

**Rights of Muslim Women in Marriage and Family; A
Comparison of Article 16 (a), (b), (c) of CEDAW and Precepts of
the Shariah.**

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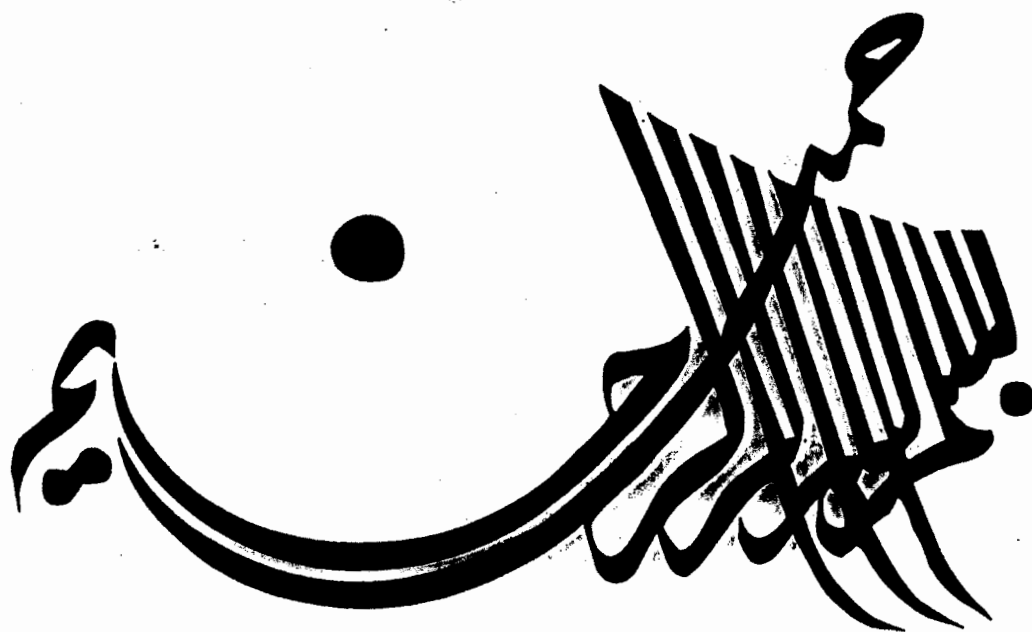
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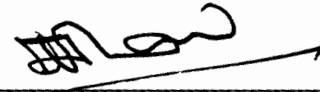
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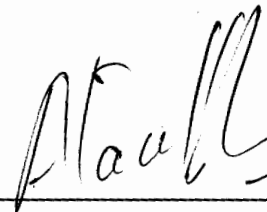
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LIST OF ACRONYMS

CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CSW	Commission on Status of Women
DMMA	Dissolution of Muslim Marriage Act
ICJ	International Court Of Justice
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and cultural Rights.
MFLO	Muslim Family Law Ordinance.
NGO	Non Governmental Organization
UDHR	Universal Declaration on Human Rights
UN	United Nation.

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Dedication

To my son

And

*To my parents whose prayers and support throughout my educational career have brought me
where I stand today and I owe everything to them.*

Acknowledgement

First of all I am very thankful to Allah almighty.

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Abstract:

CEDAW is one of the most ratified international Convention of UN on protection and rights of women and Pakistan is among other Muslim member states of the said convention who under took the responsibility not only to recognize those enumerated rights but also to take steps to get its domestic legislation in conformity with the basic principles of CEDAW.

Article 16 of CEDAW gives equal rights to both the contracting parties in a contract of marriage in all relevant aspects, which also provides same rights to enter into marriage. The language (or the literal interpretation) of the article is general as can be interpreted as to enter into an interfaith marriage by any party. Similarly both partners are given same rights and responsibility during and at the dissolution of marriage. Apparently the text contradicts the rules of Shariah regarding marriage as some specific rights and duties are assigned to both the partners in a marriage contract in Islam and getting into an interfaith marriage by Muslim women is prohibited by majority of Muslim scholars.

The technological developments in recent years have affected all aspects of life including family life of the people. On the other hand the debate on human rights issues has taken different turns enabling people to raise their voices to get their rights. Media is also playing a very important part in this regard. The interpretation of CEDAW in context of Islamic Principles is really necessary to deal with newly developing issues like of interfaith marriage particularly for people living in multicultural societies of west.

The fresh Interpretation of Shariah rulings by Muslim Scholars is the need of time for newly emerging issue on international level as Islam is the religion for all the time and is flexible

enough to adopt the social changes in accordance with the basic principles and objectives of Shariah or the Quran and Sunnah.

INTRODUCTION.

The institution of marriage serves as the cornerstone of all the societies in the world particularly Islamic society, consequently great attention has been paid to its contours within the Sharia. However, the advent of women right movement has placed stresses on the institution of marriage. While these developments have altered marriage in the West to a considerable degree, at the same time Islamic marriage has been subjected to a mounting criticism as to be a backward and pro-men institution. This reading of Islamic marriage may just be based upon a superficial knowledge of Islam and its laws related to marriage or another reason could be mixing up of cultural and customary practices of the Muslims with dictates of the Sharia.

Women rights are in the forefront of international politics and law. Islam and Islamic countries are often faced with criticism and ridicule on international forums on its treatment of women. International movements, conventions, customs and treaties are rapidly transforming the existing balance between the genders towards an equilibrium and the pressures exerted by these international forces is also encompassing Muslim countries that have become signatories to number of International Instruments aiming at amelioration of women at large. On the other hand majority of Muslim populations react to this criticism by insisting on certain cultural habits and customs as Islamic and proclaim their superiority over the Western concepts.

Islamic Law provides a lot of protection to women but with a different perspective which is more based upon functionality rather than absolute equality which is generally argued as discriminatory against women if seen through an equality lens.

Another issue that assumes importance is contracting marriage by Muslim women with the Ahl-e-Kitab and even in some cases with Mushreeken. Apparently the proponents of these inter-faith marriages argue that Islam recognizes both men and women having equal right in choosing a spouse and no clear text has been given with reference to this issue of prohibition of marriage of women with non believers and the text only provides for marriage of men with ahl kitab women and not of Muslim women with non-Muslim men. How far can this notion of equal right in choosing a spouse be stretched is then a matter of inquiry.

Classical philosopher and thinkers had denied the right to women on basis of equality which resulted in the women rights movement of the 19th century in Europe. This movement has been able to win considerable concessions from the western society. And today has created enough inertia to precipitate an international women rights movement. A culmination of the victories gained by the international women right movement is the Convention on Elimination of all form of Discriminations against Women (CEDAW) CEDAW is one of those convention which is considered as a comprehensive document for contemporary women right issues and is ratified by number of countries and is still open for ratification.

Article 16 of the CEDAW¹ relates to Women rights to Marriage and Family life and sets the bench mark for an idealist marital situation for women. This theses intends to use CEDAW

¹ Article 16 CEDAW;

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
 - (a) *The same right to enter into marriage;*
 - (b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
 - (c) *The same rights and responsibilities during marriage and at its dissolution;*
 - (d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

article 16 as the baseline and compare it with the rights of women in marriage and Family life as ensured in the Sharia and to bring out the differences (if any).

Pakistan is a signatory to the Convention on Elimination of all Discrimination against Women (CEDAW), Pakistan has taken active part in all international initiatives for the amelioration of conditions of women. Pakistan acceded to the Convention on 29th February, 1996, being the 174th State-party. However, it did so with reservation to paragraph 1 of Article 29² and with the specific declaration that the CEDAW commitments shall be interpreted only subject to its compatibility with the Constitution of Islamic Republic of Pakistan.

Being a part of international community Pakistan an Islamic state can't be separated from international law and after signing this treaty law making in Pakistan now not only look into its own sources of law but also deal with demands of international law. But superficial look

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar Institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory

² **Article 29** para 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

at international practice seem to generate wide ranging differences between the Islamic laws and secular notions of marital laws and obligations, this therefore makes this comparison between the two notions a subject of inquiry.

Globalization is a growing phenomenon which is affecting all aspects of human life including religious affiliation of people of different religions. Besides globalization culture increasing use of internet has made the world a smaller and as a result increased the interaction between people which has given birth to multi cultural societies and people getting into inter faith marriages. Interfaith marriages involve complex legal issues as different legal systems are involved and different remedies are available to them which may or may not be acceptable to other.

When we talk about women right perspective, women are given equal rights in a contract of marriage in both western and Islamic law. But this notion of equality is differently interpreted by scholars of both laws as giving equal rights of choice / consent to a marriage contract etc. Is this idea of equality of rights in a marriage contract is correct in Islamic Law /Shariah do they have same right of equality as understood or given by western world?

Muslim women married to a man other than a Muslim man is even considered as apostasy by some scholars

This raises many questions;

How true this notion is in Islamic law?

Is it a valid marriage in Islamic law?

What would be the religion of children of such couples?

Legal status of such spouses and their rights against each other?

Can we interpret article 16 of CEDAW as such or do we need to make specific laws in this regard or should we express reservations on this article of CEDAW?

If marriage is to be considered the foundation of any society then the ground realities can't be ignored. Many women in different parts of world are contracting marriages spanning beyond the folds of particular faiths, the reasons behind them can be varied but the eventual outcome remains the same, an interfaith marriage.

This thesis intends to inquire interfaith marriages and a woman's right to choose a spouse from a believing Muslim Woman's perspective and try to seek answers to all of the questions raised above from within the existing sources of the Shariah.

Not all the Muslim states have ratified CEDAW and those who have ratified, have done it with reservations as several articles are conflicting with Shariah and on the other side these religious based reservation are questioned as they contradict the purpose of the convention. Particularly the family laws under Shariah dealt under article 16 of CEDAW .Many Muslim countries consented to follow CEDAW as long as it does not conflict with provision of Shariachs and these reservations are taken with view that Shariah accords women equal rights as those of men and gives a balanced status. These reservations are besides other is taken because of the notion of equality according to it literal meaning is taken as sameness between man and women, found in various analyses. ⁴

Despite the large number of ratifications, evidences are there to show that discrimination and restriction on rights and freedoms of women in all aspects of life is still prevailing. Customs, traditions, culture, and religious matters dominate legal dialogue and inspire its implementation. It specially occurs in countries having dual or even plural legal systems or jurisdictions like in Pakistan. The rules of equality and non discrimination as established and accepted in constitutional instruments ,legislative enactment and their adherence to international human rights treaties is very efficiently presented but reality is much different in member states even obligation undertaken by these states within their municipal laws.⁵*“CEDAW can be effective and does change societies over time. Law is not only a product of culture, but an influencer of culture as well. Change will not occur, however, without proper enforcement mechanisms”.*

⁴ Article 16 reservation to CEDAW. According to Shariah , available at www.suhakam.org last visited on 20th October,2007.

⁵ Shaheen Sardar Ali , *Conceptualizing Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings*.8

Downs, Rocke, and Barsoom have argued that compliance with international treaties is high even in the absence of enforcement mechanisms because states only sign those treaties that have provisions that they would have adhered to even without the treaty.⁶

Although the two terminologies 'gender equality' and 'non discrimination' are very commonly used expressions in modern international human rights instruments, they are still unexplained and need proper interpretation. They should be construed according to both, the national and international aspect of law. While looking at international level the non discrimination and equality of two sexes raises a normative conflict as one international human rights instrument may be in conflict with rights granted under another human rights instrument, for instance, CEDAW and others similar International Convention such as; Convention on Civil and Political Rights⁷, International Convention on Economical, Social and Cultural Rights⁸, guarantying the non discrimination against women and gender substantial equality but on the other hand right of freedom of religion and belief and economical, social and cultural rights are protected by other international instruments at times get in conflict with each other. Gender equality may be objected by religious status of the person concerned especially where religious traditions provide gender hierarchies and cultural practices justify these inequalities. Secondly, the domestic law based on religious or cultural practice gets in

⁶ Downs, George W., David M. Rocke, and Peter N. Barsoom. "Is the Good News About Compliance Good News About Cooperation?" *International Organization* 50 (1996) 379-470.

⁷ Article 2(1)-Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁸ Article 2(1)- The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

conflict with these rights granted by these international laws and their application would be justified as such.⁹

Here the crucial question is that, how same standards can be adopted to give equality to women all over the world, what should be possible minimum standard of equal rights for women, do we mean all women around the world have equal rights as if they have equal opportunities to get those right, practically this is impossible. CEDAW is needed to be commonly interpreted in at least those societies who have major similarities in their social set ups and legal systems,¹⁰ for instance, SAARC member countries.¹¹

1.1 Introduction to CEDAW

Equal rights to women in all respects, faith in fundamental human rights, dignity and worth of human person and equal rights of men and women are the basic goals to be achieved by the UN.¹² Under Article 1 of the charter, basic purpose of UN is to accomplish international cooperation in the sphere of promotion of international human rights and fundamental freedom of human beings without any discrimination based on race religion sex nationality, and all members states are legally bound to make every effort to achieve these goals of achieving

⁹ Shaheen Sardar Ali, *Conceptualizing Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings*.

¹⁰ Ibid

¹¹ South Asian Association for Regional Cooperation (SAARC); Bangladesh, Bhutan, Maldives, Nepal, Pakistan, India and Sri Lanka

¹² Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (UN Declaration on Human Rights)

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. (UN Declaration on Human Rights)

the basic human rights and freedoms and as such it has become the contractual duty of every state or government and also of the UN.¹³

The CEDAW was adopted unanimously by United Nations' General Assembly on 18 December 1979. The resolution was adopted by majority of 130 votes versus none except those who were not present at the session. CEDAW was opened for signatures on 1st March 1980. Presently, 185 countries, which are more than 90% of the members of the United Nations, are party to the Convention,¹⁴ and this includes a considerable number of Muslim jurisdictions. The intention behind this instrument is to eliminate de facto and de jure discrimination and inequality on the basis of sex.¹⁵

CEDAW is an international legally binding instrument which defines the related principles, standards of conduct and obligations the states agreed to comply with. It consists of thirty articles, comprehensive bill of women rights and a platform for action for enforcing the rights.¹⁶

CEDAW isn't just a wish-list, it's an instrument designed to be used. It is an important work and result of efforts of United Nations commission on status of women in respect of human rights activities particularly in the sphere of women related issues and comprehensive international instrument on protection of women rights. This convention is an extract of many previously / already existing international instruments defining the sphere of women rights and

¹³See, for example, *Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women; Report by the Committee on the Elimination of Discrimination against Women (A/CONF.177/7)*. Published by the United Nations Department of Public Information]

¹⁴ See, for example, <http://www.un.org/womenwatch/daw/cedaw/states.htm> last visited on 10-02-08

¹⁵ Shaheen Sardar Ali, *Conceptualizing Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings*.

¹⁶Claim and celebrate Women migrants' human rights through CEDAW;the case of women migrant workers. A UNIFEM briefing paper. CEDAW's Uniqueness, an over view. Available online: http://unifem-eceasia.org/projects/migrants/hla_chapter/_06.pdf, last visited on 20th October 2008.

bringing in legislative ambit many of recommendation of the commission since its establishment in 1946.¹⁷

CEDAW is important with regard to women rights as it was not a mainstream human rights agenda /discourse as such nor automatically recognized by the international human rights' promoters. The main focus was on political and civil rights. Women rights' violation issues are mainly concerned with social and economical spheres of life and needed the change in social systems, institutions and ideologies.¹⁸

CEDAW is the only legal instrument which is particularly designed not only to protect but to promote the women rights internationally based on principles of equality of both sexes in real sense as not only in opportunity but also in outcomes, highlighting the main areas of discrimination against women including civil, political, social and economical sphere of life and require the development policies to be adopted by the states. It further mandates the guarantees of these rights through the legislative processes, as enshrining the principles of gender equality in the national constitutions and establishing the tribunals and other public institutions to give legal effects to the rights of women and to eliminate the discriminatory practices against women by institutions/ organizations and persons, by the states and provides for accountability mechanisms to ensure the women rights.¹⁹

¹⁷ Noreen Burrows, *The 179 convention on the elimination of all forms of discrimination against women* NILR 1985. 419.

¹⁸ Claim & celebrate Women migrants' human rights through CEDAW. A UNIFEM briefing paper. Available online: http://unifem-eceasia.org/projects/migrants/hla_chapter/_06.pdf last visited on 2nd October 2008

¹⁹ *ibid*

It further highlights the principle of state responsibility to women and theoretically the implementation of the convention or the rights guaranteed under it is binding on all the state parties. There is provided for monitoring mechanism for the implementation of the convention and accountability by the state concerned.²⁰

1.2 Background of CEDAW

Declaration on CEDAW had been adopted by United Nations General Assembly on November 1967 after the efforts of Commission on Status of Women (CSW) and General Assembly discussion, this document of moral and political intend came to the reality, but still not legally binding as being a declaration.²¹

Commission on status of women first adopted as sub commission of the human rights in 1946, which latter on given status of full commission as pressurized by women rights activists given mandate to make recommendations on urgently required issues and implementation of principle of UN charter of equality and freedom .Initially Commission elaborated different issues and adopted different conventions in different timings like political rights of women, consent to marriage minimum age for marriage and registration of marriage , nationality of married women .In all these treaties protection of women rights were taken as at risk of violation and assumed in rest of area there rights were not violated. Even though these

²⁰ibid.

²¹ Noreen Burrows, The 1979 CEDAW, NILR 1985.

instruments were the beginning of a journey however, latter it was realized that they were not sufficient for the purpose and not protecting rights in a comprehensive way.²²

The next five years the commission on status of women debated for preparing a convention based on declaration and requested the UN member states to send their opinions, views and proposal for said international instrument through the Secretary General. A working group was also established by the commission assigning the task to report the commission regarding the replies which was planned to meet five days before the twenty fifth sessions in 1974. The task was accomplished by the working group on 25th session and report was presented summarizing the replies of states and further proposals as to the contents of the proposed convention. At the same session it was also decided to prepare a comprehensive international instrument to eliminate discrimination against women relying on recommendations in any specific field.²³

In preparing for next session i.e. 26th session in 1976, the commission further requested member states, UN and Non Governmental Organizations to make comments on the draft articles of working group report. Before the beginning of 26th session a working paper containing four draft conventions was prepared by the Secretary General firstly submitted original working group containing report on replies of governments to the working group, which was main issue of discussion at the session and rest of three were submitted by Benin, Indonesia and All African Women Conference but were not discussed at the session. Another

²² *Short History of CEDAW Convention extracted from Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination against Women (A/CONF.177/7)*, published by the United Nations Department of Public Information.

²³ Noreen Burrows, *The 1979 CEDAW*. NILR 1985, 420. see UN doc.E/CN.6/591

draft Convention was submitted by Belgium during the debate on the draft convention. Some parts of this text were for discussion for individual draft articles.²⁴

Most of the work of commission on status of women was completed at 26th session in March, April and December 1976 .then commission presented the report to General Assembly where its third committee through its own working group discussed the required amendments and clarification for two days in December 6th & 7th of 1979 and then send it for adoption of the convention for the adoption by General assembly. And it was finally adopted on 18th December 1979.²⁵

A special ceremony was arranged at the Copenhagen Conference on 17 July 1980, and convention was signed by 64 states and 2 ratifications were also submitted. On 3 September 1981, a month later the twentieth Member State had ratified it, the Convention entered into force and faster than any earlier human rights convention had prepared consequently bringing United Nations efforts to codify comprehensively international legal standards for women.²⁶

1.3 The Organization of the CEDAW.

The convention opens up with preamble of fifteen paragraphs, elaborating the aims and beliefs of member states to achieve and in granting justice and equality to the women as that of men in all spheres of life,

²⁴ ibid

²⁵ Noreen Burrows The 1979 CEDAW .NILR 1985 421

²⁶ See Short History of CEDAW Convention

Extracted from Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination against Women (A/CONF.177/7). Published by the United Nations Department of Public Information available at www.un.org/womenwatch/daw/cedaw/history.htm last visited on 10th August 2009

Part I of the convention contain 6 articles, (1 to 6)

The second part contains three articles related to political rights of women, (7 to 9)

The third part covers social and economical rights of women (10 to 14)

The fourth part deals with matter of Civil law which is the main part of our study through this thesis work i.e. article 15 granting women the equality before law, and article 16 granting women equal rights to the men and eliminating discrimination against women in matters of marriage and family life.

The fifth part of convention provides for establishment of committee to keep the record of implementation of convention and progress made in respect of obligation under the convention and its reporting system²⁷

The sixth and the last administrative part, article 23 to 30 deals with administration of the convention.

1.4 CEDAW and Pakistan

Pakistan is one of the member countries of United Nation which has ratified /acceded to the CEDAW on 29th February, 1996, being 174th state party to the convention Ministry of Women Development is assigned task as national focal machinery for its implementation.²⁸

It was intended to make reform in the local laws under the obligations created by this international instrument. Number of laws has been passed and implemented for the protection

²⁷ Noreen Burrows ,The 1979 CEDAW, NILR 1985, 422

²⁸ www.pakistan.gov.pk/ministries/women-development. last visited on:8th August , 2009

of women rights in Pakistan but still treatment of women in Pakistan has been much highlighted and criticized by human rights activists (as in recent cases of Mukhtaran Mai) but interestingly US as most influential member of international community who played a key role in development of international human rights instruments, has failed to ratify several significant treaties including CEDAW but not criticized or blamed.²⁹

The right to equality and non discrimination are the foundations of entire established modern international human rights law and much emphasis is placed on these principles since the establishment of United Nation from 1945 that they have become not only part of international customary law but also developing as jus cogens. Despite the vast impact of equality and non-discrimination within general International Law, there are difficulties in adopting a universal or general understanding of their meaning and formulating acceptable principles for application of these principles.³⁰

The United Nations Charter was drafted keeping in mind the fundamental human rights and the principles of equality between man and women as they are born free and equal in respect of rights and dignity. And as such member states are bound to the minimum standards put by the Charter. The provision provided by the Charter has placed high emphasis on protection and support of women rights with reference to the religions that equal rights to both the sexes should be ensured without any discrimination as to sex race religion or lineage/

²⁹ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature March 1, 1980, 1249 U.N.T.S. 13, 19 I.L.M.33(entered into force Sept. 3, 1981)[hereinafter CEDAW]. Additionally, the United States has failed to ratify the international Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 993 U.N.T.S.3,6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR], or the Convention on the Rights of the Child, U.N.GAOR,44th Sess., Annex, U.N. Doc. A/RES/44/25 (1989).

³⁰ Shaheen Sardar Ali , Conceptualizing Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: 7

language. The intended faith in fundamental human rights and dignity and worth of human person but also the equal rights of man and woman and provides definite persuasive foundation to promote the rights women on equal standard. Besides UN charter all other instruments like UDHR, ICCPR, ICESCR and their protocols together strengthening the scope of these provisions related to the equal rights of women.³¹

1.5 The basic Principles of CEDAW

The CEDAW convention is framed /drafted by three overarching or we can say encompassing fundamental principles to protect women rights³²: these are

1.5.1 Principle of Substantial Equality³³

Substantial equality as defined in the convention includes the equal opportunity, access and equal results and, out comes for both males and females. It has been recognized that women are not treated equally to the men as they have to be dealt in a way that they can benefit the opportunities equally as those of men. Like in some countries women are not given chance at night shifts reason being given that they may be exposed to some violence but whatever reason is given by doing so women are denied an important economical opportunity and substantial equality demands that problem regarding night works are to be addressed instead of denying their rights make the work place more safer for both males and females.

³¹ Salma Khan, Islam and fundamentalism: Impact on human rights of women. Barcelona, April, 1998. available at http://www.mediterraneas.org/article.php3?id_article=389, last visited on 3rd November 2008.

³² Claim & celebrate Women migrants human rights through CEDAW: A UNIFEM briefing paper. CEDAW's. http://unifem-eceasia.org/projects/migrants/hla_chapter/_06.pdf, last visited on: 8th August, 2009

³³ Ibid

1.5.2 Principle of Non-discrimination

The second highlighted principle is of non discrimination and discrimination in the convention is defined as any act resulting in denial in exercising and enjoyment of right either expressly or impliedly causing discriminatory impact on women.

1.5.3 Principle of State Obligation

Under the convention the state parties are obliged or put under obligation to submit an annual report in respect of steps adapted to implementing the obligation under the convention.

1.6 CEDAW (Article 16, reservation and Declarations)

The above principles provide the source for formulation of the strategies and giving meaning to the convention.³⁴

The term Equality is a very controversial issue in this area. The notion of equality differs according to the internal systems of every state and religion. Here the concerned question is of equal treatment of women as promised under CEDAW in every sphere of life and particularly what we are mainly dealing the area of family life and more precisely the marriage right of women as equal to men as in article 16 of the CEDAW which says ;

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

³⁴ WAO RESEARCH AND ADVOCACY, available at <http://www.wao.org.my/research/cedaw.htm> last visited on 3rd November 2009

The substantially equal right in all family matters is granted to women against man and demanded the elimination of discrimination against women and particularly provides for states duty to take measures to achieve this end regarding the family matters on equal bases for both the sexes ,

(a) The same right to enter into marriage;

Same section further requires that she can have all those rights which are granted to man under any personal law of any state to contract a marriage. The language of the article leads to an idea as to give equal right to women as provided for man, at the time of contracting marriage which prima facie means equality to enter into marriage.

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

The women is also given substantially same or equal right of choice of marriage partner with her free and full consent that if she agrees to enter into such contract and without any compulsion by anyone as in case of man . Looking at it from Islamic point of views if this is taken literally then who ever can be a non Muslim or a partner from people of books which is a prohibited in Shariah particularly for a Muslim female and conditionally allowed for Muslim male.

(c) The same rights and responsibilities during marriage and at its dissolution;

The same section covers the area of rights and duties during and particularly at the time of separation or its dissolution of the spouses as both carry equal rights and duties against each other beside other related issues and if we take it literally then the roles of parent may not differ as father and mother as well as husband and wife in any way, everyone has to have a separate duty to perform.

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.³⁵

1.6.1 CEDAW and Muslim Countries.

All major religions such as Islam, Christianity, Judaism, Hinduism and Buddhism, have assigned different role for both the sexes and prefer or expect women's duty to be obedient to the man. With the social changes in the societies and human right activities the legal status of women has changed and resulting in changes in their social status and role in the society which is not the case in Islam and which is taken as complete way of life and consider no difference between religion and state. All components of state in that sense are religious and Shariah is the constitution of the state. This was purely spiritual side of the issue but there has been a

³⁵ CEDAW 29th Session 30 June to 25 July 2003.htm available at www.un.org/womenwatch/daw/cedaw/text/econvention.htm last visited 25th November, 2008.

change in approach of Islamic states particularly in 18th century more specifically with Wahabi movement in Arabia concentrated on the social aspect of Islam rather than spiritual diversions that had become associated with Islam over the millennium. It was an attempt to revitalize Islam by promoting the social values as preached by the Quran and practiced by the Holy Prophet to meet the requirements of changing social needs. The writings³⁶ of Muhammad bin Abdul Wahab are replete with issues relating to women and are really very sensitive to the plight of Women in tribal Arabia, his sensitivity and compassion toward women is somehow not translated into modern Arab and Muslim life, which is tragic. The issues particularly the implementation of the true Islamic principles related to women or the institution of family are therefore lacking.³⁷ Shariah being fundamentals of laws in Islamic states are not followed strictly in many Muslim or Islamic states because of foreign influence in the past over them who interfered in their law making to protect their economic interest which resulted in reforms in public sphere of life and women were less advantageous in respect of equality or liberty as to man was not properly analyzed in either by ancient or the modern Islamic scholars and so called fundamentalism rooted the idea of inequality and separate gender roles . With this approach they treat women differently both in personal and public sphere which is in conflict with international treaties entailing equal human rights.³⁸

Islam is the official religion of Pakistan and Sharia is the governing law particularly for the Family laws issue. Islam has some definite laws for certain family matters which are not considered as discretionary for courts of laws to make any decision against them or make any

³⁶ Nantana. J.DeLongbass. *Wahabi Islam*. Published by I.B. Taurus.

³⁷ Ibid

³⁸ Salma Khan, Islam and fundamentalism: Impact on human rights of women. Barcelona, April, 1998. available at http://www.mediterraneas.org/article.php?id_article=389, last visited on 3rd November 2008

change in them. Pakistan has signed CEDAW with Declaration of its subordination to the constitution and constitution of Pakistan 1973 provides that any law repugnant to the injunctions of Islam shall be void and Government not bound by the article 29 of the convention.³⁹

Article 29 Para 1 provides for mechanism of dispute resolution between any state party to the convention that dispute may arise regarding the interpretation/application of the convention they may refer it to arbitration and in case of no settlement within six months they may refer it to ICJ in accordance with court's statute.⁴⁰

³⁹ **Declaration:**

"The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan."

Reservation:

"The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention"
www.un.org/womenwatch/.../cedaw/reservations-country.htm

⁴⁰ Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

G:\CEDAW 29th Session 30 June to 25 July 2003.htm

www.un.org/womenwatch/daw/cedaw/text/econvention.htm

In Pakistan the legislature follows the dualistic⁴¹ approach with respect to adoption of international laws as shown by decided cases like Sheila Zia v. W.A.P.D.A⁴² and SGS Societe Genèrale v. Pakistan.⁴³ Which requires the act of the legislature of the state is required for the implementation of the international law as state law. Without Conversion of international law into domestic law an international agreement can not bound such a party for its implementation⁴⁴. All most all Muslim states had entered the convention with reservation on the bases of conflict with Shariah specially article 16 of the convention (excluding Pakistan). As Mauritania stated that it approves the convention when it comply with its domestic law and Shariah. It is commented by Gieryck that Shariah provides for male guardian ship over women and lot of discrimination is done at their homes by their husbands and families. Reservation to the said article limits the application on the relevant state of the fundamentals of the convention. And under article 28 these are not permitted as objecting the purpose of the convention.⁴⁵ Saudi Arabia's reservation regarding article 16 as free choice of spouse reservation similarly Algeria put a conditional acceptance as if it is not in conflict with the Algerian Family Code and some Islamic scholars even argued that these human rights principles are not of universal nature but only reflects the western idea of cultural development. Maldives, Morocco and Egypt have declared s reservation of article 16 as they will not comply

⁴¹ There are two basic theories of international law regarding its relation with municipal laws: Monism and Dualism.

Monist's theory supposes that international law and national law are two component of one body of knowledge called Law, whereas the Dualism denies that international and national law operate in the same sphere as for dualists international law deals with the relation of states and national laws operate for rights and duties of individual within state. Martin Dixon on international law.83,84

⁴² Ms. Sheila Zia and other v. W.A.P.D.A PLD 1994 S.C 693,710

⁴³ SGS Socite Generale v. Pakistan CLD 2002 Lah. 790

⁴⁴ Imran Ahsan Khan Nyazee, *Islamic Law and Human rights*, Islamabad Law Review, Vol 1 Spring & Summer 2003, A journal of the Faculty of Shariah & Law .International Islamic University, Islamabad

⁴⁵ <http://www.asffashahzad.com/articles/4/1/THE-EXTENT-TO-WHICH-CEDAW-IS-AN-EFFECTIVE-INTERNATIONAL-INSTRUMENT>

with CEDAW's grant of equal rights during marriage on the ground that Shariah itself provides true equality between the spouses. These and other Shariah based objection or reservation have constantly drawn criticism and objection from other member states.⁴⁶

Beside these reservation and objection CEDAW is still most powerful international instrument regarding women rights some of the state used it as basis for their laws for protection of the women rights like Sri Lanka used it as guidelines for their Women's Charter in 1993 but implementation process of the convention is still slow and limited. On the other hand in countries like Japan women remain unsuccessful in getting the rights established in CEDAW even she has ratified without any reservation.⁴⁷

There were many reasons for these declarations and reservations at the time of becoming party to the convention as declaration was a part of the negotiation to accede to the convention without any unnecessary delay in the matter, worded as not to contradict with objective of the convention and the reservation to the said article of the convention is same as Pakistan's position to the jurisdiction of international court of justice.⁴⁸

The Constitution of Pakistan was adopted in 1973 and its drafters had advantage of going through the development of all initial and major international instruments of human rights like of Universal Declaration on Human rights, International Convention on the

⁴⁶Ibid

⁴⁷ Ibid

⁴⁸ CHAPTER I (Introduction, justification and effect of declaration and reservation on CEDAW, country profile, information on the preparation of the report)

www.pakistan.gov.pk/divisions/women-development.../02chp1.pdf

Elimination of all Racial Discrimination, the international Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights. As such the provision of the constitution reflects all the principles of these instruments or we can say the chapter on fundamental rights is extracted from these instruments and the declaration on the convention would not negatively effect its implementation and facilitating the accession to the convention by Pakistan. After re evaluating the reservation to CEADW, Pakistan withdrew it on 23rd July 1997 which also shows that Pakistan keeps the reservation or declaration reviewing made by it regarding any international treaty obligations.⁴⁹

1.6.2 The Constitution of Pakistan and Fundamental Rights

The presently enforced 1973 Constitution is the supreme law of the country and all laws voted for should be conformity with the Constitution. However, this Constitution during martial law regimes has undergone various changes, affecting the guarantees provided by the constitution as supreme law of the state regarding equal human rights.

From Articles 8 to Article 28 of the Constitution⁵⁰ elaborate the Fundamental Rights which are equally granted without any discrimination to all citizens, both male and female wherever they may be, and people temporarily or permanently in Pakistan subject to the exceptions of danger to state sovereignty or integrity public order or morality they can be suspended or curtailed by the government. However these sanctions can be challenged in the

⁴⁹ *ibid*

⁵⁰ The Constitution of Pakistan 1973, article 8 to 28

Supreme Court of Pakistan and it can take notice of (suo moto) gross violation of these fundamental rights. According to the Constitution they are inalienable rights and protection of life liberty body property and reputation are also guaranteed under the constitution and any law or custom not confirming these rights shall be void(.art.8).⁵¹

The articles 20,21,22⁵² provides for religious freedoms and safeguards as every citizen has right to believe, practice and propagate their religion and permit all religious sect to establish and maintain their religious institutions without levy or exemption of any special tax and can not be compelled to attend without his will any educational intuition different to his religion,

Furthermore the articles 25, 26, 27⁵³ lays down the important principle of equality and non discrimination before law of every citizen of state without discrimination based on sex especially in different spheres of life and specifying that special provision for the protection of women can be added where required is also provided,

Article 28 provides for preservation of culture, language and script of all citizens. Besides fundamental rights in principles of policy it is further provided with regard to m women rights protection that women shall be given special representation in local bodies or institutions(art.32) and full participation in all sphere of national life(art.34) and state has also given responsibility to protect marriage ,family and the mother(art.35)⁵⁴

⁵¹ sdpi.org/know_your_rights/.../The Constitution of Pakistan.htm last visited 8th August 2009.

⁵² The Constitution of Pakistan 1973, article 20 to 22

⁵³ Ibid article 25 to 27

⁵⁴ www.sdpi.org/know_your_rights/.../The%20Constitution%20of%20Pakistan.htm - last visited 8th August 2009.

The constitution of Pakistan provides all internationally recognized basic right on equality basis to all the citizens without distinction based on sex. And as part of international community Pakistan is also taken responsible to have peaceful relation with other states and adopt some internationally common standards for human treatment or provide internationally recognized human rights to all subjects of state. Adoption of CEDAW is also part of its international obligation as party to said convention and is bound under international law to fulfill the promises under treaty obligation except for reservation in accordance with its legislative procedures. The question here is that under treaty obligation now Pakistan after ratifying The CEDAW and as an active party to it is bound by the terms of the treaty and to make or reform its domestic laws accordingly.

1.6.3 Family laws In Pakistan

In Pakistan the laws governing marriage and family matters are Islamic or based on principles of Shariah. The protections of fundamental rights regarding family are also the obligation of the government. The legislature adopted some of previous laws with reform and made new laws on different matters after independence of the Pakistan. The Muslim Family law Ordinance 1961(MFLO 1961) deals with matters like succession,⁵⁵ registration of marriage⁵⁶

⁵⁵ 4. Succession. In the event of death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

⁵⁶ 5. Registration of marriage. (1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

Polygamy⁵⁷ grounds for dissolution of marriage or Talaq⁵⁸ maintenance and dower like issues⁵⁹ and Dissolution of Muslim Marriage Act 1939 (DMMA 1939) further provides for the grounds on

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of such-section (3) shall be punishable with simple imprisonment for a term which may extent to three months, or with fine which may extend to one thousand rupees, or with both.

(5) The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of nikhanama shall be supplied to parties, and the fees to be charged thereof, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

⁵⁷ 6. Polygamy.(1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,

(a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

⁵⁸ 7. Talaq.(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective

which a decree can be obtained for dissolution of marriage including the cases of change of religion by a partner under sections 2⁶⁰ and 4⁶¹ respectively⁶². Sub clause ix of the section 2 of

until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under his section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

8. Dissolution of marriage otherwise than by talaq. Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply.

⁵⁹ M Mehmood, *The Code of Muslim Family Laws*, Pakistan Law Times Publication, 3

⁶⁰ **2. Grounds for decree for dissolution of marriage.**

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,

DMMA 1939, covers a vast ranging area of cases as it says *for any other ground recognized by Shariah for dissolution of marriage*. The Women protection Act has also become part of domestic legislation on protection of women rights. All such laws do not provide the essentials or pre-requisition for contract of marriage but dealing with the issue of dissolution. Even the section 4 of the DMMA 1939 does not directly invalidate the marriage even by conversion to another religion by wife from Islam.

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran, (ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law, Provided that:

(a) no decree passed on ground (i) shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

⁶¹ **4. Effect of conversion to another faith.**

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2;

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

⁶² Ibid.

According to Vienna convention on the Law of Treaties, 1969 Article 02,⁶³ Pakistan after ratifying CEDAW is now bound by the terms of treaty and now it is the duty of legislative bodies of Pakistan to enact new law under article 16 of CEDAW and by putting provision of the treaty into practice especially for the protection and equality of women to men. Since no direct transformation of international law into local/domestic law mechanism is available but a dualistic system for making international law applicable in the country is followed. CEDAW is divided in two parts; first part of first 16 articles contains substantive areas to be governed by treaty or areas of discrimination besides defining discrimination and rest deals with mechanism to monitor the state party's response to it or observance to treaty.⁶⁴

Article 1 of CEADW gives the definition of the term 'discrimination against women, while the constitution of Pakistan has no clear provision on this issue of discrimination. State parties to the Convention are required to put the provision to equality in their constitutions and local

⁶³ 1. For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations; or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or in the rules of any international organization.

⁶⁴ Ayra Inderyas, *A lot still needs to be done*, DAWN NEWS GROUP 27 May, 2007

laws and eliminate the discriminatory laws and policies under articles 2, 9, 15. but in case of Pakistan Hudood Laws (1979), some provision of Muslim Family Law Ordinance, Law on Honour killings (2004), Pakistan Citizenship Act are still taken as pro men and are still part of our laws.⁶⁵

Article 16 deals with equality of woman in family matters and provides equal rights to her as to the men to all related issues like contracting or dissolution of marriage or child custody etc. but in Pakistan they are denied their rights under cover of customary laws/ rules like Watta satta, Wani, haq bakshwan. and MFLO 1961 is also considered as discriminatory as man is given right to divorce without giving any reason which is not the case with wife who has to file suit and go through the court procedure to get the confirmation. Dissolution of marriage and Guardian Act also has disentitled her from custody of their minor child, and marriage age area is also ambiguous in its application.

Being obliged by the treaty now government is responsible to take some definite steps to develop a mechanism to fulfill both national and international obligations to strengthen and improve women rights in real sense.⁶⁶

The article 16 safeguarding the marriage rights particularly for women and providing the equal rights to women during and at the time of ending the contract of marriage without effecting the women right in Islam whereby women are granted equal rights to achieve a balance between both the partners but in Islam the nature of equality is based on the duties assigned to the spouses and some times imposes restriction on women which are not

⁶⁵ Ayra Inderyas , *A lot still needs to be done*, 2007.

⁶⁶ Ibid

applicable to man like in case of divorce but on the other hand man is duty bound to the maintenance of the wife and women is protected from spending any thing from her property.⁶⁷

1.7 Conclusion

CEADW is a comprehensive latest document on rights of women and most ratified among all and almost all the members of UN are party to it which shows the importance of contemporary women rights issues all over the world. Pakistan is one of the signatory to the convention and has undertaken to protect the women rights within its jurisdiction where the domestic legislation/legal system is of plural nature as two parallel systems are followed. Pakistan as member of International community is also duty bound to follow international norms particularly under the treaty it has entered into as for instance CEDAW. Besides other provisions, the article 16 require a special attention from the law implementing bodies of state as it requires further law making in matters regarding marriage providing equal rights to women to men regarding all related matters.

The basic unit of any society is a family and family need a proper regulation to perform positively and family laws and women rights are two branches of law but belong or originate from the same area of law which is Muslim personal laws. In Pakistan the Muslim Personal Laws, the area dealing with legal rights of women in contracting marriage when we talk about article 16 of the convention equal rights in contracting marriage and related family matters, are granted to women against men and abolition of all forms of discrimination against women is demanded giving the definition of the discrimination. The situation vary in different parts of the

⁶⁷<http://cedaw.wordpress.com/2007/04/10/egypt-reservations-to-cedaw/> last visited on: 8th August , 2009.

country like people from rural areas are not even aware of these rights but situation may not be much different in urban areas where not all but few may know their rights even educated class. CEDAW is a step to develop laws for protection of women rights which are also recognized and granted by Pakistani constitution but it requires lot more working to make it completely compatible with different legal system of the world facing same kind of problems in respect of women right protection. Implementation is at the beginning stage and still long way is to go to develop these laws in accordance with local legislation of Pakistan and many other Muslim states. Pakistan law making bodies have recently tried to make new laws for the protection of women like women protection bill and also raised the number of women seats in National and Provincial Assemblies and so increase the women representation in the government. Implementing CEDAW is required by the international community but making it compatible with Shariah is a difficult task since there are provisions in the convention which if implemented directly without interpreting them properly or making reservation on those provisions, can get in conflict with Shariah as in case of article 16 of it though the subordination to the Constitution is there but the constitution itself needed to be interpreted in this regard. The laws against the injunction of Shariah are void and same rights in marriage are the area which needs legal interpretation to declare it to be in conformity with Shariah or not. The immediate response is required in this regard from authorities in Pakistan so that women rights can be protected in accordance with both international law and demands of the Shariah as demand of equality effecting areas which can be a challenge for Muslims as in cases of increase in interfaith marriages by Muslims males and females.

CHAPTER TWO

Islam and Women Rights

Shariah or the Islamic law is based upon ethics and those moral values which are fundamental for any civilized society, and formulated as to achieve the objective of Shariah. These foundation or basic principles are protection of Life, Din, Reason, Property and Lineage /honor respectively. While achieving this end the rules of Shariah also provides for the punishment for violation of these principles the concept of punishment is also based upon the idea that all Maruf that is good or moral should be prescribed and all Munkar that is bad or immoral should be proscribe. As such a system based on this, guarantees protection of personal and social rights for those who are related or living in these societies. Violation of Maruf constitutes a legal offence which may or may not be a cognizable offence⁶⁸

Family and other social relations among mankind are very carefully treated by Islam on moral and fair bases. Both genders are assigned different roles to be played in the society with defined duties towards each other and division of these roles is based on the physical and mental capacities of men and women. While looking at the status of women in Islam, reciprocal rights and duties of men can not be ignored so that balance and reasons for assigning of roles can be understood.⁶⁹

⁶⁸ Anis Ahmad , *Women and social Justice* ,Objectives of Shariah, Institute of Policy Studies .16

⁶⁹ The status of women in Islam, available at <http://www.islamfortoday.com/womensrightsbadawi.htm> last visited on 20th august 2009. info@institutealislam.com

2.1 Rights of Women in Islamic Law

The issue of status and rights of women particularly in Islam is neither a new nor a completely settled one and generally presented to western reader in its incomplete form causing them to misunderstand the real position of women in Islamic concept.⁷⁰

The stance of Islam on status of women can also be understood by looking at the historical practices of other religions regarding women; looking at Islamic view regarding women; she was granted the status which had never been granted under any religion before, by placing a woman on equal footing as of men. Few verses from Quran can elaborate the Islamic stances on status of women rights or the notion of gender equality like Quran says: "*O Mankind! Be conscious of your Sustainer, Who has created you out of one living entity, and out of it created its mate, and out of two spread abroad a multitude of men and women*" (Al Qur'an 4: 1).⁷¹ In another verse it provides, "*it is He who has created you all out of one living entity and out of it brought into being, so that man might incline with love towards women*". (Al Qur'an 7:189).⁷²

The Originator (is He) of the heaven and the earth. He has given you mates of your kind. (Al Qur'an 42:11)⁷³

And God has given you mates of your own Kind..., (Al Qur'an 16:72)⁷⁴

⁷⁰ Jamal A Badawi, *The Status of Women in Islam*. Publication Section, Da'wah Academy, International Islamic University, Islamabad Pakistan.5

⁷¹ Muhammad Asad, *The Message Of Quran* Dar ul Andalus, Gibraltar,100

⁷² Ibid233

⁷³ Ibid 740

Islam looks at the women from different angles and has placed her even in better position than men and in terms of religious obligation like prayer, fasting, hajj. Both the sexes are equally accountable when they are obliged to do anything in accordance with their position; such as: age, physical conditions keeping in view their psychological and physiological conditions.

Similarly Islam improved the social position of women in an age when the most advanced nations such as the Romans and the Greek held them in contempt and bondage, denied those rights in property and curtailed their free will. They were considered inferior to men. Considering the fact that these revolutionary changes occurred in a barbarous desert society whereof female infanticide was a common practice which Islam forbade and converted it into an offence cognizable in law and in eyes of God.. Women were also granted equal right to seek knowledge as that of man. As wife her position was far improved and was even given right to consent in marriage and Islamic law provides that women can not be forced to marry without her consent to anyone.⁷⁵

Quran states, "...the rights of the wives (with regard to their husbands) are equal to the husbands, although men have precedence over them ... (Qur'an 2:228). The only priority given

⁷⁴ Ibid 405

⁷⁵ Ibn Abbas reported that a girl came to the Messenger of God, Muhammad (P.), and she reported that her father had forced her to marry without her consent. The Messenger of God gave her the choice . . . (between accepting the marriage or invalidating it). (Masnad Ibn Hanbal No. 2469). In another version, the girl said: "Actually I accept this marriage but I wanted to let women know that parents have no right (to force a husband on them)" (Ibn Maja, No. 1873). Jamal A Badawi , *The status of women in Islam*, 16

to men is based on natural difference between two genders and this priority implies a duty for a man to maintain and protect women.⁷⁶

Since, women are granted rights to enter into marriage, they are also given right to dissolve the same but a conditional permission in order to avoid haste and emotional stress, a justification for court is required unless marriage contract allows it .

Islam further recognizes women's economical rights. West could not offer rights to women until 1938, French law did not give right to married women to dispense with her property without her husband's permission whereas in Islamic law women are granted complete rights in respect of her property whether single or married. Woman is given right to seek employment if she wishes to do so but preference is given to her being supported by men as she is assigned role like mother, wife which are more likely to be protected and maintained by men. But it never forbids her from seeking employment rather it encourages when there is a need for it ⁷⁷

2.2 Marriage in Islam

In Shariah, the marriage has been highly recommended rather to remain single specially to get closer to Allah. Celibacy is disapproved as way of getting closer to God as in some other religions like Christianity. On the other hand Islam has also forbidden any physical relationship between man and woman out side the marriage.⁷⁸

⁷⁶ Jamal A Badawi, *The Status of women In Islam*. 17

⁷⁷ Ibid 21

⁷⁸ Muhammad Tahir Mansoori, *Family Laws in Islam; Theory and Application*, Shariah Academy .International Islamic university Islamabad, 1

Holy Prophet Muhammad PBUH is reported to have said that there's no celibacy in Islam. In another narration Prophet (PBUH) said:- "When a man marries he has fulfilled half of his religion, so let him fear Allah regarding the remaining half."

In another Hadith the Prophet PBUH emphasized on marriage "O young people, those among you who are able must enter into marriage .For it helps to divert your attention from woman and it is safeguard against lust .And those who can not marry should observe fast, for fasting too is a safe guard" (Hadith of al Bukhari and Muslim, bab e Nikah, on authority of abdullah Ibn Masud)⁷⁹

At another occasion the marriage was given further elaboration as "There are four reasons for men to marry women: her wealth, her lineage, her beauty, her faith. Woe betides you! Only enter into marriage with one who has faith".(Hadith of al Bukhari and Muslim on the authority of Abu Hurayrah)⁸⁰

A society revolves around a family for its existence as it basic unit and these relations need a proper regulation and check through laws and establishing rights of individuals. In Islam, the role of marriage is of fundamental importance for establishment of a successful society so the institution of marriage has been given a significant place. And it is made incumbent upon the individuals keeping in view their financial or physical conditions. The family in Islamic law is

⁷⁹ Mulana Wahiduddin Khan ,*Words of Prophet Muhammad PBUH*, selection from The Hadith, no 97, 62

⁸⁰ Ibid no.98, 63

a unit of society upon which the growth of Muslim population depends and also the growth or spreading of Islamic faith is dependant.⁸¹

According to major school of thoughts: Hanafi, Maliki and Hanbali, the hukam of marriage in Islam is recommendatory, however some times it becomes (Wajib) or obligatory on man.⁸² Shafai School considers it as (Mubah) preferable. The general opinion is that if a person; male or female fears that if he/she does not marry they will commit fornication, then marriage becomes 'Wajib'. However, one should not marry if he does not possess the means to maintain a wife and future family or if he is not capable to have sexual relationship legalization of which is major aim of marriage contract or if dislikes children, or if he feels marriage will seriously affect his religious obligations.⁸³

The marriage contract in Islamic law is called *Nikah*. Marriage is enjoined upon every Muslim, once Muhammad PBUH asked a man if he was married, who answered in negative and he further asked him if he is healthy and of sound mind which he replied in affirmative, then the prophet called him a brother of devil. Therefore in Islam, even the ascetic orders are rather married than single. It is related that one of the Companions, named 'Usman ibn Maz'un, wished to lead a life of celibacy, but Muhammad PBUH forbade him.⁸⁴

2.3 Nature of Marriage Contract (CIVIL /RELIGIOUS)

⁸¹ Thomas Patrick Hughes, *Marriage*. Excerpted from "Dictionary of Islam" by © 1886available @ muslim-canada.org/dower_dictionaryofislam.html Last visited on 20-10-2008

⁸² Imran Ahsan Khan Nyazee, *The Distinguished Jurist's primer*, (In Rushd) A translation of Bidayat al Mujtahid .Book of Marriage .1

⁸³ Maulana Zafar Ullah Shafique, *Biadai us Sanai*, Urdu translation , book of marriage, 623, vol.II Markaz e tahkeeq research cell Diyal Singh Trust Library Nisbat road Lahore.

⁸⁴ Thomas Patrick Hughes, *Marriage*. Excerpted from "Dictionary of Islam" .6

In order to understand the rights and obligation of spouse and laws governing the contract of marriage it is necessary to ascertain the nature and object of such contract. The contract of marriage "Nikah" Which literally means; getting or joining together and technically is marriage.

Marriage (*nikah*) in Islam is accepted as a sacred religious as well as civil agreement. However, it is not religious in the sense of a sacrament, but rather in the sense of realizing the spirit of Islam. It is civil contract in Islamic law, as its objective to legalizing sexual relationship between man and woman and the procreation of children and unlike Hindus it does not require any religious rite or ceremonies⁸⁵. Marriage shows the dual idea of Islam, combining the nature of both *ibadat* (worship) and *muamalat* (social relations).⁸⁶The scholars have defined the marriage contract thus:

According to Hidayat, It is to be contract which has for its object begetting and legalization of children.

According to Kanz ul Daqa'iq and fatawa Alamamangiri ,Nikah or marriage is a contract that is entered into by a man with a woman for the enjoyment of beneficiary rights over her. Similarly the Baillie digest defines it as *A Nikah in Arabic means "Union of the series" and carries*

⁸⁵ Tanzil ur Rehman , *A code of Muslim Personal Law*, Volume I , Hamdard Academy, Hamdard National foundation. Pakistan Hamdard Center Karachi 18, Pakistan 19, 20

⁸⁶ Abhishak Kumar Pandey , Article, Law school Banaras Hindu University. Varanasi ,Available at Legal Service India.com, Last visited on 20th October 2008

a civil contract for the purposes of legalizing sexual intercourse and legitimate procreation of children.⁸⁸

For Ameer Ali: - Marriage is an organization for the protection of the society. This is made to protect the society from foulness and unchastely.⁸⁹

Mahmood J. in his judgment⁹⁰ decided it as: - Marriage according to the Mahomedan law is not a sacrament but a civil contract as quoted by Mullah, the notion adopted by Mahmood J in a suit for restitution of conjugal rights not as definition of marriage.⁹¹

Marriage or Nikah among Muslims is a 'sacred Covenant' or 'Mithaq-e-ghalid' between a man & a woman, soliciting each others life companionship, which in law takes the form of a contract or aqd. Under Section 2 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

very comprehensive definition of marriage by Dr Tahir Mahmood" A solemn pact between man and woman soliciting each others life companionship which in law takes the form of a contract (aqd).⁹²

Marriage in Islam is one of the most emphasized area and through many verses in Quran have highlighted different issues related to marriage reflecting the importance of marriage in Islam and regulating the relation of both the partners. the Holy Prophet described marriage as his Sunnah and for Muslims Sunnah of a Holy Prophet(PBUH) is some thing much more than just a rule or definition of Contract Act 1872. Muslim jurists have unanimously agreed

⁸⁸ Tanzil ur Rehman, *A code of Muslim Personal Law*, Hamdard Academy, Pakistan 20

⁸⁹ Abhishak Kumar Pandey, Articles, Available at Legal Service India. com, Last visited on 20-10-2008

⁹⁰ Abdul Kadir Vs Salima, All 149 (FB), 1886

⁹¹ Muhammad Munir, *Marriage in Islam, A civil contract or a sacrosanct*. Hamdard Islamicus. 77

⁹² Ibid 80

as marriage being mandatory on a person who is physically and financially able to contract marriage.⁹³

From above definitions the dual nature of marriage contract it can be concluded in Islam which is not only civil but it's also entails some religious obligations. As rights and obligations arising out of such a contract is not a product of legislative body but derived from Quran and Sunnah.⁹⁴

2.4 Essential Requirements of Marriage

Islam protected the rights of women which were not given to her in pre Islamic era and made her a party on equality basis in contract of marriage instead of a sale commodity. The contract of marriage being a contract has certain conditions to be fulfilled before conclusion without which it can not acquire the legal status.

Like other contracts the parties are required to be eligible for said contract for which Islamic law provides that male or female who attained puberty (for boys the 12 years and for girl 9 years is the described age of puberty by Islamic scholars) and of sound mind can legally enter into a valid marriage contract either by themselves or through their guardians.

It was a preferable social practice to marry at early ages in Arab society. Generally law does not provide for a definite procedure of celebration of a marriage ceremony nor does it compulsorily demand be reduced in writing the contractual agreement, though Quran recommend the witting down of future contract as an evidence of it and removing doubts (Al

⁹³ Ibid 79

⁹⁴ Tanzil ur Rehman ,*A code of Muslim Personal Law* , Hamdard foundation, Pakistan 20

Quran II:282) but oral contract especially seemed to be prevalent at that time. Important requirements to the marriage contract is the offer (*ijab*) by one contracting party and the acceptance (*qabul*) by the other, taking place at the same meeting in the presence of two witnesses or one male and two female witnesses.⁹⁵

A dower agreed between the parties, to be settled upon the woman. The error of the settlement does not nullify the contract, for under any circumstances, the woman becomes entitled to her dower, whatever type it is.⁹⁶

Women under Islamic law are given option of puberty to accept or reject the contract of marriage entered into by her guardian, during her infancy. A Marriage without the consent is not valid contract either express or implied. In Ameer Ali's view the validity of marriage depends on two conditions, first the capacity or eligibility of the party to enter into marriage contract and secondly the celebration of marriage in accordance with the generally recognized norms or laws of the place where the ceremony taking place. The term the capacity is dependent upon or is to be judged by the *lex domicile* (law of the state where the parties live).more precisely we can say that for contract of marriage like other contracts, personal capacities of the party is dependent on the law of domicile. Whether both are from same country or belong to different country. If the each in their *lex domocilie* are capable they can contract marriage. The legal capacity will be determined in accordance with the law of domicile

⁹⁵ John L. Esposito , *Women in Muslim Family Law* Syracuse University Press. Syracuse, NY. 1982. 16.

Available at Questia Media America, Inc. www.questia.com

⁹⁶Thomas Patrick Hughes Marriage. *Excerpted from "Dictionary of Islam"*

For example if a Muslim is domiciled in England the governing law for the purpose of capacity for marriage contract will be of England but person living in a Muslim state will be governed by the law of that state. And capacity to contract marriage will be decided accordingly⁹⁷

Generally, the contract of marriage with regard to capacity of the contracting parties is taken as on same basis as any other contract like understanding, puberty and freedom.

The freedom or the free consent of the parties is also an important requisition of any contract so is the case with contract of marriage. Syed Ameer Ali's opinion regarding consent of women in contract of marriage is fundamental as without understanding the nature of contract one's consent can not be taken, as such mutual consent including capacity is required of all the parties to the contract is mandatory to be it valid and binding. But the eastern practice may cause in some cases the consent indirectly through guardian as living in privacy which is not exactly the rule in Muhammadan law. Capacity of an adult and sane woman is absolute, no guardian is required in Hanafi and Shias and Hidayah also holds that women of sound mind and adult can enter into contract of marriage by herself without guardian. But condition of guardian is mandatory in Malikies and Shafies. Personal and individual consent is refused in these two schools on the presumption of incapacity of women to understand the nature of contract and to provide safeguard to women from deceitful practice or to avoid marrying her to someone whose not morally or socially fit partner.⁹⁸

⁹⁷ Thomas Patrick Hughes *Marriage. Excerpted from "Dictionary of Islam"*

⁹⁸ Thomas Patrick Hughes *Marriage. Excerpted from "Dictionary of Islam"*

From above discussion it can be concluded that following are the legal requirements for a valid marriage contract;

- (i) There must be a proposal made by or on behalf of one of the contracting parties to the marriage, and an acceptance of the proposal by or on behalf of the second party.
- (ii) Both proposal and its acceptance must be made simultaneously or at the same session of the meeting. Provided that the acceptance must be related to what is being offered.

The consent given must be free consent; it must not be an outcome of compulsion, duress, coercion or undue influence

- (iii) Both the parties must be legally competent or capable to enter into the contract. The two parties must be legally competent; i.e. they must be sane and adult and so is the case of guardian in case of minor. The women must not be from the forbidden class such as those falling within the prohibited degrees.

- (iv) There must be two male or one male & two female witnesses, who must be sane and adult Muslim present at the time of the marriage proposal or offer and acceptance. (Not needed in Shia Law).

- (v) Neither writing nor any religious formal procedure is required.⁹⁹

2.5 Prohibited Degrees of Marriage¹⁰⁰

⁹⁹ Legal Service India.com, Article. By Abhishak Kumar Pandey Law school Banaras.

¹⁰⁰ Maulana Zafar Ullah Shafique, Biadai us Sanai, Urdu translation, book of marriage, vol. II 687

In Islamic law it has been explained in much detail the categories of relations ship in which marriage can be contracted and in which one can not get into theses relations. These prohibitions can either be of permanent or temporary depending on the causes of prohibition. Islamic scholars have divided these causes on the basis consanguinity, affinity and fosterage which create permanent prohibition and temporary prohibitions. Temporary Prohibitions are related to those cases which are of nature which can be altered to a situation which does not fall within the prohibited degrees, then make the contract regular or valid.¹⁰¹

2.5.1 By reason of Consanguinity 'the man is by prohibited to marry in direct line.¹⁰²This category includes mothers, daughters and their daughters, sisters and their daughters. Brother daughter and her descendants all maternal and paternal aunts.

2.5.2 By reason of (Marriage) Affinity a man is prohibited to marry.¹⁰³ This category includes mothers in law, step daughter(s) and her descendants , step mothers or fathers wives .Among these categories of prohibited marriages the two i.e. step mother(s) and of son's wives are because of contract itself and the third category of wife's daughter(s) is because of consummation.¹⁰⁴

2.5.3. By reason of Fosterage a man is prohibited to marry.¹⁰⁵This category deal with a man' disability to marry women with whom he has created or developed a relation because of suckling during his infancy.

¹⁰¹ Muhammad Tahir Mansoori , *Family laws in Islam*. Theory and Practice .83

¹⁰² Al Quran 4:23

¹⁰³ Al Quran 4:22

¹⁰⁴ Muhammad Tahir Mansoori, *Family laws in Islam*. Theory and Practice ,85

¹⁰⁵ ibid

By a hadith of Holy Prophet Muhammad (SAW) Allah has prohibited by fosterage what which has been prohibited by consanguinity. i.e. all those relation which are forbidden because of consanguinity same relations are prohibited by fosterage.

Foster mother and his foster grandmothers.

2.5.3 Other Prohibitions Illicit sexual contract between a man and women results in a prohibition of marriage between the man and those relatives of female with whom he is barred because of affinity, according to Hanafi and Hanbali schools, as they consider sexual act as equaling to nikah or marriage and as such on basis of affinity they don't allow them to marry in any of these relations.

On the other side, the Shafi jurists hold an opposite view because for them an unlawful act can't render a lawful act unlawful. So they allow or don't prohibit these marriages on ground of affinity.

As far as marriage is concerned between adulterers or between the same couple, jurist allow them to marry and even marriage between adulterer and with another man is allowed provided she is not pregnant at the time of marriage with another man. For Abu Hanifa even this marriage during pregnancy is permissible but couple can't have sexual intercourse till the delivery. Remarriage with a woman who was separated on the ground of imprecation can not get together again is another legal bar on marriage. This is majority view but hanafi jurists allow them to remarry if accuser admits and undergoes the punishment of eighty stripes.

2.5.4 Temporary prohibition on marriage in shariah.¹⁰⁶

- i) In addition to permanent prohibitions on marriage there also exists certain situations where the prohibition is of temporary nature and can be removed if certain circumstances associated with it are removed. These are; Marriage with a woman who is already married
- ii) Marriage with a woman who is undergoing her period of iddah for which certain time periods are described as in case of divorce three periods of menstruation, for a widow four months and ten days and for a pregnant woman time period of iddah is till the delivery of her baby and for non menstruating women the prescribed time is three months.
- iii) Combining two sisters, or aunt or niece in marriage in one time or keeping them as wives at the same time. Or marriage with sister's aunt or niece when the wife is undergoing iddah. Shiah immamah allow this category with consent of both wives.
- iv) Women repudiated thrice is not lawful for the same man unless she marries again and then divorced and then completes the mandatory period of idah, provided that it was not planned between former couple (the second marriage/divorce) consummation of second marriage is a condition to marry again the former husband.
- v) Fifth marriage in presence of four wives. a man is not allowed to marry fifth time unless one of former wives is divorced irrevocably.

¹⁰⁶ Muhammad Tahir Mansoori, *Family laws in Islam, theory and practice*, 88-92

- vi) Man or woman in ihram for either hajj or umrah is not allowed to contract a marriage. By majority of jurists however Hanafi the allow contract but don't allow sexual relations between the couple.
- vii) Marriage to an idolatress is not allowed by jurist but women among people of books are conditionally allowed.

Above mentioned categories of marriage are mostly considered as fasid (irregular) marriages and there are some other areas like marriage without consent of wife or consent taken by fraud coercion etc or marriage in absence of witnesses or without permission of guardian also falls within the ambit of irregular marriages which can be regularized after removal of the causes of irregularity, if possible, through a new marriage contract.

2.6 Classification of Muslim Marriage

Muslim jurists have divided validity of marriage contract into three categories relying on the deficiency in basic requirements of marriage contract.¹⁰⁷

2.6.1. Valid marriage (Sahi) valid and completely lawful ,which is conformity with the demands of shariah entailing all legal effects like dower, legitimacy of sexual relationship and of children out of the wedlock inheritance etc.¹⁰⁸

A valid marriage is in conformity to every legal requirement and is not affected by any internal or external attribute of marriage contract and The contracting parties of a *sahih* marriage are

¹⁰⁷ Muhammad Tahir Mansoori, *Family laws in Islam*, Prohibited Marriages 88-92.

¹⁰⁸ Ibid.

entitled to all of the rights and subject to all of the obligations arising from the consequences of a valid marriage contract.¹⁰⁹

2.6.2. Void marriages (Batil) Completely bad in its foundations, which are not permissible by dictates of shairah and create no legal effects.¹¹⁰

A *batil* or void marriage is an unlawful union that awards no mutual legal rights and obligation to the parties of the marriage contract. There will be no inheritance claim. Since the marriage is null and void and thus not considered to exist, the issues are illegitimate. *Void* marriages include such situations as marriage of a Muslim woman to more than one husband at the same time, or spouses are from legally prohibited degrees i.e. consanguinity fosterage or affinity such a marriage is void ab initio.¹¹¹

2.6.3. Irregular (Fasid) marriage : An irregular marriage good in its foundations but unlawful in its attributes ,that are temporary in nature because of any legal impediment or not fulfilling condition(s) required by Shariah for valid marriages but can be regularized by meeting the requirements.¹¹² A marriage may be irregular because of lack of a formality like that of witnesses, or an impediment that can be removed, like two sisters in marriage at the same time or a fifth wife. If a judge may regularize such a marriage by removing the cause of irregularity as by divorcing one of sister or the fifth wife or by addition of another or lacking number of witnesses etc.

¹⁰⁹ John L. Esposito , *Women in Muslim Family Law*. Syracuse, NY 1982. 18.19

¹¹⁰ Muhammad Tahir Mansoori, *Family laws in Islam*, prohibited marriages. Pg 88-92

¹¹¹ John L. Esposito , *Women in Muslim Family Law*. Syracuse, NY 1982. : 18.19

¹¹² Muhammad Tahir Mansoori, *Family laws in Islam*, prohibited marriages. Pg 88-92

Without consummation an irregular, marriage has no legal effect and even consummation has taken place the parties are given limited rights such as the wife may have the right of dower but no right of maintenance. The children of this marriage are considered legitimate, however, and are entitled to a share of the inheritance, no mutual rights of inheritance etc.¹¹³

2.7 Capacity to enter into a Marriage contract of Spouses in Islamic law.

According to Islamic law the legal capacity to contract a marriage the party should possess discretion or (rushd) and understanding of the nature of the contract. However, the presumption of discretion is not related to age but to physical capacity to reproduce or puberty.. The parties to a marriage are required to grant a free consent to the marriage contract therefore consent of minor is not a consent. In cases where a minor is entered into a marriage contract by a guardian the minor upon reaching majority is granted the right to re-visit the contract which is known as Option of puberty (haq-ul-kiyar ul Buloogh). The parties to a marriage contract must be of sound mind, and have attained puberty. And in case of absence of evidence the presumed age of puberty is 15 years.

The term 'legal capacity' or 'Ahliyyah' as described by Al Zarqa as "a Description presumed in a person rendering such a person a possible candidate to receive a legislative injunction." The word ahliyyah in Arabic means sufficient qualifications, the possession of which enables the possessor to enjoy something or be qualified for certain matters. The root word

¹¹³ Ibid

this term the ahl means worthy of .According to Al Sabouni it is the ability of person to be oblige, be obliged and conduct ones affairs by oneself. And in view of El Alami it is ... the fitness of a person to enter into obligation, that is to bind and be bound.¹¹⁴

From the above definitions by different jurists it evident that "Ahlliya" is the qualification of person which enables him to acquire certain rights and bear obligations and ability to enter into transactions and conduct action having legal consequences.

2.8 Competency of the Parties in a Marriage¹¹⁵

2.8.1 Religion

Under Hanafi law a Muslim man is allowed to marry a Muslim woman, or a Jewish or Christian woman (*kitabiyah*) who believes in a heavenly or revealed religion which has a *kitab* or revealed book. He cannot, however, marry an idolatress or a fire-worshipper. A Muslim woman, again more controlled in the exercise of her options, can marry only a Muslim man.

Another barrier to marriage in the category of family relationship involved unlawful conjunction. A Muslim must not be married at the same time to women related by consanguinity, affinity, or fosterage, as for example, two sisters or an aunt and her niece. An unlawful union in Hanafi law renders a marriage irregular but not void.¹¹⁶

¹¹⁴ Mahdi Zahraa.,The Legal capacity of women in islamic law, by Arab Law quarterly, Vol.11, No.3 (pp 245-263) pg 245. Published by :BRILL.

¹¹⁵ John L. Esposito, *Women in Muslim Family Law*, Syracuse, NY. 1982. 20

¹¹⁶ Ibid .21

2.8.2 Equality

A somewhat less important doctrine regarding marriage is *kafaah*, the rule of equality which states that a marriage is a suitable union in law if the man is equal in social status to the woman. However, this obligation does not apply to the woman, since she is considered to be raised to the husband's position by marriage. In Hanafi law, equality is a necessary condition determined by (1) family, (2) Islam, (3) profession, (4) freedom, (5) good character, and (6) means: A marriage that does not favorably meet these criteria is not necessarily void. The judge (*qadi*) must carefully exercise his discretion in determining whether to annul the marriage (*faskh*) on the basis.¹¹⁷ The various requirements which determine the categorization of a marriage revolve around the following concerns: (1) number of spouses, (2) religion, (3) family relationship, (4) *iddah*, and (5) equality.

2.9 Marriage contract between a Muslim female with People of Book and infidels

Majority of jurists in Islam are unanimous on the point that marriage of Muslim women with an infidel or non-Muslim is not valid whether consummation has taken place or not it is a *Batil* marriage *ab inito* and no legal rights and obligations arise from such a contract in any respect what so ever. But some take it as an irregular marriage but this is a minority view.¹¹⁸

The Holy Quran in its two verses deals with marriage of a Muslim with a non-Muslim and they are as under:

¹¹⁷ *ibid*

¹¹⁸ Tanzil ur Rehman., *A Code of Muslim Personal Law*, VOL. 1, Hamdard Academy, Pakistan KPakistan. 36

- i) Do not marry unbelieving women (Idolatress) until they believe. A slave woman who believes is better than then unbelieving women, even though she allure you. Nor marry (your girls) to unbelievers until they believe; A man slave is better than an unbeliever, even though he allure you. (Al Quran, Surah al Baqqrah II: 221) ¹¹⁹
- ii) This day are (all) things good and pure made lawful unto you. the food of people of book is lawful to you and yours is lawful unto them.(lawful unto you in marriage) are (not only)chaste women among people of book revealed before your time .(Al Quran, Surah al Maidah, V:5)¹²⁰
- iii) Today all good things of life have been made lawful to you. And food of those who have been vouchsafed revelation aforetime is lawful to you, and your food is lawful to them. And (lawful to you are), in wedlock. Women from among those who believe (in this divine writ), and, in wedlock, women from among those who have been vouchsafed revelation before your time ...the lost. (Al Quran, Surah al Baqqrah II: 221)¹²¹

Here the question that arises is of equal rights of women. In case of marriage and divorce a right of choice of spouse is granted to women, in case of an adult or a major female along with is the right to give her unconditional consent to her marriage. So if the law has given the male a right to marry a non Muslim female and women from people of book why the

¹¹⁹ Ibid 25

¹²⁰ Ibid

¹²¹ Ibid

same can not be granted to Muslim female?. The clear text of Quran provides for male (Muslim) to do so but in case of female it is not clear that if she is not allowed to marry a non Muslim Christian or Jew.

The Muslim jurists believe that Islam is superior to all religion and generally the male are given an upper hand between the two sexes .In case of marriage in Islamic the matter of religion and faith of the offspring is also considered of utmost importance hence caution is advised in matters that can distort a child's matters of faith and professed religion. A tradition of Holy Prophet Muhammad is that the child follows the religion of one of his parents who professes the better faith, in such a case the practical implication will be different if the father is Muslim the father's faith will govern but otherwise Muslim women being in a weaker position may not be able to defend her faith for her child and by legalizing the marriage between a Muslim woman/ Mother and a Non-Muslim male/father will amount to allowing the non-Muslim father the power to alter the child's free profession of Islam.

One of the objectives of Shariah is the protection of progeny and on the other hand one of the purpose is the procreation of children and women in interfaith marriage even with ahl kitab can be a cause of negation of this objective of Shariah.¹²² Granting non Muslim men superiority over a Muslim female is therefore not acceptable even if otherwise complete in all its form. Accepting a non Muslim above a Muslim woman will be against the basic spirit of Islam¹²³.

¹²² Muhammad Munir, *Marriage in Islam ,A civil contract or a Sacrosanct*, Hamdard Islamicus,80

¹²³ . Tanzil ur Rehman., *A Code of Muslim Personal Law* ,Hamdard National Foundation, . 37

According to some of jurists the marriage of a Muslim female to a non Muslim in likelihood would lead her to Kufr and is therefore prohibited on the ground that the women usually follow the ways of their husbands which includes religious affiliation and for them the term mushrik is also applicable to people of the book like Jews and Christians assigning the same reason they don't consider it a valid marriage contract.¹²⁴

2.10 Modern Legislation in Islamic States on Marriage with non Muslim.

Many of Islamic countries have codified their personal laws related to ,marriage of Muslim female and a non Muslim e.g. in Lebanon the marriage of Muslim female with a non Muslim is a void marriage the Ottoman Law of family rights ,1917 (sec. 7C)

Similarly the same law is applicable in Jordanian family laws (Article 29).

Turkish and Cypriot family laws also prohibit such marriage, an irregular or void marriage depending on the judgment of court. (sec. 17)

Syrian law of personal status 1953 provides that such marriage shall be void (section 48)

In Iraqi law of 1959 it has been declared that that marriage of Muslim female with ahl –e-kitab is valid but void in case of non Muslim¹²⁵

Cultural and social practices or set ups in different societies vary from others and members are assigned different roles to be played may not be discriminatory particularly religious based commands must be given some concession for acceptance. As in case of Islam

¹²⁴ Maulana Zafar Ullah Shafique Bidai us Sanai ,urdu, translation 721.

¹²⁵ Tanzil ur Rehman., *A Code of Muslim Personal Law* ,Hamdard national foundation , Karachi Pakistan.

maintenance and welfare of family is the area for man to work for and held accountable but not as if he is given authority over other member of family as understood many people that he is superior but rather he is responsible religiously for fulfillment of his duty towards his family. We should look at this practice or role of man from Islamic perspective compelling man as how to treat his wife and but not from other practice or religions which may not offer analogous ideas.¹²⁶

2.11 Conclusion

In Islam a legal marriage leads to relationship between man and woman is of complimentary nature and both are assigned specific roles to supplement each other and as such may not be taken as discriminatory and not as authority over women.¹²⁷

Marriage in Islamic concept is very holy and sacred relationship. In Islamic law married couple are assigned different roles and held accountable for their responsibilities towards other and family life is regulated by definite principles both can not go beyond. Equalizing the rights and the roles would result in breaking the institution of family as leading to confusions. The Islamic concept is not discriminatory but better idea for smooth running of institution of family¹²⁸.

¹²⁶ CEDAWS Reservation -Stand available at

<http://peguamsyarie.blogspot.com/2008/06/cedaws-reservation-stand-pgsm.html> last visited July 27th 2009.

¹²⁷ ibid

¹²⁸ ibid

The contract of marriage is not only a civil contract but also a sacred religious ceremony followed as sunnah of holy Prophet (PBUH) as Nasir Jamal describes it as a civil contract but of unique nature, since it is regulated by Shariah giving it character of sanctity.¹²⁹ So even as civil contract all requirements are fulfilled the religious side must also be completed in all forms. In this chapter, the generally known areas for a valid marriage are tried to be highlighted rather reproduced because when we look at a marriage contract either from its civil angle or religious side both it seem that an interfaith marriage by a Muslim women as civil and to some extent from religious side is not legally prohibited as not being codified, which is not a permitted rule by scholars because of its consequences.

Islamic principle of Sad e Rah is also important here which provides that any particular act which may be permitted in itself but leads to some evil consequences at large or may be of lesser benefit in itself should not be validated ab initio. So any such marriage which may in itself not prohibited but leads to bigger loss to "Din" must be avoided.

Women rights are protected from every angle in Islamic law particularly in marriage contract and tried to be given a better position than of man. The Quranic verses are interpreted by different jurist and scholars in different times as when a cause of action arose. Recent social developments and increase in use of technology and Particularly accelerated Women rights issues has developed a need to challenging interpret these women related verses more clearly and highlight the most criticized issue of equality in more definite and clear terms so that non Muslim would be able to understand Islam, as it is a religion for all the times and for welfare of all the human beings.

¹²⁹ Muhammad Munir, Marriage in Islam. Hamdard islamicus,80

Chapter Three

Human Rights and social developments

The human rights are constantly growing phenomena with ever increasing influence. The equal rights of women are one of its important concerns in this ever increasing list of concerns. The women right in itself has multiple dimensions with varying dynamics. One of the main areas regarding women rights is the family issue and more precisely the equal rights of hers in family affairs. CEDAW has granted woman equal rights under article 16 to contract a marriage as against a man. There are many reasons for growing demands of these issues and every passing minute it takes a new turn. Inter faith marriages are getting more common then ever before in different parts of world.

3.1 Human Rights and Family Laws

Human rights issues and family laws are very related areas of International law which were previously covered under different conventions and treaties either part of family laws or under conflict of laws but now it has become a specialized area of human rights in itself International Family Law.

Globalization, changing life styles and international mobility of capital, accompanying the labor resulting in disturbing families and creating new families and new dimensions to the traditional concepts of Family Law. Boundaries are becoming more permeable allowing adoption of new brides in new families, escaping for any reasons from old one. People of different origins and nationalities getting closer to each others marry and have children,

divorce, or change their ideology not in local ways. These trends and practices are creating friction between different family laws at international level on one hand and on the other creating pressures on the human rights for change and adaptation of new realities. It is even effecting law making of different states as for example polygamy or child marriage is prohibited in many states. We can very rightly conclude that relationships are changing under the norms of globalization and human rights and local laws alone can not deal with the matter.¹³⁰

The use of internet has become very common and every part of world has access to the other edge of the world .Internet as available in every part of the world is now most common source of knowledge and so many website are their preaching their religion effecting peoples mind. Fatwas now can be taken online readily while staying home.

3.2 Globalization and Family Laws

Due to globalization the world is rapidly becoming one state with different societies. Previously the religion was the root of idea of oneness of humankind but with the growth of globalization or the idea of global village has made the interdependent world and religion's effect on thought of people has now weakened .The idea of unity of humanity has not much to do with globalization but with a greater focus on economic interaction involving exchange of capital services and some time labor crossing borders and resulting in flow of ideas, tastes and

¹³⁰ Barbara Stark , *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of Transnational Law. Vol 39. Issue 5. 2006. 1551+. COPYRIGHT 2006 Vanderbilt University, School of Law; COPYRIGHT 2007 Gale Group

even change of values among the people of different religions which is precipitating the move towards one world social system and one global unity.¹³¹

Globalization positively effect the world as expand world trade and economy, Reducing travel and communication costs and making it easy to understanding each others and becoming more compassionate for each others in cases of natural and man made calamities. Human rights issues and idea of public accountability has become more common and particularly the women rights are dramatically high lighted and helped in solution of these problems. All these and many other angles of globalization are contributing towards the religious teaching of every community of the world. But besides positivity of globalization there are many adverse results which can neither be avoided nor be ignored. Globalization has made people to go for profits ignoring basic needs of life .It has removed the control of the governments over cross border financial flow and drastic changes in the currencies particularly Asian countries, promotion of consumerism is also the result of this phenomena making people only think for themselves rather than to think for humanity and leading towards the global culture due to which indigenous cultures particularly of east are being replaced by the western cultures. In brief we can say for globalization has maximization of profit as its main aim, is effecting peoples life from all the direction and societies are becoming less exclusive and forcing us to become a global unity.¹³²

¹³¹ Chandra Muzaffar , *Globalization and Religion: Some Reflections*, available at islam on line.net- Living Shariah, Last visited 10th May2009

¹³² ibid

Since the increase of internet use has also increased the interaction of peoples and is gradually developing a multi cultural society of the world. So many web sites are available which provides Islamic teachings and even unrecognized or banned sites are providing knowledge of Islam. Internet has made every thing available at door step including education and now it is believed to be the cheapest source of getting knowledge on anything in the world .Use of internet has made people closer to each other and has made people aware of the diversity in culture and religion that exists in the world. Different culture are getting mixed up and developing some new trends and values by mixing the original ones .This trend also led to a boost to interfaith marriages then ever before. People from different backgrounds for many reasons but most common are economic or educational needs to travel to different parts of the world and get settled in new states and by following or adopting local laws and customs. This is more significant when people live for long periods of time or permanently shift to other county and their generations are grow in an alien environment, like many Muslim and others races and groups live in Europe or America. People of different casts and religion living in one community like Christian, Jews, Muslims, Indian and Pakistanis etc. Many Muslims are still living in India as they did not come to Pakistan and their generation have grown there and naturally being national of these countries follow their laws and regulations' and organize their life style accordingly. Even they may follow some special laws but can not escape the social atmosphere and when you live o work at some place regularly one has to be influenced by atmosphere round him. Globalization has raised the mobility of families and capital and most importantly transforms the cultures which change every thing.¹³³

¹³³ Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of

To become modern or more precisely to be a westernized person people are adopting their practice in their living like divorce is very commonly available than before even in some Muslim states like Egypt woman is given an option to file for divorce¹³⁴

3.3 Interfaith Marriages and Multiculturalism

Increasing number of interfaith marriages across international barriers is also a product of similar issues of globalization and like. usually people follow their own personal laws but there are many who do not do so and go for local laws and assign different reasons for doing so like non availability of suitable partner , unawareness of Islamic rulings regarding such marriages over aging, economic priority of our new generation and most importantly social atmosphere like Muslim living in west are living in multi cultural society and following the ideas of human rights and independence which make them more concerned about themselves rather religion based social attitudes. We here are more concerned about Muslim women contracting interfaith marriage an emerging problem or challenges facing these days by Muslim world.¹³⁵

Muslim women in India or Malaysia or Pakistan, and many other countries contracting such marriages and no laws have been enacted in this regard in their personal laws. Cases for these marriages are not usually brought to the courts and if people do there's no uniform way of dealing with such cases. As in Malaysian case they freed a woman after four month of detention.¹³⁶

Transnational Law. Volume: 39. 1551+

¹³⁴ Ibid

¹³⁵ Sigvard von Sicard, *interfaith marriages*, Dialogue and Beyond: Christians and Muslim Together on the way, LWF Studies 01/2003

¹³⁶ Jalil Hamid , World Wide Religious News, by (Reuters, August 11,2007)

In another decided case by Federal Shariat Court of Pakistan where by a woman was denied citizenship of Pakistan for his foreigner husband under section 10 of Citizenship Act 1951 and on of the defense by Government of Pakistan was "Foreigner women marrying Pakistani husband can not be equated with foreigner men Married to Pakistani women in our society. While Aurat foundation, a Non Governmental Organization (NGO), raised the objection that the same law is discriminatory and against the international obligation under CEDAW. The court declared the law as gender discriminatory but did not allow the citizenship on the bases of discretion of the Government.¹³⁷

Interfaith marriages again involve a number of issues particularly of Muslim and more specifically of Muslim women. As discussed in second chapter generally accepted rule for such marriages is that they are not permissible but ground realities can not be ignored. A Muslim getting married to a non Muslim (Kafir) is unanimously agreed that it is prohibited but with people of books i.e. Jews and Christians in some cases permitted.

It further involves the issue of Muslim with another sect of Muslim like Shia Sunni Marriage. Further more the issue of apostasy some times also involved so this is not an issue which can be ignored.

The classical and some contemporary scholars differ as to the legality of such marriages. Through out the Islamic history the marriage of Muslim women to people of book has been

¹³⁷ Federal Shariat Court of Pakistan. Gender Discrimination, Suo moto no. 1/K of 2006. In Re : Pakitan Citizenship Act. 1951. Islamabad Pakistan.

unanimously rejected and viewed that such marriages are unlawful and religiously prohibited.¹³⁸

With reference to the verse of Quran regarding the prohibition of marriage the most quoted are sura Baqra verse 221,¹³⁹

“Do not marry unbelieving women until they believe: a slave woman who believes is better than an unbelieving woman, even though she may allure you. Nor marry (your girls) to unbelievers until they believe: a slave man who believes is better than an unbeliever even though he allure you. Unbelievers do (but) beckon you to the Fire. But Allah beckons by His Grace to the Garden (of Bliss) and forgiveness, and makes His Signs clear to mankind: that they may receive admonition.”

Again the verse 10 of Sura al Mumtahinah¹⁴⁰

“O ye who Believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the

¹³⁸ Zulfiqar a Shah , Marriage of Muslim women to a Jew or a Christian.

¹³⁹ وَلَا تُكْرِهُوا الْمُشْرِكَاتِ حَتَّى يُؤْمِنَ وَلَأَمَانَةَ مُؤْمِنَةٍ خَيْرٌ مِنْ مُشْرِكَةٍ وَلَوْ أَعْجَبَتْكُمْ وَلَا تُكْرِهُوا الْمُشْرِكِينَ حَتَّى يُؤْمِنُوا وَلَعِبْدَ مُؤْمِنٍ خَيْرٌ مِنْ مُشْرِكٍ وَلَوْ أَعْجَبَكُمْ أُولَئِكَ يَدْعُونَ إِلَى النَّارِ وَاللَّهُ يَدْعُو إِلَى الْجَنَّةِ وَالْمَغْفِرَةِ بِإِذْنِهِ وَيُبَيِّنُ آيَاتِهِ لِلنَّاسِ لَعَلَّهُمْ يَتَذَكَّرُونَ . (2:221)

¹⁴⁰ يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا جَاءَكُمْ الْمُؤْمِنَاتُ مُهَاجِرَاتٍ فَامْتَحِنُوهُنَّ اللَّهُ أَعْلَمُ بِإِيمَانِهِنَّ فَإِنْ عَلِمْتُمُوهُنَّ مُؤْمِنَاتٍ فَلَا تَرْجِعُوهُنَّ إِلَى الْكُفَّارِ لَأَنَّ لَهُنَّ حِلًّا لَهُمْ وَلَا هُمْ يَحِلُّونَ لَهُنَّ وَأَتَوْهُنَّ مَا أَنْفَقُوا وَلَا جُنَاحَ عَلَيْكُمْ أَنْ تُنكِحُوهُنَّ إِذَا آتَيْتُمُوهُنَّ أَجْرَهُنَّ وَلَا تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ وَأَسْأَلُوا مَا أَنْفَقْتُمْ وَلَيْسَ أَلْوَا مَا أَنْفَقُوا عَلَيْكُمْ حُكْمُ اللَّهِ بِحُكْمِ بَيْنِكُمْ وَاللَّهُ عَلِيمٌ حَكِيمٌ

(Unbelievers) lawful (husbands) for them. But pay the Unbelievers what they have spent (on their dower). And there will be no blame on you if ye marry them on payment of their dower to them. But hold not to the guardianship of Unbelieving women: ask for what ye have spent on their dowers, and let the (Unbelievers) ask for what they have spent (on the dowers of women who come over to you). Such is the Command of Allah: He judges (with justice) between you. And Allah is full of knowledge and Wisdom.”

Quranic scholars differ as to the interpretation of these verses whether the verse are directed to all the polytheists female or ruling is for specific group among them .And whether the ruling is fully /partly abrogated or applicable?

Some of them like Mujahid ,Ibn Abbas Hassan al Basri are of view all the polytheists including Jews and Christians are directed or intended object of this verse and maintained that this early verse made all polytheists women impermissible for Muslims but the later verse of Sura Al Maidah excluded the women among people of book as an exception to that rule. On the other hand scholars like Qitadah and Saeed bi Jubair opine that this verse did not include the Jew or Christian women but was directed to the Arabian polytheists who did not have any book. Ibn Jarir Tabari agreed to this second view excluding the women of people of book from the ruling of this verse.¹⁴¹

Both the verses not precisely dealing with the issue of interfaith marriage between Muslims and people of book but more specifically the term used is Mushrikat and Mushrikeen those who make partner for Allah the polytheists and not marriage to any Jew and Christian.

¹⁴¹ Zulfiqar a Shah, *Marriage of Muslim women to a Jew or a Christian* ,

Ibn Kathirs explains it as this verse prohibits the earlier permission to marry a Mushrik or polytheists as Zainab, Prophet's (PBUH) daughter was married to Abu ul A'as who was at that time a polytheist and became Mulsim after 6years after her migration to Madinah and Prophet returned her to him under same old Nikah

Some of the latest scholars following Ibn Umer's direction and take Christians and Jews as same as polytheists arguing the on the basis of the Quranic verse 98:6 and 72¹⁴²

"Those who reject (Truth), among the People of the Book and among the Polytheists, will be in Hell-fire, to dwell therein (for aye). They are the worst of creatures." (98:6)¹⁴³

They do blaspheme who say: "Allah is Christ the son of Mary." But said Christ: "O Children of Israel! Worship Allah, my Lord and your Lord." Whoever joins other gods with Allah, Allah will forbid him the Garden, and the Fire will be his abode. There will for the wrongdoers be no one to help¹⁴⁴. (Al Quran ;Al-Maidah: 72)

It is worth mentioning here that Christianity is not a monolithic religion (as in case of Islam) based on theological controversies historically for many years. Their notion of God and Christ has been interpreted in different ways among different sects. Some of these

¹⁴² Ibid
¹⁴³

(إِنَّ الَّذِينَ كَفَرُوا مِنْ أَهْلِ الْكِتَابِ وَالْمُشْرِكِينَ فِي نَارِ جَهَنَّمَ خَالِدِينَ فِيهَا أُولَئِكَ هُمْ شَرُّ الْبَرِيَّةِ) (6)

¹⁴⁴ لَقَدْ كَفَرَ الَّذِينَ قَالُوا إِنَّ اللَّهَ هُوَ الْمَسِيحُ ابْنُ مَرْيَمَ وَقَالَ الْمَسِيحُ يَا بَنِي إِسْرَائِيلَ اعْبُدُوا اللَّهَ رَبِّي وَرَبَّكُمْ إِنَّهُ مَنْ يُشْرِكْ بِاللَّهِ فَقَدْ حَرَّمَ اللَّهُ عَلَيْهِ الْجَنَّةَ وَمَأْوَاهُ النَّارُ وَمَا لِلظَّالِمِينَ مِنْ أَنْصَارٍ (72)

interpretations are close to the message of Quran about Christ and his mission but some are very controversial.

This day are (all) things Good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time, when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues. If any one rejects faith, fruitless is his work, and in the Hereafter he will be in the ranks of those who have lost (all spiritual good).

This is one of the latest revealed verses which permitted people of book for marriage for Muslim males which is unanimously agreed by Muslim scholars and according to al Tabari the ruling of this verse were not abrogated by any other verse. Therefore we can say that text is silent on the question of marriage (permission or prohibition) of Muslim women to man among people of the book and this silence can be taken as permission, as a thing is permissible unless clearly prohibited.¹⁴⁵

Like wise we can not say that that marriage with woman among people of book was not permitted before revelation of this verse of Sura Al Maidah and was made permissible afterwards through this verse and vis a vis it can further be argued that marriage with a chaste

¹⁴⁵ Zulfiqar a Shah ,Marriage of Muslim women to a Jew or a Christian ,

Muslim woman was not allowed before that if we see the sequence of the verse. Definitely the answer will be negative¹⁴⁶

On the other hand we do not find any authentic hadith which clearly prohibits such marriage. Al Tabari reports that Prophet PBUH said that *"We marry the women of People of the Book but they are not permitted to marry our women."* is not reported by any other hadith source like Bukhari or Muslim. Same statement is reported by some others sources as an opinion of Jabir Bin Abdullah but not of Holy Prophet PBUH.

It was rule during the Umer's regime that Christian can not marry a Muslaim woman and a Bedouin can not marry a immigrant woman in order to stop them from taking them out of Madinah. This seemed to be based on Maslah Mursala or pubic good and not on any Quranic or hadith Injunction and reason of such practice was also provided and text is silent to this effect.¹⁴⁷

Zafar Ali Shah in his article has another interesting and very practical interpretation for the present times, he concludes *"that intermarriage between Muslims and the People of Book is unlawful not because it is prohibited in itself (Haram li zatih) but because of the possible evil consequences (Haram li ghayrih). It will not be impermissible in circumstances where the evil consequences could be avoided and positive results could be achieved"*.

¹⁴⁶ ibid

¹⁴⁷ ibid

A similar line of thought finds echo in rulings of Imam Khaleel Mohammad,¹⁴⁸ a modern Islamic scholar on the interfaith marriage with Jew or Christian and even with any non Muslim argued that main reason for which jurists prohibit this marriage is the dominance of the religion of male spouse in such marriage which is very significant hurdle for woman to keep her religious affiliation intact and ultimately loss for Islam. He is of view that to day woman has every right; she can add a prenuptial condition in her contract of marriage that neither spouse would be forcibly converted to other religion. And for religion of children he argued that they can make their own decision for choice of religion keeping in view the ideas of their parents' practices and can make an informed decision.¹⁴⁹

The globalization as said earlier has created an environment where people are getting more interactive for many reasons and dramatically changing the social behavior and old values, priorities are changing. Increased number of interfaith marriages is one of the outcomes of these changes. Women for many reasons are getting into these relations particularly Muslim women .Previously it was only elite class which was involved in such marriages but now even middle class families are facing this problem who previously considered it as against heir religious practice .To find a suitable partner Muslim girls in India these days and this is becoming more frequent as time passes.¹⁵⁰

¹⁴⁸ The author studied Shariah at Muhammad Bin Saud university in Riyadh(Sunni) and Zeinabbiya(Shai),PhD in Islamic Law from Mcgill Universty

¹⁴⁹ Imam Khaleel Mohammed's defend of interfaith marrigaiage, available at <http://www.muslim-refusenik.com/news/interfaith-marriage.html> last visited on 8/22/07

¹⁵⁰ MH Lakdawala, *Interfaith Marriages, Disturbing Trend* ,Islamic voice Rabi-ul-Akhir 1422H July,

It is also an important angle of the issue that transformation of role of women within families and she's is equally rather more participating in family income than her partner giving her more say and control in family affairs. This may make a man to keep the relationship which has more of an economic benefit but can also be vise versa.¹⁵¹

The people are more conscious about importance of education then ever before and is another factor effected the developing new family relations. Girls are getting more educated than boys among different communities and it is getting difficult for Muslim girls especially middle class to find a suitable partner from their own communities tending them to go out of their casts or communities.¹⁵²

Lack of Knowledge about Islam is one of the most important reason for these practices .Parents attention is more on career and education of children rather to teach them basic ideas or codes of religion. Furthermore lack of communication between parents and children is also one of the reasons as interaction between Muslim girls and males of other communities is increasing due to education and on the other side parent's failure to explain the Islamic values and limits.¹⁵³The legality of these marriages is not only the issue of concern but it entails further collateral legal issues regarding the children of these couples and their divorce, custody and maintenance like areas. Ultimately the religion become a controversial point among these

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¹⁵¹ Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of Transnational Law. 2006. 1551+

¹⁵² MH Lakdawala , *Interfaith_Marriages, Disturbing Trend Islamic voice Rabi-ul-Akhir 2001,*

¹⁵³ *ibid*

couple and practice vary case to case like some times couple follow their individual religions and some time the don't follow any of religion. This trend is very alarming and if the women are not given their real status and these and other further issues would keep on rearing their heads. Fundamental reforms are required to be under taken at grass root level to avoid such major problems of the time.¹⁵⁴

Culture changes every thing and social practices can not be separated from law making in the society and when we talk about globalization the idea of westernization can not be taken away form the mind. Western culture, Coca Cola, Angelina Jolie and free marketing ideas are the product of these westernization and globalization which has surrounded the world from all sides. And developed multicultural societies particularly the area of International family law has become identical with the western culture and families become local. The race of recognition and demand of human rights like protection and right to culture has rooted in many such issues. Besides multiculturalism another demand of human rights activists is the equality of both the sexes indulging almost every culture of the earth.¹⁵⁵ As family is a woman domain and also a major site of woman operation so the part played by globalization in this regard has to be closely monitored. The globalization has put different culture into close proximity and at times even in the same family. All these and many other issues are collectively effect the Family law area as for instance that a child custody according to best interest of child is in conflict in Shariah ruling regarding child custody.¹⁵⁶

¹⁵⁴ Ibid

¹⁵⁵ Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of Transnational Law. 2006. 1551+

¹⁵⁶ Ibid

3.4 Human Rights Law Verses Family Law

Human right law was initiated by Universal Declaration of Human Right in 1948 after facing the Nazis Regime .Theoretically it was recognized that people have rights even against the state including civil political economic and social rights. The declaration was not a binding instrument as parties did not intend to bind it. In 1952 two convention /covenant were drafted in accordance with the nature or type of right like civil political social and cultural rights. Human rights law usually focuses on the treatment of state of its subjects whereas the family law is recognized and protected under international human rights. However the human rights have gradually getting into contact and conflict with family laws. Human rights norms are applied to family law issues all over the world as result of treaty ratification some time supporting domestic like UNICEF and some times challenging where after ratification domestic law does not confirm the treaty obligations. Even if the state may not ratify a treaty but international human rights norms can be guidelines and can be relied upon ¹⁵⁷as in case of US human rights norms are not incorporated in their family law but influencing that law because of increasing application of human rights laws to family law areas and increased approach of US courts of Human rights in general. ¹⁵⁸

¹⁵⁷ Ibid

¹⁵⁸ *"Roper v. Simmons, the Court finally joined the rest of the world in rejecting the juvenile death penalty. While expressly noting that "[t]he overwhelming weight of international opinion against juvenile death penalty is not controlling here," Justice Kennedy stressed that such opinion, provides respect and significant confirmation for the Court'sn determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express*

3.5 State Obligation under international law

Among many other of human rights norms, one of the important and recent issues is of gender equality and its influence in family affairs. The women convention provides the framework for recognition of women right and elimination of discrimination against women in all spheres of life. It provides for discrimination and hold a state to be responsible for all discrimination on basis of gender through state policy or otherwise and article 2 of the convention require a state to take measure to ensure the gender equality including legal reforms customs and practices which are leading to cause discrimination against women. Thus the convention requires a state to take necessary steps to eliminate the discrimination. The issue of Gender equality is the crux of the article 16 of the same convention regarding family laws¹⁵⁹. Although the same article has more reservation than any other article but still effected or caused many laws reforms in such mattes particularly in divorcees for instance China, Ethiopia, Russia and Egypt. Even where the law assures the equality but in fact may not be available or over ridden but no government can ignore in law making these issues as people demand it as legal right.¹⁶⁰

affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."

¹⁵⁹ *State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ...d*

(c.) The same rights and responsibility during marriage and at its dissolution. (180)

¹⁶⁰ Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of Transnational Law. 2006. 1551+

International Family law interrupt the domestic family law as more integration of multicultural societies is taking place in the era of globalization and every passing day Lawyers are confronted with the issues of custody , divorce, adoption abduction or domestic violence especially the where the concerned parties are the citizen of different states or residing at different place . Further more the International family law is also the concerned area of gender issues as women are there where the family is, so gender issues are also the a part of a family and human rights as well.¹⁶¹

The IFL or internationalizing of law and particularly the human rights is a subject of escalating field and involves the regional treaties Hague Conference on private international laws, bilateral or multilateral treaties expressly dealing with family law matters and procedures by which substantive law is applied by the lawyer, judges and legislators. IFL is based on three different bodies of law that is family, international and comparative law. Domestic family laws are the main concerned area in development of IFL including the Marriage, Divorce, custody, domestic violence, maintenance or support and so on. No single legal system can solve these issues without referring to the other one especially when the societies are getting more cosmopolitan as these days without being influenced by others. While looking at international angle the private international law used to deal with conflict of individuals but with the increase in the human rights ideas the individuals are becoming subjects of public international laws as human rights becoming public/universal in nature and by saying so we can say the family laws are also becoming part of general laws specially in the context of human rights debate. The comparative laws are to deal with the issues in cases where two or more states are involved

¹⁶¹ Ibid

and in family laws perspective it highlights the ways in which culture and religion holds up or undermine the laws.¹⁶²

3.6 Interfaith marriages in Islam

"Do not marry idolatresses until they believe; a believing slave-girl is better than an idolatress, though you may admire her. And do not marry idolaters, until they believe. A believing slave is better than an idolater, though you may admire him ...

(Qur'ān 2:221)

O believers, when believing women come to you as emigrants, test them ... Then, if you know them to be believers, return them not to the unbelievers. They are not permitted to the unbelievers, nor are the unbelievers permitted to them ... Do not hold fast to the ties of unbelieving women ...

(Qur'ān 60:10)

Today the good things are permitted to you, and the food of those who were given the Book is permitted to you, and permitted to them is your food. Likewise believing women in wedlock, and in wedlock women of them who were given the Book before you if you give them their wages, in wedlock and not in license, or as taking lovers.

(Qur'ān 5:5)"¹⁶³

The question of interfaith marriage in Islam is an important one while taking into consideration the historical perspective and latest social attitude. The attitude towards the issue is different from other revealed religion of Judaism and Christianity, as religiously mixed marriages are prohibited among them but the situation is different in Islam. Since the very beginning Islam has made distinction between different religion regarding marriages and draws

¹⁶² Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*. Vanderbilt Journal of Transnational Law. 2006. 1551+

¹⁶³ Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*. - author. Publisher: Cambridge University Press. Place of Publication: New York. 2003.160.

different rules for marriage of Muslim males and females. Muslim scholars have thrived with discussion regarding rules and laws to govern such marriages but still this aspect of Islamic law needs special attention.¹⁶⁴

The above mentioned verse of Quern have become bases for said issue .the first verse clearly prohibits the marriage of Muslim either male or female with polytheists and in the second verse the using the term *Kawafir* rather mushrikat is generally taken as same as the first verse. The third re granting permission to a Muslim marry a free and virtuous woman among the People of Book. The said verse does not refer to cases of giving Muslim women in marriage to men of scripture, but this possibility is rejected by majority of Muslim jurists and laws specially the Muslims of early centuries as in such marriages the woman cannot get superior status as a Muslim which she should enjoy as being Muslim and she would face an unavoidable wifely subordination of her infidel husband. Besides it also involves the lack of compatibility of spouses (*Kafawa*) which requires equality of status of partners in contract of marriages which not only requires that husband should be superior in religion but socially as well. Umer b.al Khattab is reported to forbid such marriages as a Muslim may marry a Christian woman but that a Muslima may not marry a Christian man.¹⁶⁵ Some classical Jurists take marriage as a kind of enslavement and husband is considered by them as master of his wife and as such it is not permissible for him to have a Muslim wife, a slave for an infidel but reverse situation is permissible for them as Islam is exalted then others and Islam prohibits non Muslim to have Muslim slave and they link or familiarize such marriages as slavery. Such marriages not only

¹⁶⁴ibid

¹⁶⁵ibid,161

results from giving a woman into marriage to a non Muslim but also the cases here woman converts to Islam. It is even prohibited by many Muslim scholars who gave detailed rules for such situations in provide different conditions regarding the continuation of such marriages based on different tradition of Holy Prophet PBUH .And cases of Ikrama b. abu Jahal and Safwan Bin Umayyah and even cases like of Hani b. Hani Qabisa al Shybiani whose four wives embraced Islam and Umer allowed their marriage to stand which was not in other cases attributed to Umer's regime ¹⁶⁶like wise in some cases marriage was annulled and in others it remained but spouses were kept apart till the settlement an returned their wives for even very long periods of time attributing the case of Zaynab the daughter of Holy Prophet PBUH who embraced Islam before her husband Abu la Aas who later on converted to Islam but their marriage was not annulled but the time between their conversion was long for different reasons like political weakness in Mecca and even some reports says that she was returned with a new marriage contract. ¹⁶⁷ The prohibition of such a marriage is based on the idea that Islam is exalted and nothing is above Islam which allows a man to marry a woman among people of Book and man is superior part of household and is granted such privilege. Muslim man is above their woman but their men are not above our women.

On the other hand recent Muslim authors differ in their view point regarding prohibition of such marriage and refers to the idea of Islamic tolerance that Muslims believe in the prophet hood of Moses and Jesus and will not impose their religion by force. On the contrary situation could be reverse and their as to the interpretation and classification of the polytheists and

¹⁶⁶ Yohanan Friedmann ,*Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*. Cambridge University Press. New York. 2003 162

¹⁶⁷ *Ibid* 168 -170

women of scripture. Marriage with idolaters is unanimously prohibited but regarding the terms Muhsanat and Mushrikat they differ.

It can be concluded from views of differ Muslim scholars regarding interfaith marriage that Muslim males and free chaste women among people of book is licit and giving in marriage to any non Muslim even with man among people of book is prohibited and marriage between Muslim male or female with a polytheists is illegal. In most of cases opposition of interfaith marriage is based on practice consideration like raising children in accordance with Islamic values and inconvenience for Muslim husband when his wife consume pork or wine an any other prohibited activities according to Islam, may cause problem for spouses of different religions.¹⁶⁸

3.7 Conclusion

The Pakistan is signatory to many international human right instrument and as part of international community it has certain obligation under these treaties. In recent years the notion of human rights has accelerated the attention of the entire world and affected all most every aspect of life increasing the demands of these rights then ever before. The law making agencies are working accordingly keeping these issues in view. The notion of equality is a very vital side of the issue. Equality in contract of marriage is one of them and recent attitude of especially young generation are getting involved in marriages out side their communities

¹⁶⁸Yohanan Friedmann ,*Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*. Cambridge University Press. New York. 2003: 193.

particularly in multicultural of societies of today as in West and countries influenced by them like India for many social and personal reasons. Islam forbids the marriage of a Muslim woman to any non Muslim and even people of book. The marriage of male Muslim is permitted. But in case of a Muslim women the matter is subject to reservations in many cases cant be allowed. But ground realities present a different picture and societies are becoming secular in nature keeping the religion as a personal matter not as fundamental of life

The reasons giving by the scholar for prohibiting these marriage are based on practical implication like subordination of man and cause loss to Islam and their children will of what religion but some modern scholar are of different opinion as the status in recent scenario of human rights more specifically woman rights e status of woman has been changed and put on equal as of man and at times women are earning more than man sharing financial responsibility with their partners. Interfaith not only involves marriage among different religion but also inter-sect marriage like Shia Sunni marriages which again involve same kind of issues in practice. Since no laws are enacted in this regard and social behavior can not be ignored. Family law specialist should give special attention on the issue and give their recommendations to the law making agencies.

4.0 Conclusions and Recommendations.

It can be concluded keeping in view the research conducted through this thesis that Human rights from any angle or perspective can not be ignored as they are inevitable to live in a peace full social atmosphere and their protection and promotion both are the fundamental obligation of any Government without any particular difference. Human rights debate is an on going debate and rights of women are one area of concern in any human right instrument.

CEDAW is one of the Human rights protection international instrument which deals particularly with women rights protection and demands abolition of all for of discrimination against women and thereby provides for granting equal rights of women as those of men. Same rights are provided to women under CEDAW regarding family matters under article which needs a detail examination regarding its interpretation with reference to the social or religious patterns of the nations not only the member sres but for international community irrespective of its accession to it or not. Pakistan is one of the member state of the sais convention and have obligation to implement the aims of the convention but subject to the constitution which is the supreme la wof the state. And which further demands the priority of religion over any law or in other words no law can enacted if it is repugnant to injUNCTION of Islam.

CEDAW under article 16 gives equal rights to women in respect of marriage as to enter into marriage contract and at the tie of its dissolution and same rights and responsibility. The literal interpretation of the said article of course get into conflict with principles of Sharih regarding Marriage and associated rights and obligations causing confusion for an individual.

Islamic law provides some definite rule on this issue but globalization and other factors creating multicultural societies are causing mixtures of religions which resulting in increase of interfaith marriages not only by Muslim males but also Muslim women are also getting into this kinds of relations which are apparently prohibited by majority of Muslim Scholars and Direct text is not much clear as to the status of female in case of interfaith marriage and ground reality can not be ignored.

The Laws in Pakistan mainly family laws are already undergoing transformations and this is the time to look into them in such away as to deal with modern legislations and its international customary and treaty obligations as in case of CEDAW which she is bound to follow in order to have good relations with international community. The media as highlighting human rights issue also effecting minds of People and some hoe representing them like the Doha round of Debates, debated and declared that a women should be given every right to marry out of her own will.

People even educated Muslims are not much familiar with or aware of actual rules of marriage in Islam and contracting such marriages out of their sweet wishes and such marriage mostly in west which has to be carefully treated by Muslim Scholars.

The express Provision of Religion in respect of marriage contract or Nikah Nama may be incorporated.

CEDAW reservation may also be reconsidered on article 16 in accordance with principles of Shariah and at least in member Muslim states it may be commonly interpreted so that a common standard may be achieved in Muslim jurisdiction

Pakistani legislation may consider their principles of policies which provides for the duty of state as to take such steps which can enable a Muslim to live his life according to the principles of Sharia .

The Media can also play a significant role in order to spread awareness on the issue and Government may adopt such policies to direct media to achieve such an end.

Internationally a team of Muslim Scholars (Mufties) can also be composed to give an international fatwa comprising of representatives of Muslim states.

Following the Islamic principle of sad e zaria () it is the right time for adoption of some strict precautionary measures for protection of integrity of a Muslim family based on Islamic values and develop a compatibility with international social and technological developments.

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