostitution of women in the guise of legal marriage.
6. Another finding is that most of the *misyar* marriages are short lived, because the man's intent in it is to enjoy for short duration. The man gives the woman false impression; victimizes her sexually, and later desert her.
7. Another finding is that the condition of no maintenance and sexual intercourse goes against the Islamic principles of marriage. Allah asked men to pay dowers, maintain just distribution of time and just treatments of all wives fairly.

RECOMMENDATIONS

Therefore, after analyzing statement of problem and attempting to answer the research questions, the following are my recommendations:-

1. *Misyar* marriage could get its way to other Muslim countries including Nigeria; therefore marriage should be made easier for people. If needed government should impose laws to subsidize the marriage to a certain level, so young men get encouraged to marry. Bridal gifts should also be limited.
2. Muslim women should explore the concept of sharing love, wealth, time and hardship with other women; they should understand that her husband has the right of marrying up to four wives. The women should allow their husband to marry within the regime of polygamy
3. A man desiring to have more than one wife should ask himself as to his ability to take care of the needs of the women and his children. He should appraise his situation and then decide whether or not he is capable of having additional wife.
4. The government should try to empower both men and women, encourage less advantageous men to marry wealthy and career women, so that she will contribute in reducing the burden of the family and raising happy family.
5. The government and Muslim scholars should organize public lectures with a view to enlightening the general public on the negative effect of *misyar* marriage, so that it could not get its way to Nigeria.
6. Finally, to make contemporary marriages to be integrated in the Islamic family law syllabus at various Universities and other institutions in Nigeria, in order to aid understanding their impact and further legal research in the area.

Finally, when entering marriage, there is need to adhere with objective of marriage in Islam as contemplated in *Suratul Rum* verse 21 has always been achieve. Marriage is expected to be long term relation, as well as full time not merely part time relationship. Because our beloved Prophet (PBUH) himself took care of his wives in all respect and in his own home. Therefore there is

need to regard the creation of Allah and engage into marital relations with God fearing.

Allah knows the best.

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