THE RIGHTS OF SPOUSES IN MARRIAGE UNDER THE STATUTE AND ISLAMIC LAWS IN NIGERIA: AN APPRAISAL

BY

JUMMAI ADAMA MOHAMMED AUDI

JANUARY, 2003

THE RIGHTS OF SPOUSES IN MARRIAGE UNDER THE STATUTE AND ISLAMIC LAWS IN NIGERIA: AN APPRAISAL

JUMMAI ADAMA MOHAMMED AUDI

BEING A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF DOCTOR OF PHILOSOPHY IN LAW (Ph.D.)

JANUARY, 2003

DECLARATION

I, **Jummai Adama Mohammed Audi** do hereby declare that this project has been produced by me. It has not been presented on any previous application for a higher degree. All quotations are indicated in the Notes and References and Sources of information are duly acknowledged by me.

SIGN: J Mohammed Audi DATE: 16/6/03

CERTIFICATION

This thesis entitled THE RIGHTS OF SPOUSES IN MARRIAGE UNDER THE STATUTE AND ISLAMIC LAWS IN NIGERIA: AN APPRAISAL by JUMMAI ADAMA MOHAMMED AUDI ESQ meet the regulations governing the award of DOCTORATE DEGREE OF LAW (Ph.D) of Ahmadu Bello University, Zaria, Nigeria and is approved for its contribution to knowledge and literally presentation.

DR. A. M. GURIN
Chairman, Supervisory Committee

16/6/2003
Date

DR. IBRAHIM NA'IYA SADA
Second Supervisor and Member
Supervisory Committee

23/06/03
Date

HEAD OF DEPARTMENT
Private Law.

19/6/2003
Date

PROF. S. B. OJO
Dean, Postgraduate School.

19/7/04
Date

DEDICATION

This work is dedicated to the best father on earth:

Baban Zarah

ACKNOWLEDGEMENT

I acknowledge my eternal gratitude to Allah for being my companion throughout this work and my life.

My gratitude goes to my main supervisor Dr. Aminu Mohammed Gurin, the Head of Islamic Law Department and Dean of Law for his magnificent contribution to the successful completion of this thesis, and to Dr. Ibrahim Na'iya Sada who started the supervision at the initial stage before he left for the Human right commission, Abuja, who has now returned to the University, and as the Second Supervisor, and Director of Islamic Legal Studies. My thanks goes to my colleagues and students who have assisted in many capacities, notably amongst them are Fru Francis Cho, Jibril Mohammed, Oba Olubiyi, Godwin Attah, and Mal. Muhammadu Adamu Alangade. My profound gratitude goes to Oba Olubiyi for timely needed contribution towards the successful finishing of this work. I also thank my husband, Mallam Mohammed Bello Audi and my children for their every day support throughout this work.

ABSTRACT

Chapter One: INTRODUCTION

Chapter one introduces the general status of women in the family which found support and basis from the Bible, culture and traditions as well as the misinterpretation of Islamic injunctions, which resulted in making women a disadvantaged sex. It provides problem statement of the research regarding the rights of women within the meaning of "human right" as conceived by human right activists like Hobbes Locke and Thomas Payne were highlighted; The objective of the study is to examine the Statutory and Islamic law provisions as well as court cases in order to show the extent to which husband's and wives' rights are protected by both the laws and the courts, i.e. juridical study.

The research put in one document the pieces of the rights of spouses in marriage under both Statutory and Islamic Law marriages for the benefit of spouses, intending spouses, law students, lawyers, women activists, etc.

The scope of the study covers the review of Statute, literature and court case studies from wide range of time.

Chapter one also introduces the history of the laws governing those marriages as well as their structures in Nigeria.

Chapter Two

Chapter two looks at the general concept of legal family in Nigeria. It distinguishes the systems of family units, patrilineal, matrilineal, polyandry and polygyny types. It laid emphases on the form and nature of marriage under the Statute and Islamic Laws, whose characteristics are monogamy and polygamy respectively. It stated that legal family is created through a valid marriage between a man and a woman under the two well known laws, whereas these laws did not recognize marriage between a man and a man or between a woman and a woman, which may lead to extinction of human race.

Chapter Three

This chapter deals with contract to marry under the Statute in Nigeria. It defines marriage under the Statute, listed and examines the basic requirements for a valid statutory marriage. It examined the prohibited degrees which is based on prohibiting "incestuous" marriages as well as other factors which would render the marriage invalid, such as lack of capacity and compliance with the formalities required under the Act. It examined the issues of breach of promise to marry as well as the variety of relief that the marriage offers.

Chapter Four

Chapter four like for marriage under the Statute, it examined the preliminaries of the contract to marry under Islamic Law in Nigeria. It studied betrothal and the nature of the marriage from the angles of religion, social and legal aspects. The prerequisites of a valid marriage, impediments based on consanguinity, affinity, and fosterage. Offer, acceptance and stipulations were also examined.

Chapter Five

Chapter five: The rights of spouses in marriage under the Statute in Nigeria were identified and discussed. These rights are the rights to consent to marry, the right to consortium, change of name, cohabitation, sexual intercourse, mutual defence, procreation and preservation of human race, control of sexual behaviour, etc. It also examined the wife's rights, the husband's rights as well as their mutual rights. Furthermore it examined the obligations of the spouses towards each other.

Chapter Six

It also identified the rights of spouses under Islamic Law. It examined the rights of the wife, the rights of the husband and their mutual rights, these are the rights which are to do with dower, maintenance, matrimonial home, divorce, khul and inheritance in all their ramifications. Furthermore it examined the obligations of spouses towards each other.

Chapter Seven: Conclusion And Recommendations

It concludes the study of the rights of spouses in marriage under both the Statute and Islamic Laws by stating one, that these rights are most of the time asserted at the court which has the power to order the compliance with the established laws because wives are usually denied their rights. Two, it state that international women groups have come together to further their interest as disadvantage group in the society. They are not only calling for the application of the women's rights but are also saying that negative culture and traditions should be discarded. Furthermore, they are asking that their rights be upheld and protected in their public life under twelve critical headings listed in the Chapter Seven. The conclusion also stated that marriage under Islamic Law is marriage like marriage under the Statute though they differ in nature e.g. regarding marriageable age, prerequisites and characteristics. It pointed out the effort made by Nigerian government for women's (married or not married) protection and their recognition on the principle of "complimentary role" in public life and the society as a whole which starts from the family. Nigeria made a conscious effort to draft a law; the National Women's Policy which was signed into Law by the President Chef Olusegun Aremu Obasanjo in August, 2000.

It aimed at uplifting the status of women generally within the family and in public life for economic and social advancement of Nigeria. It concluded with recommendations for a better married life consisting of peaceful co-existence, harmony and tranquility for a happy home, and society.

LIST OF CASES

A

1. Agu V Agu Suit No. E/ID/1966 (Unreported) Oputa J. 91, 260

2. Agunta V Agunta (1972)2 EC SLR 20. 263

3. Ahize V Ahize Suit No HOW/IIM/67 (Unreported) Nkemma J. High court Owerri 25 August 1967. 238

4. Aiyede V Norman Williams (1960) LL.R. 253 109

5. Akuwudike V. Akuwuidike (1963) 7 E.N.L.R. 196 106

6. Alhaji Danladi Abubakar V Uwani Danladi case No. BAS/SCA/CVA/39/BH.11/94 315

7. Alhaji Karami Tudun Wada V Aishatu Bappa case No. BAS/SCA.CVA/125/GM 92 312

8. Asiata V. Voncallo (1900) N.L.R. 41 86

B

9. Bannett V S. Bannett (1969) 1 All ER 539 213

10 Beamish V Meamish (1559 – 61) 9th 274. Per Willes J, at 330. 123

11. Beckley V Abiodun at 330 II ER 735 101

12. Beekeen V Beekeen (1948) P. 302 (CA) 259, 260

13. Best V Samuel Fox & Co. Ltd. (1952) AC 716, 736 (1952) 2 ALL ER 394, 401 214

14. Blackwell V Blackwell (193) 2 ALL ER 595, CA .....

15. Bradshaw V Bradshaw (1877) 216

16. Buckland V Buckland (1668) P. 296, (1967) 2 All ER 300. 211

C

17. C. V C. (1942) N.Z.L. R. 356 210

18. Calderbank V Calderbank (1975) 3. WLR 586 227

19. Chilton V Chilton (1952) 202

20. Cowley V Cowley (1901) AC 450 215

21. Coxhead V. Mallis (1878) 3 CPD 439 87

22. Dawodu V Dawodu (1974) 4 CCCHCJ .....

23. Ditchman V. Worral (1880) 5 CPD 410 87

24. Davis V Johnson (1978) 2 W.L.R. 552, 567 Per Dilhorne 248

25. Dixon V Dixon (1878) 9 C.H.D. 587. .....

26. Dunn V. Dunn (1949) P. 98 Per Denning, L.J. at 103. 216

E

27. Estate of Park (1953) 2 All E.R. 1411, 1430, C.A. 209

F

28. Fatsuma Bako Fara V Bako Fara Sharihuru Case No. BAS/SCA/CVA/90/AR 92. 281

29. Fatume & Abubakar Sarkin V M. Jidda Case No. SCA/W/6/BO/76 318

30. Fendall V Goldsmith (1877) 2 PD 263, 264. 215

31. Fender V. St. John Midway (1938) AC 1. 84

32. Frost V Knight (1872) L.R. 7 Exch III 110

33. G. V G. (1964) P. 133. 259

34. Glover V Glover (1964) FLR. 262. 229

35. Goigoid Fali V Hauwa Karama Suit No. BOS/SCA/CV/104/93. .. 342

36. Govier V. Hancock (1796) 6 TERM REP. 603 224

H

37. Hanbury V Hanbury (1892) P. 222. 254

38. Heydon's case (1584) 3 CO. Rep. 268

39. Hyde V Hyde (1886) L.R.I. P & D Pp 130, 133. ..... 75, 82

I

40. Ikpi V Ikpi (1957) WNLR 59. 261

J

41. Jackson V Jackson (1932) 146 LT 406 261

42. Johnson V Johnson CC HCJ/II/72, 94 256

43. Jones V Maynad (1951) 1 All E.R. 802. .....

44. Jummai Yusuf V Yusuf Nayawo Case
No. BAS/SCA/CVA/69/TR/92. .....

K

45. Katambe Muhammed V Habiba Tsado Oonna Suit
No. SCA/NS/V/ 4/90 341

46. Karimatu Idi Inusaina V. Idrisu Dausara Suit No. SCA/KN/18/01 285

L

47. Karimatu Yakubu & Anor Y. Yakubu Paiko & Anor
(Unreported) Suit No. CA/K/805/85 174

48. Laila Dogon Yaro V Jimoh Bello Suit No. KDH/2HA/86 38

49. Legey V O. Brien (1834) M. W. 325 209

M

50. Mairo Baba Nasidi V. Alhaji SLR, Vol. 1 172

51. Mariyama V Sadiku Ejo (1960) NRNLR 81 .....12, 34

52. Martins V Adenugba (1946) 18 NLR 63 108

53. Mcewan V Mcewan (1972) I WLR 1217

54. Moss V Moss (1897) P. 263, 271-273 211

55. Muhammad Abubakar V Hadiza Muhammed and Ibrahim Ndagali Chakyaoi KWS/SCA/CV/PAP/24/91 172

56. Muhammed Jatau Wazin V Mammu Hajiya case No. BAS/SCA/211/GM/92 356

57. Nachimson V. Nachimson (1930) C.A. P. 217 75

58. Nanda V Nanda (1967) 3 All ER 401

59. Naylor V. Naylor (1962) 2 All ER 138 (C.A) 271

O

60. Obele Iniya V. Obele (1973) I.N.M.L.R. 155 122

61. Obiekwe V. Obiekwe (1963) 1 ENLR 196 ..... 74, 106

62. Ogunleye V Ogunleye Suit No. WD/31/70 of 2nd July 1971. 228

63. Okafor V Okafor Suit No. 0/60/71 (Unreported) HCL Onitsha 13 Nov. 1972. 257

64. Okanlawon V Okanlawon Suit No. WD/31/70 of 19th Feb. 1971. 228

65. Olikagbue V. Olikagbue Suit No. M/17/66 (Unreported) Benin High Court 22, Sept 1966. 101

66. Olusanya V Ibadiaran (1971) 1 LIILR 149

67. Olu-Ibukun V Olu-Ibukun (1974) ECS LR 726 258

68. Oshodi V. Oshodi (1963) 2 All N.L.R. 214 85

P

69. Perry V Perry (1952) 1 ALL ER. 258

70. Place V Searle (1932) 2 K. B. 497 214

71. Pulford V Pulford (1923) P. 18-21. 216

R

72. R. V Clarence (1888) 22 QBD 23, at Pp. 53-54 216

73. R. V Clarke (1949) 2 All ER. 448

74. R. V Creamer (1919) 1 KB 564, CA 216

75. R. V Jackson (1891) 1 QB 671, CA 6, 119

76. R. V Miller (1954) 2 All ER 529 217

77. R. V Princewell (1963) NRLR 54 96

78. R. V Rose (1854) 15 Cox, CC. 450 222

79. Re-Taylor Application (1972) 2 QB 369. 269

80. Rosanwo V Rosanwo (1961) WNLR 297 271

81. Rogers V Rogers (1962) 3 FLR 398

S

82. Saidu Emigi & Patiko Ndako V Aliyu Kosulukpa & Teni Saidu Suit No. SCA/NS/CV/63/91 340

83. Santos V Santos (1972) 2 WLR 889 (C.A) 262

84. Sharp V sharp (1961) 2 FLR 434 262

85. Shaw V Gould (1868) L .R 3 H .L 55

86. Shyngle V Shyngle (1923) 4 NLR 91 271

87. Sigh V Kaur Post P. 94 .....212, 268

88. Smee V Smee (1965) 7 FLR

89. Sofena V Sofena (1976) CCCHCJ 1923

90. Sowande V Sowande F.S.C. 130/1962 (Unreported) 259

91. Spier V. Hunt (1908) 1. K. B. 720 84

92. Szechter V Szechter (1971) P. 296. (1970) 3 ALL ER. 905 212

T

93. Taylor V Taylor (1934) 2 W.A.C.A 348 20

94. Tremain's Case (1719) 1 Strange 167. 246

U

95. Ugboma V. Morah (1940) 15 NLR 78 88

96. Ugogi V Okeke & Anor (1964) 2 All NLR 148 238

97. Umara V Bukar Sarki Suit No. CA/J/IBS/84 37

98. Uso V Iketubosun (1975) WRNLR 187. 110

V

99. Valier V Valier (1925) 133 L. T. 830 210

100. Vaughan V Vaughan (1973) 3 All ER 449 C. A. 225

W

101. Wachtel V Wachtel (1973) Form 72

102. Walker V. Walker (1952) 2 All ER 138 C. A. 258

Y

103. Yinusa V Adesobokan (Unreported) Appeal No. SC/70, Reported 1971 NRNLR. 40

Z

104. Zulai Mohammed V Abubakar IBN Mohammed Case No BAS/SCA/CVA/50/GMT/92 354

LIST OF STATUTES

B

1. Bastardy Laws Amendment Act, 1872

C

2. Children and Young Persons Act of 1946. Cap. 32 Laws of Federation of Nigeria, 1958

3. Constitution of Federal Republic of Nigeria 1999.

4. Criminal Code Act Laws of Federation of Nigeria and Lagos 1958. Now Cap 77, Laws of Federation of Nigeria 1990.

5. Custody of Children Act 1891

6. Custody of Infants Act 1873

D

7. Divorce Ordinance No 2 of 1872

8. Divorce Ordinance No 10 of 1873

9. Decree No 12 of 1989

10. Domestic Violence and Matrimonial Proceedings Act 1976.

E

11. Education Act 1944

12. English Matrimonial Proceedings and Property Act 1970

13. Evidence Act, Cap 62 Laws of Nigeria 1958 Now Cap. 112 Laws of Federation of Nigeria 1990

G

14. Guardianship of Infant Act 1886.

I

15. Infant Laws 1958, Cap 49 Laws of Federation of Nigeria.

16. Interpretation Act of England 1964

L

17. Law Reform Commission, No. 33 Paragraph 11-15

M

18. Matrimonial Causes Act Cap 220 Laws of Federation of Nigeria 1990.

19. Matrimonial Causes Act 1965 of England

20. Matrimonial Causes Rules of 1983.

21. Matrimonial Proceedings Act 1976

22. Married Act Cap 114, Laws of Federation, 1958 Now Cap 218 Laws of Federation of Nigeria 1990.

23. Married Women Property Act of 1882 and 1893

24. Married Women and Tortfeasor Act 1935

25. Married Women Property Law 1958, Now Cap 76, 1959 Laws of Western Nigeria.

26. Marriage Ordinance No. 10 of 1884

27. Marriage Proclamation Ordinance No. 1 of 1907

28. Marriage Registration Ordinance No. 21 of 1863

29. Mental Health Act 1833.

N

30. Native Court Edict of 1967

31. Native Court Law of 1956

32. Native Court Proclamation No. 5 of 1900

33. Nigerian Matrimonial Causes Act 1973

P

34. Poor Law Amendment Act 1844

35. Pre - 1900 Statutes

36. Pre – 1900 English Bastardy Act

S

37. State Courts (Federal Jurisdiction) Act, Cap 177, now repealed by 1970 Decree.

T

38. Talfourds Act 1839.

W

39. Wills Act of 1837.

ABBREVIATIONS AND MEANINGS

A

1.	A.I.D.S	-	Acquired Immune Deficiency sydrome
2.	ALL E.R.	-	All English Reports

B

3.	BAS	-	Bauchi State
4.	BLS	-	Borno State

C

5.	C.A	-	Court of Appeal
6.	C.C.H.J	-	Certified Copy of High Court Judgement.
7.	C.H.D.	-	Chancery Division
8.	C.I.L.S	-	Centre for Islamic Legal studies.
9.	C.E.D.A.W	-	Convention on Elimination of Discrimination Against Women

E

10.	E.N.L.R	-	Eastern Nigerian Law Reports
11.	F.L.R.	-	Federal Law Reports
12.	F.S.C.	-	Federal Supreme Court

J

13.	J.A.L.	-	Journal of African Law

K

14.	K.B.	-	Kings Bench
15.	KN.	-	Kano

L

16.	L.L.R.	-	Lloyds Law Reports
17.	L.Q.R.	-	Law Quarterly Review
18.	L.R.H.L	-	Law Reports House of Lords
19.	L.R.EXCH	-	Law Reports Exchequer
20.	L.R.P.&D	-	Law Reports Probate Division

M

21.	M.C.A	-	Matrimonial Causes Act
22.	M & W	-	Meeson & Welsby Report Exchequer.
23.	N.G.O.	-	Non-Governmental Organisation
24.	N.L.R	-	Nigerian Law Reports
25.	N.N.L.R	-	Northern Nigerian Law Reports
26.	N.S.	-	Niger State
27.	N.Z.L.R.	-	New Zealand Law Report

P

28.	P.B.U.H	-	Peace be upon Him
29.	Q.B.	-	Queens Bench

30.	Q.B.D.	-	Queens Bench Division
		E	
31.	R.A.F	-	Royal Airforce
		S	
32.	S.A.W	-	Sullallahu Wasallam (May the Blesing and Peace of Allah be upon Him)
33.	S.C.A	-	Sharia Court of Appeal
34.	S.L.R.	-	Sharia Law Reports
35.	S.T.D.	-	Sexually Transmitted Diseases
		T	
36.	T.L.R.	-	Times Law Report
37.	TERM –REP	-	Term Reports
38.	U.N.D.P.	-	United Nations Development Project
39.	U.I.L.R.	-	University of Ife Law Reports
		V	
40.	V.V.F.	-	Vesico Vaginal Fistulae
		W	
41.	W.A.C.A	-	West Africa Court of Appeal
42.	W.L.R	-	Weekly Law Reports
43.	W.L.U.M.	-	Women Living Under Muslim Laws.

GLOSSARY

A

1.	ALLAH	-	God
2.	AWN	-	Messenger

C

3.	CONSENSUS	-	Meeting of Minds between the Contracting Parties to a Marriage.
4.	COITUS INTERRUPTIONS	-	Sexual Interruption by one of the Spouses
5.	CONSENT AWARD	-	Mutual agreement between the Spouses to submit to the Court to make the necessary order without further hearing.
6.	CEDAW	-	Convention the Elimination of Discrimination Against Women
7.	CRIMCOM	-	Is shorten for Criminal Conversation. It is Sexual Intercourse of an outsider with Husband or wife or a breaking down of covenant of fidelity.

D

8.	DARUL HARD	-	Non-Islamic State Engaged in Fighting the Muslim. In other words such a country is referred to as a hostile country

H

9.	HADD PUNISHMENT	-	The Specific Fixed Penalties laid down by sharia for the specified crime.
10.	HADITH	-	Reported Speech or Sayings of the Prophet.
11.	HARAM	-	Unlawful thing or act

I

12.	IDDAH	-	A period within which a divorced or Widow should wait before remarrying to ensure inter-alia that there is no confusion about the paternity of children.
13.	IHRAM	-	Condition of a person on pilgrimage or lesser pilgrimage: Specially robbed and under special condition of behaviour
14.	INTER-ALIA	-	Among others

J

15.	JIHAD	-	A Holy war in the course of Allah.

K

16.	KATIB	-	A court clerk
17.	KHITBAH	-	A Declaration of a man's intention to Marry a particular woman.
18.	KHALWAH SAHIHAH	-	The meeting of spouses with each other after contracting a valid marriage in a secluded place where they are confidently certain that no body can come in or even discover their presence and at the same time none of them has any physical or legal impediment that may prevent either of them from sexual intercourse.
19.	KHUL`U	-	Termination of marriage at the instance of the wife a lieu of a consideration payable to the husband.
20.	KITABIYYA	-	People who believed in the revealed books of God: Jewish or Christian woman.

L

21.	LACUNAE	-	A vacuum created by the absence or silence of a law over an issue
22.	LEX DOMICILE	-	Place where parties are domiciled, or to the natural law of a party.
23.	LEX LOCI	-	Place of residence of the parties
24.	LI'AN	-	Literally it means mutual cursing, is legally an oath taken four times with a curse at the fifth instance by each of the spouses, when the husband accuses his wife of committing adultery but he has no witnesses except himself to establish the accusation.

M

25.	MUBAH	-	Something Permissible Under Sharia
26.	MUFTIS	-	Islamic scholars that are capable of giving legal advices.
27.	MUQAWWIM	-	Valuer

N

28.	NAFAQAH	-	Maintenance
29.	NAIB	-	Deputy Qadi
30.	NIKAH	-	Contract of marriage
31.	QADI	-	Judge

S

32.	SHARIA	-	Islamic legal system or code which applies to muslims in all aspect of their lives.
33.	SADAQ/MAHR	-	A specific consideration given by man to a woman for the purpose of a marriage

T

34.	TALAQ	-	Divorce to release, to let loose, or to free, or to untie a knot.
35.	TAR-JUMA	-	Interpreter
36.	TUKWICI	-	(That you offerings) in Hausa which would then be accepted by those present as witnesses.
37.	U.N.	-	United Nations
38.	WLUM	-	Women Living Under Muslim Law.

TABLE OF CONTENT

Title Page	- -	i
Declaration	- -	ii
Certification	- -	iii
Dedication	- -	iv
Acknowledgement	- -	v
Abstract	- -	vi - ix
List of Cases	- -	x - xvi
Table of Statutes	- -	xvii - xix
Abbreviations	- -	xx - xxii
Glossary	- -	xxiii - xxvi
Table of Contents	- -	xxvii

CHAPTER ONE

1.0	**Introduction**	-	1
1.1	The General Status of Women in the Family	-	1 - 11
1.2	Statement of the Problem	-	11 - 13
1.3	Objectives of the Research	-	13 - 14
1.4	Justification for the Research	-	14

1.5	Methodology of the Research	-	15 -16
1.6	Scope of the Research	-	16 - 17
1.7	History of Laws Governing Marriages in Nigeria Under the Statute	-	17 - 21
1.8	History of Laws Governing Marriages Under Islamic law in Nigeria	-	21 - 22
1.9	Sources of Nigeria Family Law	-	22 - 27
1.10	Administration of Justice in Sokoto Caliphate	-	27 - 30
1.11	The Coming of the Europeans (Colonial Period	-	30 - 42
1.12	Sources of Islamic Law	-	42 - 46
1.13	The System and Structure of Shariah Court with Jurisdiction over Marriages Under Islamic Law	-	46
1.14	The Basic Legislative enactments governing Area Courts	-	46 - 48
1.15.0	The System and Structure of "English" Courts with Jurisdiction on Matrimonial Cases	-	48
1.15.1	State High Courts	-	48 - 50
1.16.	Court Structures in Nigeria	-	51
1.17	Conclusion	-	51 - 52
	End Notes and References	-	53 - 54

CHAPTER TWO

The Concept of a Legal Family and Marriage with Particular Reference to Nigeria.

2.0	Introduction	-	55
2.1	The General Concept of a Family	-	55 - 57
2.2	Types of Families	-	57
2.2.1	Patrilineal System	-	57
2.2.2	Matrilineal System	-	58
2.4	Form and Nature of Family under Islamic Law	-	59
2.4.1	Polygamy/Polygyny	-	59
2.4.2	Stipulations/Conditions in Marriage Contract (Shurout)		64 - 71
2.5	Form and Nature of Marriage under the Statute	-	72 - 75
2.6	Definition of Marriage under the Statute	-	75
2.7	Definition of Marriage under Islamic Law	-	76
2.8	Conclusion	-	78
	End Notes and References	-	79 - 80

CHAPTER THREE

Contract to Marry under the Statute in Nigeria		-	81
3.0	Introduction	-	81
3.1	Contract of Marriage under the Statute	-	82 - 83

3.2	Capacity to Marry	-	83
3.2.1	Single Status	-	84 - 85
3.2.2	Lack of Capacity	-	85 - 86
3.2.3	Infancy	-	87 - 88
3.2.4	Parental Consent	-	88 - 89
3.3.0	Essential Elements of a Valid Marriage	-	90
3.3.1	Age	-	90 - 91
3.3.2	Consent	-	92 - 93
3.3.3	Prohibited Degrees of consanguinity and Affinity	-	93 - 95
3.3.4	Single Status	-	95 - 96
3.3.5	Sanity	-	96 - 97
3.4.0	Formalities Towards Marriage Under the Marriage Act Act 1990, CAP 218.	-	97
3.4.1	The Preliminaries of Marriage	-	97
3.4.2	Notice of Marriage	-	98
3.4.3	Registrar's Certificate	-	98 - 99
3.4.4	Special License	-	99 - 100
3.4.5	Caveat	-	100 -102
3.4.6	Celebration of Marriage	-	102
3.4.7	Marriage in a licenced place of worship	-	102 - 104
3.4.8	Marriage in the Registrar's Office	-	104 – 105

3.5.0	Lack of Form	-	105 - 107
3.6.0.	Breach of Promise to Marry	-	107
3.6.1	Non-Performance	-	108 - 109
3.6.2	Anticipatory Breach	-	110
3.7.0	Matrimonial Relief Based on Statutory Marriage	-	111
3.7.1	Relief can be granted by the Court	-	112 - 113
3.7.2.	Obtaining Relief is much more formalized	-	113
3.7.3	Availability of Greater variety of Relief	-	113
3.7.3(i)	Action for Restitution of Conjugal Rights	-	113
3.7.3(ii)	Termination of Marriage	-	114
3.7.3(iii)	Void Marriages	-	114
3.7.3(iv)	Voidable Marriages	-	115 - 116
3.7.3(v)	Nullity	-	116 - 117
3.7.3(vi)	The Law is more Certain	-	117
3.8.0	Reconciliation has been given special emphasis	-	117 - 119
3.9.0	Legal Consequences of Statutory Marriage	-	119 - 120
3.9.1	Conclusion	-	
	End Notes and references	-	121 –124

CHAPTER FOUR

Contract to Marry Under Islamic Law in Nigeria – 125

4.0 Introduction - 125

4.1 Preliminaries of Marriage - 125 - 127

4.1.1 Betrothal - 127 - 134

4.2.0 Nature of Marriage in Islam - 135

4.2.1 Religious Aspect - 135 - 139

4.2.2 Social Aspect - 137 - 141

4.2.3 Legal Aspect - 141 - 145

4.3.0 Prerequisites of Contract to marry under Islamic Law - 145

4.3.1 Pre-requisites of Marriage - 145

4.3.2 Compatibility of Parties to the Marriage - 145 - 148

4.3.3 Capacities of the Parties - 148 - 149

4.3.4 Age - 149

4.3.5 Mental Capacity - 149

4.3.6 Absence of Legal Impediment - 150

4.3.7 Permanent Impediment - 150 - 151

4.3.8 Prohibition based on Consanguinity - 151

4.3.9 Lactational Fosterage - 152

4.3.10 Prohibition based on Affinity - 153

4.3.11	Temporary Impediments	-	154 – 155
4.4.0	Marriage Formulas	-	156
4.4.1	Offer and Acceptance	-	156 - 158
4.4.2	Stipulations in Marriage Contract (Shurout/Ash'shard)	-	158 -161
4.5.0	Marriage Guardianship	-	161 - 163
4.5.1	Authorities of Marriage Guardianship	-	163 - 166
4.5.2	Classes of Marriage Guardianship	-	166 - 175
4.5.3	Witnesses	-	175 - 177
4.5.4	Conditions of Witnesses	-	177 - 178
4.5.5	Female Witness	-	178 - 180
4.5.6	Necessities of Witnesses	-	180 - 181
4.6.0	Publicity	-	181
4.7.0	Sadaq/Dower – Payment	-	181 - 185
4.7.1	The Nature of Dower	-	185 - 188
4.7.2	Classification of Dower	-	188 - 190
4.7.3	Eligibility to Dower	-	191 - 193
4.73	Full Fixed Dower/Sadaq	-	193 - 199
4.8.0	Conclusions	-	199 - 200
	End Notes and References	-	201 - 204

CHAPTER FIVE

Rights of Spouses in Marriage Under the Statute in Nigeria

5.0	Introduction	-	205
5.1	Consent	-	206
5.1.1	Circumstances under which Consent as a Right To marry may not be valid	-	209
5.1.2	Unsoundness of Mind	-	209
5.1.3	Drunkenness and the effect of Drugs	-	210
5.1.4	Mistake	-	210 - 211
5.1.5	Fraud and Misrepresentation	-	211
5.1.6	Fear and Duress	-	211 - 212
5.1.7	Mental Disorder	-	212 - 213
5.1.8	Veneral Disease	-	213 - 214
5.1.9	Pregnancy Per alium (Pregnancy by another person)	-	214
5.2.0	Consortium	-	214 - 215
5.2.1	Change of Name	-	215
5.2.2	Duty to Cohabit	-	216 - 217
5.2.3	Sexual Intercourse	-	217 - 218
5.2.4	Mutual Defense	-	218
5.3.0	Procreation and Preservation of Human Race	-	219 - 221
5.4.0	Control of Sexual Behaviour	-	221

5.5.0 Protection of Morals - 222

5.6.0 Mutual Protection - 222 - 223

5.7.0 Rights of the Wife - 223

5.7.1 Maintenance - 223 - 324

5.7.2 Ordering the Husband not to molest the wife - 225

5.8.0 Right of the Husband - 225

5.8.1 Maintenance - 225 - 229

5.8.2 Adultery and Damages therefore - 230 - 231

5.8.3 The right to testamentary capacity - 231 - 233

05.9.0 Mutual Rights and Obligations of Parties in respect of children - 233 - 235

5.10.0 Custody - 235

5.10.1 Custody of Legitimate Children of Monogamous Marriage - 235 - 237

5.10.2 As between parent and third party - 238

5.10.3 Custody of illegitimate children - 238 - 239

5.10.4 Custody in the Matrimonial Causes Act, 1990 - 239 - 240

5.11.0 The Right of Parent to Control and Chastisement- 240 - 241

5.12.0 The Right to Determine Religious Upbringing - 241

5.13.0 The Right to child's Services - 242

5.14 Maintenance of Children by Parents Under the Statute - - 242

5.14.1 The Pre-1990 English Statutes - 242 - 243

5.14.2 Infants Laws of 1958 - 243 - 244

5.15.0 Illegitimate Children under the Act - 244

5.15.1 The Pre-1990 Bastardy Acts - 244 - 245

5.15.2 Maintenance of Children and Young Person's Act - 245 - 246

5.15.3 Matrimonial Causes Act 1990 - 246

5.16.0 The Parent's Power to Control Education - 246 - 247

5.17.0 Parental Right over the Administration of Property - owned by children - 247

5.18.0 The Right to Represent the Child in Legal Proceedings – 248

5.19.0 Kind and Impartial Treatment - 248 - 249

5.20.0 Remedies under the English Domestic Violence and Matrimonial Proceedings Act, 1976. - 249 - 250

5.21.0 Mutual Rights to Divorce for spouses - 250

5.21.1 The two-year Separation rule - 250 - 252

5.22.0 Grounds For Divorce under the M.C.A Cap. 220 LFN - 252

5.22.1 The Eight Fact Situations - 252 - 253

5.22.2 Adultery - 253 - 255

5.22.3 Conduct which the Petitioner Cannot Reasonably be expected to bear - 255 - 256

5.22.4 Cruelty - 255 – 257

5.22.5 Desertion for One Year - 257 - 258

5.22.6 Defacto Separation - 258 - 259

5.22.7 Animus de serendi - 259 - 260

5.22.8 Lack of Just Cause - 260 - 261

5.22.9 Absence of Consent - 261 - 262

5.22.10 Separation and respondent's Consent to Dissolution - 262 - 263

5.22.11 Three Years Separation - 263

5.22.12 Failure to comply with a Decree of Restitution of Conjugal Rights - 264

5.22.13 Presumption of Death - 264 - 265

5.23 Inheritance and a Mutual Right - 265 - 266

5.24 Conclusion - 266 - 267

End Notes and References - 268 - 272

CHAPTER SIX

6.0 **The Rights and Duties of Spouses under Islamic Law**- 273

6.1 Introduction - 273 - 277

6.2 The Right of the wife as obligation of the husband - 277

6.2.1 Financial/Material Rights - 277 - 280

6.2.3 Specified Dower - 280

6.2.4 Unspecified Dower (Mahr-al-mithli)	-	281 -283
6.2.5 The Rights to Maintenance (na faqah)	-	283 - 288
6.2.6 The extent of Maintenance	-	228 - 290
6.2.7 Conditions for the Entitlement of Maintenance	-	290 - 293
6.2.8 Other Circumstances of Maintenance	-	293 - 294
6.2.9 Maintenance during sickness	-	294 - 296
6.2.10 Maintenance of recalcitrant wife	-	296 - 298
6.2.11 Maintenance during arrest	-	298 - 299
6.2.12 Maintenance of a working class wife	-	299 - 301
6.2.13 Maintenance of wife due to poverty of husband	-	301 - 303
6.2.13 Maintenance during waiting period (iddah)	-	303 - 307
6.3.0 Non Financial Material Right of the wife	-	308 - 309
6.4.0 Matrimonial Home	-	309 - 311
6.5.0 Khul'u (Self- redemption)	-	311 - 319
6.6.0 Right of inheritance	-	319 - 321
6.6.1 The woman as wife	-	321
6.6.2 The woman as daughter	-	321 - 322
6.6.3 The woman as a sister	-	322 - 325
6.7.0 The rights of the husband	-	325
6.7.1 Obligation and duties of the wife	-	325 - 327

6.7.2	Duty of Obedience	-	327 - 331
6.7.3	Going out to seek for knowledge	-	331 - 332
6.74.	Going out to work	-	332
6.7.5	Living according to the husband's socio economic standard	–	333 - 334
6.7.6	The right to marry more than one wife	-	334 - 337
6.7.7	The right to pronounce talaq	-	337 - 346
6.8.0	The right to inheritance	-	347
6.8.1	The right of sexual intercourse	-	348
6.8.2	The duty to breast-feed children	-	348 - 349
6.8.3	Mutual rights of the spouses	-	349 - 350
6.8.4	Right to maintenance	-	350 - 351
6.8.5	The right to sexual intercourse	-	352 - 353
6.8.6	Custody, Paternity and Legitimacy of Children	-	353 - 360
6.8.7	Paternity and Legitimacy	-	360 - 361
6.8.8	The right to consortium	-	361 - 362
6.8.9	The Right to Kind Treatment	-	362
6.8.10	Right to dissolution of marriage	-	363 – 364
	Conclusion	-	
	End Notes & References	-	365 - 370

CHAPTER SEVEN

7.0	**Conclusion**	-	371 - 381
7.1.0	Universal Women Issues: Breaking new grounds and Creating hopes for the future	-	381 - 382
7.2.1	Formation of women living under muslim laws (WLUM) Network	-	383 - 384
7.2.2	Objective of WLUM	-	384
7.2.3	Aims of WLUM	-	384
7.2.4	Methods of Achieving the Objectives	-	385
7.2.5	The Beijin Plat Form for Action and Clear Mandate for Women's Progress 4th Women World Conference 1995.	-	386
7.2.6	The Beijin Declaration	-	387 - 390
7.3.0	The Draft National Policy of Women in Nigeria	-	390 - 391
7.3.1	Policy Thrust of the Draft National Policy on Women in Nigeria	-	391 - 393
7.3.2	Patriarchy, Ideology and Legal Framework	-	393
7.3.3	Culture	-	393 - 396
7.3.4	Chart Showing countries and Marriageable ages in muslim world	-	396 - 397
7.3.5	Recommendations	-	398 - 400
	End Notes & References	-	401 - 402
	Bibliography	-	403 – 406

CHAPTER 1

1.0 INTRODUCTION:

1.1 THE GENERAL STATUS OF WOMEN IN THE SOCIETY

Nigeria covers a geographical area of approximately 923, 770 square kilometers with a population of 86 million people by 1997. The 1991 census[1] puts the population at 88.5 million people, growing at the rate of 3.2% annually with an average of 6.8 children per woman. It also shows that 35% of the population (with a growth rate of 6% per annum) live in urban centers, while the bulk lives in the rural area. Whereas women constitutes 49.6% (officially) of the whole population in the 1991 national census.

This research therefore, basically, seeks to examine the rights and duties of spouses in the family and how the same are applied and protected by Laws and the Courts in such a populated country where the women and children put together constitutes the highest percentage of the population

The role of the women in Nigerian societies as in other societies is multi-dimensional. They therefore play prominent roles in agricultural production and marketing along side with men and children. In the rural areas in particular, the responsibility for domestic chores such as clearing of farms, cooking, child bearing and upbringing rests almost solely on them. In some cases, they are reduced to "hewers of woods and drawers of water". This is more so because in the traditional Nigerian setting, the family

system is basically patrilineal and the aim of marriage are procreation in order to keep or maintain the man's lineage and for the use of children for farming cash crops and for subsistence. There is a widespread practice of female child marriage in the rural areas who are also expected to perform the roles of women such as giving birth, home chores, etc. just like an adult. Some girls in the rural areas, particularly in Northern Nigeria marry pre-menarchally at 12 years, while some girls in the urban centres marry at an average age of 13- 14 years.

Yet it has been generally recognised that the status of women in Nigeria family as in every other culture throughout the ages has been a source of concern. The situation has led to sympathy and now has metamorphosed into an "era of aggressive feminism" by women forming organisations for discourses on their statutes in the society on sectoral issues such as education, health, politics, legal rights, etc. To buttress the low status of women (and children) in Nigeria, the former Honorable Attorney-General of the Federation, in his letters to women organisations, government, ministries, parastatals, etc. in his person acknowledged that:

> Women and children constitute virtually 75% of our national population, our laws as they stand presently do not offer any where near adequate protection for their rights .[2]

The women's low status generally emanates from the prejudices embodied in history, culture and even under the cover of Christian religion. Over the years, the female sex has suffered subjugation in Nigeria even before the slave trade which in turn distorted the male sex population as well as that of humanness itself. "Humanness" is founded by both male and female sexes, which in turn gives rise to family. It is this general low status of women that informs the emphasises on protecting and advancing their rights, globally through non-governmental organisations.

The family has thus remained the most ancient and primordial social unit. It comprises of the husband/man, wife/woman and child/children. In Africa, however, the concept of family is far more wider, extending to half brothers and sisters, cousins, uncles, aunts, nieces, nephews etc.

In the past, and in some instances today it is the man/husband who leaves the home in search of means of livelihood for the family. That is, he leaves the home in order to meet challenges in search for food and money for the family. On the other hand, all the domestic chores, bearing child, upbringing, cooking, just to mention but a few rested on the women as wives. Thus, there is said to be a natural division of labour myth which assigned certain duties/roles to women and others to men. Beyond the domestic chores, most of the women/ wives have no place in the broader society.

This tradition and myth of division of labour has also found support in the Bible which is however, often misquoted from Saint Paul's Epistle to Timothy, it says;

> Let a woman learn in silence with all submissiveness, permit no woman to teach or to have authority over men. She is to keep silent for Adam was formed first, then Eve, and Adam was not deceived but the woman was deceived and became a transgressor. Yet woman will be saved through bearing children if she continues in faith and love and holiness with modesty.[3]

The woman/wife is thus defined in terms of her person-hood, child bearing, a depersonalization. It was expressly stated by Saint Augustine in the following words

> I do not see what other help a woman would be to man if the purpose of generating children was eliminated.[4]

In addition to the above, the native laws and customs, and particularly the misconception and practical application of some of the Islamic provisions as though they are indigeneous customs, provide cover for male superiority amongst muslims.

Some examples of these are:

1. Maintenance in Islam. It is said that husbands should provide food, cloth and shelter for their wives, to even cook and feed them or to employ another to do so. In practice many women feed themselves and their children because they do not know such right exists. If

they do know the husband will not have peace and the courts will have to be multiplied many folds to entertain almost all women's suits against their husband's failure to grant such right.

2. Custody in Islam. Children are often confiscated even at breast when the couples separate rather than complying with the law which gives the mother priority to raise her child if she satisfies the condition.

3. Chastisement, which is recognized by Islam to be carried out with very slight strokes by husbands on their wives, has gone beyond that in exercising the right to inflicting grievous bodily injuries.

The research is consequently going to dwell on highlighting the rights and obligations of spouses in the Chapters that will follow.

Based on all these, many women are thus limited in self-definition to sexual function only. This formed the very basis of discrimination of the female in any given society; in family decision making, social, political, religious and governance spheres.

Even in England, a place termed a civilized country, at one time, women, married women, lunatics, drunkards, imbeciles and infants were grouped together as those without capacity to sue or be sued. They could only exercise such rights through a friend or a guardian, which we shall come to see in the body of this research.

they do know the husband will not have peace and the courts will have to be multiplied many folds to entertain almost all women's suits against their husband's failure to grant such right.

2. Custody in Islam. Children are often confiscated even at breast when the couples separate rather than complying with the law which gives the mother priority to raise her child if she satisfies the condition.

3. Chastisement, which is recognized by Islam to be carried out with very slight strokes by husbands on their wives, has gone beyond that in exercising the right to inflicting grievous bodily injuries.

The research is consequently going to dwell on highlighting the rights and obligations of spouses in the Chapters that will follow.

Based on all these, many women are thus limited in self-definition to sexual function only. This formed the very basis of discrimination of the female in any given society; in family decision making, social, political, religious and governance spheres.

Even in England, a place termed a civilized country, at one time, women, married women, lunatics, drunkards, imbeciles and infants were grouped together as those without capacity to sue or be sued. They could only exercise such rights through a friend or a guardian, which we shall come to see in the body of this research.

Further more, the personality of a wife was submerged into that of her husband until the famous case of ***R. V. Jackson***,[5] and the coming of modern legislations such as The Married Women Property Act of 1882, as well as the Law Reform (Married Women and Tort Feasors) Act of 1935 which made a married woman "a feme sole" to enable her sue and be sued, acquire title, hold and dispose of it as feme sole. In this case, the wife went to stay with her relatives while the husband travelled to New Zealand. She refused to live with him again after he returned, as well as to comply with the decree of restitution of conjugal rights. The husband hired two hefty men to seize her one Sunday after a church service into a carriage to his home and there after she was not permitted to leave the matrimonial building. She applied for a writ of habeas corpus. The court unanimously held that it was not a defence that he was merely confining her to enforce his right to her consortium. The Judge said "from now the shackles of servitude fell from the limbs of married women and they were free to come and go at their will"

So also, the Biblical myth which says "woman is a woe to man" has contributed greatly to the low and inferior status of woman/wife almost every where in Christendom. In Nigeria, the situation is further compounded by the native laws and customs as already mentioned above. This low and inferior status of females had in no small way exposed them to serious dangers of various dimensions. Some are exposed to battering,

without proper maintenance, not allowed to pursue education other than some times Islamic knowledge, are deprived of their children when they are separated, kept in seclusion which often times denies them the right to seek for education and medical care. Today the debasement of women is in the form of benignity and feigned admiration. Even the American Supreme Court Justice, Bradley in 1872 said,

> The paramount mission and destiny of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.

In that year, the American Supreme Court upheld the exclusion of women from the practice of law on the ground that women were timid and delicate sex.

Similarly, in 1970, the Catholic Bishops of Massachusetts opposed women's right to election magnanimously in order to preserve women's "respect and dignity" that unenfranchised women enjoy in their home. Most employers too were reluctant to hire the services of women on a permanent basis because they soon get pregnant, hence are unsuitable. The overall result of this discrimination at home and outside led to a male dominated society starting from within the family. This and other factors informed the formation of women groups to speak with one voice against their low status in the society.

Whereas the Quran absolutely made no distinction between man and woman in relation to ALLAH as both are striving for reward for good deeds in the same manner spelt out for both. Suratul Al-Nisa (women) chapter 4 verse I says:-

> Oh people! be careful of (your duty to) your Lord, who created you from a single being and created its mate of the same (kind) and spread from these two many men and women, and be careful of (your duty to) ALLAH by whom you demand one of another (your rights) and (to) the ties of relationship, surely Allah for ever watches over you.

There are many verses in the Quran to show that Allah created both men and women with souls alike. The advent of Islam has outrightly put a stop to most of the pagan practices of the Arabs like burning of female children alive, naked dancing by women and in turn entrenched in the Quran the upholding and defending of their rights as spelt out therein. The Qur'an has thus brought revolutionary teachings that both men and women possess inherent virtues and nobility without ascribing sin and wickedness to women as does the Bible. The Islamic view is also clearly stated in chapter 2 verse 187 which emphasized the essential unity of men and women beautifully in the following manner:-

> They (wives) are your (men's) garment and you are garment for them.

The Qur'an does not therefore regard a woman as "an organ of the Devil" or a Devil. Rather a woman is referred to as MUH SANAH i.e. a "fortress

against Satan, because a good woman helps her husband, and the reason for marriage is well stated above in chapter 30 verse 21 which puts the man on the path of rectitude in his sexual life. Hence, it is said in Islam that the most precious thing a, man can possess in this world is a virtuous woman who is his best treasure.

The Prophet (S A W) addressed multitude of muslims just before his death on Mount Arafat in his famous sermons where on the Ninth day of Dhul Hilijah D. H. in the Uranah Valley he said amongst other things that:

> .....O people it is true that you have certain rights with regard to your women, but they also have rights over you. If they abide by your rights then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friend with any one of whom you do not approve, as well as never to commit adultery. They are trust of God.....

However, it is one thing to have all the protections of law from religious injunctions for the protection of wives and children, it is another to effectively apply or implement them in practice. Refusal to apply or implement it would well lead not only to injustice, but to untold hardship, difficulty, inconveniences, mental and physical inbalance, etc to women and married female and children. The Juridical treatment of women, husbands, daughters and children generally by the Courts will be the focus of this study.

In the Nigerian ancient societies, just like in any other one the father or husband had the right and power to discipline, sell or even kill their daughters. Also women were regarded as domestic chattels who had little or no right in the family and outside. So if the woman is to survive in the male dominated society, she should not only have some clearly defined rights, but these rights should be recognised and observed and most importantly, the courts should be manned by those capable of observing and enforcing them towards achieving the desired peace, order, stability and equity in the family. The law should be seen assisting the family relationship towards peace and harmony.

In the case of female child, developed countries had long ago recognized that they suffered abuses and neglect and was a source of concern to humanity. It was, however, believed that this does not occur in Africa due to the extended family system which tend to provide protection, and security in the household where elders live together with young couples thereby assisting and guiding them in many respects. It is recognized that this cherished extended family system is collapsing due to separate living of couples away from parents. This tends to subject the young mother to emotional trauma, which is in turn reflected on the daughter (often referred to as intra-familial discord in medicine) by separation on marriage.

Therefore the legal relationship which marriage creates under the statute and Islamic law are generally not known, understood nor respected in many matters particularly by many husbands, who are supposed to head and guide their family while protecting the rights of each members.

1.2 STATEMENT OF THE RESEARCH PROBLEM.

The legal duties, status and rights of spouses in marriage touches directly on their rights whether in the family or in the society at large. Thus the meaning of "right" has been expanded by eminent philosophers such as Hobbes, Locke, Rousseau and Thomas Payne only within the context of "The Right of Man" in their theories of Natural Rights which includes those of women, wives and children. These theories inferred that man/woman possess natural rights as a human being by the fact of his or her existence because natural law assumes that all human beings have the same essential attributes. The word "right" is derived from the Latin word *RECTUS*, which means straight thought, as opposed to non-conformity with the law, morality and justice. It could also be used to refer to a person who has a just and valid claim including those accruing as consequences of marriage. So it has been argued that if women and female children are both de jure and de facto treated as human beings, there would be no need to hold discourses on their rights in isolation from that of the men either in the family or outside the family realms. Women generally agreed that there is

need because of the family systems e.g. patriarchy as well as some of the gender roles spelt out by men through customary laws, and men's reluctance to give wives their rights, as spelt out by some provisions in religions.

In family issues, in particular, it is often asked whether the woman has any rights at all in her marriage supported by law which can be enforced by the courts. In the domain of marriage, for instance, regarding parental consent, "bride price" and dower has been criticized on the ground that in reality it depicts some kind of transaction having an economic and investment nature particularly where refund of the "bride price" or dower is made to the husband upon dissolution of the marriage as in ***Mariyamu V. Ejo,***[5a] a case in which the parties were Igbirra muslims. This feature gives the husband a full money backed guarantee for the wife he "purchased", being one of the criticisms of the system. It is apparent that there is a general misconception of the Islamic system which needs to be clarified in the body of this work. However, it will be necessary to explain here that there is no such thing as refund of bride price in Islamic Law after divorce.

It has been observed that the failure to abide by the duty to maintain wives and children is one of the major sources of instability of marriage. Instability of a marriage may arise also where the spouses do not know their rights and obligations in clear terms or if they do, the failure to abide by it willingly. Most time the husband who is the head of the family may assert

his position as a head to "bully" or chose what obligation to fulfill and in the manner of his choice disrespectfully, knowing that the wife is in a weaker pedestal to do much for her self and children. The research is to uncover the extent of legal protection given to spouses in theory and in practice. Hence the research will be interested in the juridical treatment of spouses.

1.3 OBJECTIVE OF THE RESEARCH

The study intends to examine the existing statutory provisions and under Islamic Laws relating to marriage and their legal consequence respectively. It will also examine some court decisions to show whether or not injunctions, legislation and courts have actually protected the rights of the spouses or not. This is because, it is one thing to have the laws and injunctions and another to have the parties observe them, and in case of failure to observe the rights, the position taken by the courts in applying and enforcing the laws as a means of supporting and strengthening marriage relationship for a happy co-existence.

Majority of couples are not aware of their rights and duties in matrimonial homes. This ignorance some times leads to matrimonial problems. It is also evident that even where spouses are aware of some of these rights and duties, they often misuse or abuse them leading to disharmony and un-peaceful coexistence in the family. It also leads to

unfair treatment and surbodination of the wife rather than mutual type of relationship.

This study will also look into both systems relating to the established rights and duties of spouses with a view to finding out whether or not courts have provided the needed protection to spouses in line with statutory and Islamic provisions or injunctions for the desired peaceful coexistence needed for an orderly family. If the family is orderly the nation too will be because the nation starts with the family. The main purpose of this research therefore is to look into the rights and responsibilities of spouses towards themselves during marriage and after. To also look into the legal protections available to spouses and their children where their rights are denied.

1.4 JUSTIFICATION:

The research will be useful to the lawyers, students, researchers, intending couples as well as married couples, Non-governmental organisations, particularly those working on women's human right and those of children, women activists and the public at large.

1.5 METHODOLOGY

This study will make use of the existing materials on the subjects and will look into the decisions of some of the High Courts and Sharia Courts handling such matrimonial cases.

There will be the studying of Statute and Islamic Laws on marriage on the rights and duties of spouses therein. Cases will therefore be obtained from some High Courts, State Sharia Courts and Area Courts of Nigeria. To do this research, there will be books' study and of religious injunctions and case study. The literature review of books, articles and other relevant write-ups on the topic for the research will include the following publications

1. Abdu al Ati, Hammudah, The Family Structure in Islam, Islamic Publications Bureau Nigeria, 1982

2. Ahmad, K. Family Life in Islam, the Islamic foundation, Leicester.

3. Ambali, M. A., The Practice of Muslim Family Law in Nigeria, Tamaza Publishing Co. Ltd; Zaria, 1998

4. Arthur, P. and Henry, F. M., Marriage Law in Africa, Oxford University Press, London, 1971.

5. Bromley, P. M., Family Law, 5th ed., Butterwoth London, 1976.

6. Guring, M. A., Introduction to Islamic Family Law, C.I.L.S. A.B.U., Zaria.

7. Hamilton, C. The Hedaya, Ktab Bhavan, 1979.

8. Murdock, G. P. Social Structure, Colliex Macmillan, ltd London, 1965.

9. Mutahhari, Mutada, The Rights of Women in Islam, World Organisation for Islamic Services Tehran, Iran, 1981.

10. Nwogugu E. I. Family Law in Nigeria, Heinemann Education Books (Nig.) Ltd., Revised ed. 1990.

11. Stern, G. H.; Marriage in Early Islam, Royal Asi'atic society, London, 1939.

12. Yusuf, A. A. Translation of the Holy Quran.

13. ETC.

1.6 SCOPE OF THE RESEARCH

The study will encompass the history and sources of laws governing statutory and Islamic Law marriages, and the concepts of marriage under both the statute and shariah laws, touching particularly on the capacity of the parties, breach of promise to marry and the concept of marriage. The study will also as indicated earlier look into the court system having jurisdiction over marriage and its incidences. Since the main purpose of the research is to look in to the rights and responsibilities of spouses towards themselves during the subsistence of the marriage and when the marriage has "broken down irretrievably" or after termination of the marriage under Islamic Law, the legal protection available to the spouses and children will be focused on with the purpose of determining the protection that is given by the courts. This is because aggrieved women and young wives seek redress in the courts to enforce their rights as a result of problems in marriage relationship which has eluded them in the family on the grounds

that women's rights have generally been observed in their breach and not falling within the meaning of "Human Rights as they are domestically related.

Having discussed the statement problems, objectives, justification, methodology and scope of the research, it is necessary to now examine the historical development of laws governing marriages both under statute and Islamic law in Nigeria and their sources.. The aim is to bring into light the starting point of the two marriages that have greatly influenced Nigerian family system and the rights of spouses and their children therein.

1.7 THE HISTORY OF LAWS GOVERNING MARRIAGES IN NIGERIA UNDER THE STATUTE.

The celebration of monogamous marriage in Nigeria started in 1863 in the Colony of Lagos following the cessation of it to the British Crown in 1861. The marriage Ordinance of 1863[6] granted licence "to marry" in the settlement of Lagos and its dependencies. Since that year, several Ordinances were enacted such as the Registration Ordinance[7] for the registration and solemnization of marriage within Lagos settlement only. The then Divorce Ordinance[8] was meant for the Colony alone, but the Marriage Ordinance of 1884[9] was said to be more comprehensive. Even when Lagos became separated from Gold Coast, the Ordinance remained the applicable law. Since these Ordinances applied to the Colony of Lagos

only, parties outside Lagos were free to contract either a customary law marriage or a Christian type of marriage, which is usually celebrated in the church.

However in 1900 the Marriage Proclamation came into being for the Southern Protectorate with similar provisions as that of 1884 Ordinance. But in 1906, the merger of Lagos Colony and Southern Protectorate made the 1884 Ordinance of the Colony applicable to the rest of the territory after repealing the Marriage Proclamation of 1900. The Protectorate of Northern Nigeria all this time had no provisions like those found in the Colony and Southern Protectorate. Only Islamic Laws, indigenous laws and customs regulated marriage relationships.

In 1907, the Marriage Proclamation[10] was issued to the then Northern Protectorate. In 1914, the two Protectorates were merged and it became necessary to streamline the marriage laws. Due to this merger, the Marriage Ordinance of 1914[11] repealed the previous Ordinances, which has now been reenacted in Cap 218, Laws of the Federation of Nigeria 1990, called the Marriage Act.

In 1970, the Matrimonial Causes Act, the first indigenous legislation in the area of marriage was enacted. In substance, it was based on the 1959 Australian Matrimonial Causes Act, the Divorce Reform Act of England as well as the 1970 Divorce and Matrimonial Causes Amendment Act of Newzealand.

The Nigerian Matrimonial Causes Act is now entrenched in Chapter 220, Laws of the Federation, 1990. Section 114 (a) of the MCA defines Matrimonial Causes to mean proceedings for a decree of:

(a) Dissolution of marriage

(b) Nullity of Marriage.

(c) Judicial Separation

(d) Restitution of conjugal rights

(e) Jactitation of marriage, and it further includes ancillary proceedings brought under any of the five headings above e.g. maintenance of a party to the proceedings, settlement damages in respect of adultery, etc.

Going back to the Matrimonial Causes Act (MCA) section 1 enacts that proceedings in matrimonial causes can only be under the Act. While section 8 says the law to be applicable is the law stated in the Act.

Thus, from the time the Supreme Court was established in 1900[12], it is worth noting that the Court was given jurisdiction of the High court of England, which was to be exercised in accordance with the law and practice in force in England. This jurisdiction was transferred to the High Court by the Regional Court's Federation Jurisdiction Act of 1958, but there was no change in the law or procedure to be applied. This interpretation of the law to be applied in Nigerian courts was affirmed in

the case of ***Taylor V. Taylor***[13]. This case stated that probate law was to be construed for application as "in force in England at any particular time when the received law is to be applied" in Nigeria. The courts in Nigeria to day apply the English law which is now Nigerian law and practice.

Since monogamous marriage has been made important by the British rulers from the beginning and there has now been a severance of the link with English law it is relevant to consider which body in Nigeria has power to legislate on matters affecting such marriages. Under the 1960 and 1963 Constitutions, jurisdiction were given to the Parliament to make laws with respect to "marriage other than marriages under Moslem and Customary laws..."[14]. It was under this provision that the Federal Military Government enacted the Matrimonial Causes Act of 1970, now reenacted as laws of the Federation, 1990. The National Assembly in the present day democratic dispensation has the power to make such legislation.

The word "Marriage" in the earlier enactments was capable of different interpretations. The question that readily comes to mind is, does the Federal Parliament have exclusive power over the whole area in which monogamous marriages are practiced or only in so far as the creation of marital relationship that exist. The 1999 Constitution has resolved this ambiguity because the Exclusive List gives the Parliament/House of

Assembly power to legislate on the formation, etc. of monogamous marriages.

In conclusion, the laws that now regulate monogamous marriage is the former Marriage Ordinance of 1914 now contained in chapter 218 Laws of the Federation of Nigeria 1990 called the Marriage Act and in the case of matrimonial proceedings it is regulated by the Matrimonial Causes Act 1970, now also contained in Cap 220 Laws of the Federation of Nigeria 1990 under section 114 (a).

1.8 THE HISTORY OF MARRIAGE UNDER ISLAMIC LAW IN NIGERIA.

Marriage under Islamic Law is governed by the Quran, hadith and Islamic Juristic opinions/schools and the prevailing views from amongst the Islamic school of thoughts. The Islamic school of thought, that is widely followed in Nigeria and other West African countries is the "Malikis". This school of thought is named after an early Islamic scholar called Malik Ibn-Anas from Medina in the eighth century A.D.

Islamic Law (or shariah) in Nigeria particularly in Northern Nigeria forms the most important system of laws, on personal religious matters and it is extensively followed. Islam was introduced in Nigeria as early as the first half the 14th century by Arab traders and scholars through the trans-saharan trade. Since then it had suffered declines but became reinforced

during the reign of Sultan Muhammad Rumfa of Kano (1463-1499). Despite the people's Islamic knowledge their practice was not real. Islamic laws were defied and abused by ignorant and nominal kings as well as by the populace who had little or no Islamic knowledge. Until Shehu Uthman came and embarked on extensive reforms through preaching tours in different Hausa lands. Preaching was in Hausa and fulfulde. There were oppositions to the cause of Shehu particularly from the kings who do not wish to see their unlimited power and authority over their subjects curtailed by Islamic laws. It is necessary to further examine the administration of justice in the past so that the present would be better understood.

1.9 SOURCES OF ENGLISH NIGERIAN FAMILY LAW.

A. Marriage Act of 1914.

The English family law in Nigeria for the purpose of monogamous marriage, is regulated by Cap 218, 1990 Laws of the Federation of Nigeria, being a re-enactment of the Marriage Ordinance of 1914. This statute is substantially similar to the 1884 Ordinance of Lagos and Gold Coast based on the principle of English monogamous marriage, making it a purely civil function while the observance of religious ceremony was left out. It continued to be applied to the Southern and later to the Northern protectorates.

The source of Law for monogamous marriage is statutory enactment provided by the British Crown since the cession of Lagos in 1861 and

colonization of Nigeria as a whole. The Nigerian Matrimonial Causes Law is also statutorily enacted, to be discussed later.

The Constitution of the Federal Republic of Nigeria Since 1963 to the 1999 version gave the Federal Parliament and the National Assembly power respectively to make legislation in respect to: (item 23, Exclusive List Part I of the Schedule)

> Marriages other than marriages under muslim law or other customary law: annulment and dissolution of, and other matrimonial causes relating to, marriage other than marriages under moslem law or other customary law.

The Phrase "marriage" other than customary Law refers to monogamous marriages. Therefore, only the parliament previously and today the National Assembly has the power to make laws on all matters of monogamous marriages, whereas any matter not within item 23 of the Constitution belongs to the region/state for providing legislation on.

The current enactment is in the Second Schedule Part I: Exclusive Legislative List item 61 of the 1999 Constitution.

The sources therefore are as follows:

1.9.1 Local Nigerian Legislation:

The Received English Law

Local Legislation accounts for some part of the Nigerian Family Law. These Local Statutes are either a copy of or directly inspired by existing or former English Laws of England. The Marriage Act 1914 (now Cap 218 LFN 1990) is a Local Statute on Family Law which have application throughout Nigeria. It provides the conditions and formalities for a valid monogamous marriage.

The Received English Law has remained a source of law. English laws were imported into Nigeria by the means of reception statutes, known as the "Received English Statutes." The Received English Statutes implied that Nigeria Courts shall apply English law of a particular date on a particular subject. Example of the receiving English Law is Section 4 of the Regional Courts Federal Jurisdiction Act, it provides that:

> The jurisdiction of the High Court of a Region in relation to marriages and the annulment and dissolution of marriage and in relation to other matrimonial causes shall, subject to the provision of any laws of a region so far as practice and procedure are concerned, be exercised by the court in conformity with the law and practice for the time being in force in England.

The reception of other aspects of English family Law: The aspects of family law other than marriage and matrimonial causes are exclusively within the legislative competence of each region then. E.g. the Northern Region High Court Law No 8, 1955, Sections 28 and 29A provides respectively that:

Subject to the provisions of any written law and in particular to these sections 26, 32 and 35 of this Law:

(a) the common law

(b) the doctrine of equity

(c) the statutes of general application which were in force in England on the 1st day of January, 1900.

Shall in so far as they relate to any matter with respect to which the legislative of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court.

Section 28A (1) All imperial Laws declared to extend or apply to the jurisdiction of the court shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future local legislation.

(2) For the purpose of facilitating the application of the said imperial Laws they shall be read with such formal verbal alterations, not affecting the substance, as to names, localities, courts officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

These legislation were not limited to family law but to many other matters. It is worthy to note that the phrase "reception clause" gave rise to various legal definitions and interpretations in the courts.

1.9.2 MATRIMONIAL CAUSES ACT 1970

Before the coming of the Matrimonial Causes Act (MCA) in1970, s. 4 of the state Court (Federal Jurisdiction) Act, Cap 187 of 1958 of the superior English Courts was the applicable law in Nigeria.

The law gave jurisdiction to the State High courts on the dissolution, annulment and other matrimonial causes relating to monogamous marriages, though subject to the provision of any laws of any state in so far as practice and procedure are concerned and were to be exercised in conformity with the law and practice for the time being in force in England. Due to this, the Nigerian law of matrimonial causes was at that time subject to change with the law in England regardless of needs, values and situations in Nigeria. This notwithstanding, the break between Nigeria and England is not in whole as there are traces of applicable English law. For example, the practice and procedure to be followed in proceedings for divorce, nullity or judicial separation under section 98 is still applicable. Although section 112 (1) of the 1970 Act (now cap 220 Laws of the Federation, Nigeria 1990) empowers the Chief Justice of Nigeria in consultation with the chief Justices of the states, and in appropriate cases, with the presidents of the courts of Appeal, to make rules of practice and procedure for Nigerian courts. This has not been done, therefore, the English rules of practice and procedure in force at the commencement of the Act shall continue to apply.

Furthermore, the English rules of Common Law and doctrines of Equity as well as some English statutes of general application still apply. For example, those dealing with the annulment of void and voidable marriages, because the Act is silent on the rules that, only the parties to a voidable marriage can bring proceedings for its annulment and during the life time of both spouses.

The 1970 Matrimonial Causes Act is based on the Australian Matrimonial Causes Act, 1959 and that of Divorce Reform Act, 1969 of England but with certain modifications and some fundamental differences.

One of the main criticism against the Nigerian Act was that it was not preceded with debate by the Nigeria public while the Australian and British decisions are no more than just persuasive authorities while in the case of conflict, the local case-law would prevail.

The history and court systems on statutory marriage are discussed separately in this chapter.

1.10 ADMINISTRATION OF JUSTICE IN THE SOKOTO CALIPHATE.

It has been reported that even though Islam had been introduced to Hausa land in the 14th century, it had little influence on the every day life of most of this people[15]. Initially, Shariah was seen as opposing the unlimited power and authority of the kings over their subjects, which was the only acceptable code of law.

The sources of law at that time were the local traditions and their enactments, which were proclaimed at the market places. The king then was supreme and his word was law, while the people were his slaves.

Shehu Uthman B. Fodio's Kibab Al Farq contained a list of how and where the kings and the officials oppressed their subjects. Amongst other things, they misappropriated the possessions of women who were wards of the courts, abducted and kept them as wives without offering marriage to them. They set aside the hudud (defined penalties prescribed by shariah) like those for adultery, theft, etc. and commuted them for sequestration of

the culprits possessions. These sad events, amongst other things, led Shaykh Abdullahi and Uthman B. Fodio to plan and actually executed a Jihad against the syncretist rulers of Hausa states. Following the jihad, was a new administration based on shariah, which rested on the Caliph who was the head of the Caliphate. As he could not handle all the responsibilities, he appointed officers whom he supervised as follows:

1. KADI:- His main duty was to administer justice in the community.
2. The WAZIR (Vizier) and the Amir (Emir or governor) were also delegated to administer justice by the caliph.
3. WALI AL-MAZALIM:- were some sort of super judges who were delegated to try cases involving powerful government officers who were seen to be above the Kadi's court.

In appointing a Kadi the following laid down qualifications were followed. They were:-

i. He must be a Muslim
ii. He must be a male
iii. He must be of full age
iv. He must be sane and
v. Free (i.e. not a slave)
vi. He must be of honourable moral character and probity.
vii. He must not be deaf or dumb.

For the purpose of discharging his duties properly, the absence of any of these would disqualify a person from being a Kadi. The decisions that were passed by a Kadi who did not possess any one of the above qualifications became null and void. Because justice was the most essential attribute of the Kadi, they were adequately paid in order to avoid the temptation of receiving bribe. They could therefore not accept any gifts except from close relations. Their social interactions were also restricted in order to protect them from corrupt influences. The rationale behind all these was simply to prevent undue friendship that may tamper with the strict impartiality in the discharge of their duties. A Kadi is disqualified in trying cases in which his relations were involved or he has an interest in.

Apart from the Kadis who had general jurisdiction there were also Kadis appointed to determine particular cases such as those relating to marriage only to deal with the administration of orphans' property. The Kadis were authorized to determine all such cases under their jurisdiction without reference to any one.

The Kadis were made to have messengers, clerks etc. who assisted them in the court in the dispensation of justice. Such people include:

1. **NAI'B** i.e. deputy kadi. He assisted the kadi and had the authority to try all types of cases within the kadis jurisdiction when the latter is absent or sick. They must, as a matter of fact, possess the same qualification.
2. **MUFTIS**: They were very important officials in assisting the kadis. They were scholars of Islamic Law who rendered legal decisions on

cases referred to them. Ideally, they were to be more learned than the kadis in Islamic law since it was to them that the kadis turned to for advice and guidance on matters that were not clear to them. At first the Muftis performed this function collectively as scholars rather than on an individual basis. Later, there was one Mufti attached to a court. With the passage of time and the coming of the colonialists, the office of the Muftis suffered severe neglect although the title remained. The qualifications and status disappeared to no more than those of the court clerk due to the Proclamation.

3. **KATIB (Court Clerk)**: His duty was to record details of all cases heard and tried by the kadi.
4. **QASIM (Estate distributor).** He assisted the kadi in distributing the estate of the deceased to their heirs.
5. **MU QAWWIM**: He also assisted the kadi as a valuer. As part of his duties he inspected properties under litigation for valuing.
6. **'AWN (Messenger)**: He was responsible for delivering of summons to the parties involved in the suit.
7. **TARJUMAN (Interpreter)**: He interpreted statements into the language understood by all those involved in the case.

1.11 THE COMING OF THE EUROPEANS (COLONIAL PERIOD)

After this brief background of shariah and its court officials, it is still necessary to further examine the activities of the British Colonial masters since 1900 vis-a-vis the various proclamations establishing the courts, its personnel and the gradual changes that took place over time.

As already mentioned on the arrival of the British conqueror, shariah system was already established in the Northern part of Nigeria. However, when the British firmly rooted themselves, they began to establish new policies and directions which eventually brought to an end the then shariah legal system. The application the legitimacy test which was subjected to whether or not it passed the series of tests laid down by the British such as "it should not be repugnant to natural justice, equity and good conscience" nor contrary to pubic policy" etc.

Thus, the applicability of shariah and all other native laws and customs were controlled and supervised by the then British government as per the laid down test - under Lord Lugard who made his first proclamation in 1900[16] for the administration of Justice in Nigeria based on the British notion. In fact, such administration was termed to be "for better regulations and control of native court" This proclamation provided that:

i. The resident[17] was empowered to establish in his province by "warrant" under his hand, such native courts as he deemed fit in the circumstances.
ii. The court was to administer native laws and customs prevailing in the area of jurisdictions of each court, in both civil and criminal matters. In criminal matters they might award any punishment and in civil matter they might make any order that native law and custom authorized, subject to the condition that an inhuman treatment could not be inflicted. And they could not inflict the penalty of death.

iii. The Emir or chief was to appoint the judges subject to the Resident's approval. Where there was no emir or chief the Resident appointed judges.

iv. The Resident had the power to enter the courts at any time and to inspect them. He could transfer a case from one court to another, he could review the findings of a court and order a retrial or modification of the sentences or order of the courts.

v. The practice and procedure of the courts were to be governed by native law and custom subject to the rules that might be made by the High Commissioner.

It is noticed that this organisational pattern of native courts continued to be incorporated in subsequent enactments made by the then High Commissioner for Nigeria, Sir Lord Lugard in the 1900 Native Courts Law of that year. This Proclamation allowed the Kadis' courts to administer Law in both civil and criminal matters subject to the condition that no inhuman treatment could be inflicted on any one.

The Resident could also review the findings of the court or order a retrial or modify the sentence or award.

In 1906 another Proclamation was introduced to effect some change on the previous one. It created the Alkalis' courts and Judicial Councils by "warrant" under the Resident's hand. The Alkalis' courts were presided over by Kadis with or without concilar helpers, while the Judicial Councils

This Edict, (of 1967)[20] allowed the continued application of Islamic Laws. Section 20 therefore provides that "the courts shall apply the native laws and customs prevailing in this areas of jurisdiction..." Their application were still made subject to the passing of the validity tests. The practice and procedure for the courts were however those of Islamic Law.

The validity test doctrine was applied in the case of ***Mariyama V. Sadiku Ejo***[21] where a child born ten months after divorce to a second husband was said to belong to the first husband as the idda or "waiting period" under Islamic law was not observed. The court declined to enforce Islamic law as the rule was termed "repugnant to natural justice, equity and good conscience," which would take away a child from the couple who were its universally acknowledged (biological) parents. The court did not merely apply the repugnancy rule but went beyond it to examine the result of applying such rule.

When Nigeria became a sovereign nation in 1960, its basic law- the Constitution was enacted three years later (in 1963). This Constitution created the Shariah Courts of Appeal in the then Northern Nigeria. In 1979, the Constitution turned these courts into state courts following the territorial division of Nigeria into states. The Constitution was further amended in 1999 by a Promulgation decree under the military government.[22]. The Constitution to be referred to from now on is the current 1999 Constitution

of Nigeria. Section 275 of the 1999 Constitution provides for the establishment of the Shariah Courts as follows:

1. There shall be for any state that requires it, a Shariah Court of Appeal for that state.
2. The Shariah Court of Appeal of the state shall consist of a Grand Kadi of the Shariah Court of Appeal and (b) such number of kadis of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the state.

Appointment of Grand Kadi and Kadis is governed by section 276 of the 1999 Constitution, which says that:

1. The appointment of a person to the office of the Grand Kadi of Shariah Court of Appeal shall be made by the Governor of the state on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the House of Assembly of the state.
2. The appointment of a person to the office of a kadi of the Shariah Court of Appeal of the state shall be made by the Governor of the state acting on the recommendation of the National Judicial council.
3. A person shall not be qualified to hold office as Grand Kadi or Kadi of the Shariah Court of Appeal of a state unless.
    a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years and has obtained a recognized

qualification in Islamic law from an institution acceptable to the National Judicial Council.

b) he has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than 10 years; and

i) he either has considerable experience in the practice of Islamic law or

ii) he is a distinguished scholar of Islamic law.

4. If the office of the Grand Kadi of the Shariah Court of Appeal of a state is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed those functions, the Governor of the state shall appoint the most senior Kadi of the shariah Court of Appeal of the state to perform those functions.

5. Except on the recommendation of the National Judicial Council, an appointment pursuant to subsection (4) of this section, shall cease to have effect after the expiration of three month from the date of such appointment and the Governor shall not re-appoint a person whose appointment has lapsed.

The jurisdiction of the Shariah Court of Appeal is contained in section 277 as follows:-

> (1) The Shariah Court of Appeal of a state shall in addition to such other jurisdiction as may be conferred upon it by law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

The Justices of the Federal Vourt of Appeal in the case of ***Umara V. Bukar Sarki***[23] said "jurisdiction involving questions of Islamic law matters means:

a) any question of Islamic Law regarding marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage relating to a family relation or guardianship of an infant,

b) where all the parties to the proceeding are muslims, and question of Islamic law regarding a marriage or regarding family relationship or the guardianship of an infant.

c) any question regarding wakf, gift, will or succession where the endower, donor, testator, or deceased person is a muslim.

d) any question of Islamic Law regarding an infant, prodigal or person of unsound mind who is a muslim or the maintenance or guardianship of a muslim who is physically or mentally infirm.

e) where all the parties to the proceedings (whether or not they are muslims) have by writing under their hands requested the court that hears the case in the first instance to determine it according to Islamic law.

It is worth noting that there has been a departure in the present enactment from the use of the word "personal" which was used in the repealed Constitution and previous laws,. The importation then of that word was to inter alia, distinguish matters which were purely personal from the remaining body of the laws retained under the name Islamic law. The Honourable Chief Judge of Kaduna State in the case of ***Laila Dogon Yaro V. Jimoh Bello***[24] said that:

> It becomes impossible to read into the Constitution that the removal of the word "personal" has secured some additional areas or aspects of Islamic law...

This view is correct in the light of S. 244 (2) of the Constitution which widens the Courts jurisdiction to "any other question of Islamic Law not enumerated in paragraphs (a) and (b), if all the parties to the proceeding (whether or not they are Muslims) have requested the Court to hear the case in the first instance, to determine it in accordance with Islamic law...

And for the practice and procedure of the Shariah Court of Appeal section 279 says:-

> Subject to provisions of any law made by the House of Assembly of the state the Grand Kadi of Sharia Court of Appeal of the state may make rules vested in it by this regulating the practice and procedure of the Sharia Court of Appeal.

The jurisdiction has already been focused above.

In the exercise of its functions, the Court shall be duly constituted if it consists of at least three kadis of the court under section 278.

It is also necessary to point out that the 1999 Constitution has provided for an appeal under section 244(1) to the Court of Appeal as of right in any civil proceeding with respect to any question on Islamic law which the Sharia Court of Appeal is competent to decide.

The section went further that:

(2) any right of appeal to the Court of Appeal from the decisions of a Sharia Court of Appeal conferred by this section.

a) shall be exercisable at the instance of a party thereto or with the leave of Shariah Court of Appeal, or of the Court of Appeal at the instance of any other person having an interest in the matter; and

b) shall be exercised in accordance with an act of the National Assembly and rules of court for the time being in force regulating the powers practice and procedure of the Court of Appeal.

So far there is one reported case touching on conflict of Shariah and English law jurisdiction/on Islamic Personal matter on Islamic Personal matter. It is the controversial case of ***Yunusa V. Adesubo***[25] which went up to the Supreme Court. In principle a muslim's personal law is deemed to be governed by Shariah/Islamic law. The deceased in this case though a muslim, shared/devised his property in accordance with the English Wills Act of 1837 which is not recognized by Islamic law. The Supreme Court gave priority to English Law over Shariah in sharing the deceased's property. The decision in this case led to the demand for a Supreme Shariah Court in Nigeria where the judges/kadis would enforce muslim personal laws on parties in the court. To compromise this request was the creation of a division in the Federal Court of Appeal now called court of Appeal. Three of the justices are required to be learned in Islamic personal law in order to hear appeals from the various Shariah Courts of Appeal of the Federation.

That is, therefore the nature of the Shariah Court of Appeal. The structure of courts in Nigeria that apply Islamic law is broken down into several hierarchy. It starts at the grassroots level with courts referred to as Area Courts, which are further, categorized into grades. Appeals from Area Courts of a state therefore lie to the Shariah Court of Appeal of a state and

finally to the Court of Appeal where section 247 states that in doing so, it shall consist of not less than three justices of the court learned in Islamic law. Such is the trend of the introduction of Shariah in Nigeria. It shows the gradual curtailment of the powers of the chiefs and kings as well as of the judges, whom at first had unlimited jurisdiction to try civil and criminal cases including homicide. Their powers as we have already noted were drastically reduced by Lord Lugard's Proclamation, and then by the Constitutions of the Federal Republic of Nigeria.

A change was therefore gradually introduced in the application of Islamic law, showing its movement towards being statute controlled, particularly relating to its establishment, jurisdiction, composition etc. regarding the shariah properly being applied to Muslims, particularly in family law or personal status areas.

1.12 SOURCES OF ISLAMIC LAW (SHARIAH)

1.12.1 Introduction

Shariah has been defined by Muslim scholars as the body of

> those institutions, which Allah has ordained in full or in essence to guide the individual in his relationship to God, his fellow Muslims, his fellow men, and the rest of the universe.[1]

It may be regarded as a natural law, It also designate the principal Islamic Laws which regulates all aspects of public and private life. To Muslims, shariah is one comprehensive body of law that is divine in origin, religious in essence and moral in scope.

Islamic Law, would therefore encompass two basic elements: the devine, which is unequivocally commanded by God or His Messenger, designated as shariah; and the human, which is interpretation and or application of shariah, which is designated as figh or applied shariah. Islamic Law is "evolutionary" in nature because its growth took centuries and went through phases. The Quran made provisions for simple, practical problems of every day life and later, became complex and comprehensive. The sources of Islamic Law comprised of a wide range of basic, supplementary and rational roots, outlined below.

1.12.2 The Quran

The Holy Qur'an is the main source of Islamic Law, it provides the basics for all human actions; in marriage, in public life as well as spiritual sphere.

While making provisions, it also provides explanations, but has also left out various detailed unelaborated issues which has to be explained and regualted by Sunnah and other sources of law.

1.12.3 Sunnah

The second sources of Islamic law, are considered to be supplementary and explanation, of the Holy Qura'n.

The Sunnah consist of those sayings, deeds or tacit approvals by the Holy Prophet Muhammad (S.A.W.) himself. It is divided into three parts: The first, al-sunnah al-qawliyah, is the traditions or al-hadiths, which are the statement of the Holy Prophet; the second, al-sunnah al-fi'liyah, (the traditions of deeds) is derived from the deeds of the Holy Prophet and the third, al-sunnah taqririyah the tradition or tacit approval, is taken from the Holy prophet's silence or his tacit approval regarding his deeds which had occurred during his life time.

The sunnah were collected after the Holy Prophet's demise, which is known today as Hadith, also known as the traditions of the Holy Prophet.

1.12.4 IJMA – OR CONSENSUS OF OPINION

Literally, it means unanimity of opinion on a certain solution. It is an expression of unanimous consent of learned Muslim jurists who are termed mujtahid, on theological and legal matters. It's value is expressly recognised by the Qur'an. The issue at hand is judged by reason and common sense.

The method of reasoning here is the same as ijtihad. There are laid conditions for the validity of ijma; they are:

1. It must not be against the text of the Qur'an or the Sunnah.
2. The ijma of the companions of the Prophet (S.A.W.) shall not be re-opened.
3. The jurists of a particular age should be unanimous on the point arrived at.

The exercise of ijma to meet new circumstances began in the prophets life time through ijtihad. After the passing away of the Prophet ijtihad gain wider prevalence and the four caliphs resorted to its use. Therefore, ijtihad is a great source of law and the great Imams of the various schools used it to meet the demands and requirements of the muslim community by different methods such as qiyas (analogy of muslim jurist), istisan (preference to a particular view), istishab (presumption of continuity), maslahah (public interest) as secondary sources.

1.12.5 QIYAS OR ANALOGY

With the conquest and expansion of the Islamic state, and as centuries went by, new cases arose which were not tackled by the Holy

Qura'n, the Sunnah or the consensus of opinion. The jurists found themselves compelled to seek for solutions, thereby, had recourse to reason, logic and opinion. In this pursuit, however, they were not entirely free or unrestrained for they had to adhere to scientific rules and premies which they classified in a new category known as analogy. Analogy (qiyas) thus became the fourth source of Islamic law.

Therefore, it is a process of deduction by which the law of the text is applied to cases which though not covered by it are governed by the reason of the text.

For a qiyas to be valid it must not oppose the provision of the Qur'an and it must be found on law established by the text of the Qur'an, the tradition or ijma without changing the law itself.

It has been argued that the mujtahid may err in judgement and a qiyas of one generation may be rejected by a following generation. Thus, making it inferior as source of law than the first three sources listed above.

The Shia, out of the whole jurists do not recognise qiyas and ijma as sources of law because, they said only the word of Allah is binding to them.

1.12.6 ISTIHSAN-EQUITY

It means the exercise of Private judgement on public good or in the interest of justice. It could mean rationalization or legal reasoning which is

not covered by Qiyas. It is derived from customs and usages which prevailed in Arabia before Islam which do not oppose the spirit of the Qur'an and are not expressly forbidden by the Sunnah.

It is divided into the following.

1. Istidlah or inference or rationalization or legal reasoning which is not covered by the Qur'an.
2. Istihab or a link. It is used to link up later circumstances with the earlier one by argument and assumption that such rules remain valid so long as these conditions have not been altered.

The development of law by Istihsan muslahat (public interest) and Istidlal are through human rational sources for equity in Islamic Law.

1.13 THE SYSTEM AND STRUCTURE OF COURTS WITH JURISDICTION OVER MARRIAGES UNDER ISLAMIC LAW IN NIGERIA'S AREA COURTS

1.14 The basic legislative enactment's governing Area Courts are the various Area Courts Edicts which are as follows:-

Bauchi State Area Court Edict 1968

Borno State Area Court Edict 1968

Gongola State Area Court Edict 1968

KadunaState Area Court Edict 1976[26]

Kano State Area Court Edict 1967[27]

Kwara State Area Court Edict 1967[28]

Niger State Area Court Edict 1967[29(a)]

Sokot State Area Court Edict 1967[29(b)]

Note that the Edicts cover only the Northern parts of Nigeria where Shariah Courts are found. The courts are divided into four classes.

1. Upper Area Courts
2. Area Courts Grade I
3. Area Courts Grade II
4. Area Courts Grade III

These courts have both civil and criminal jurisdictions. Part II of the first schedule to each Area Court Edict spells out the jurisdiction of the various grades of Area Court. All the grades of the courts have unlimited jurisdiction in

a) Matrimonial Causes and matters between persons married under customary law or arising from or connected with a union contracted by customary law other than those arising from or connected with a Christian marriage as defined in section 1 of the criminal code,[30] and
b) Suits relating to the custody of children under customary law.

Note that customary law here is meant to include Islamic Law.

The Area Courts are subject to the general supervision of the High Court. Appeals from the Area Courts lie to the Upper Area Courts, which

also has original and appellate jurisdiction. Appeals from the Upper Area Courts lie to the Shariah Courts in cases involving muslim personal law and to the High Court involving English form of marriage and others.

1.15.0 THE SYSTEM AND STRUCTURE OF "ENGLISH" COURTS WITH JURISDICTION ON MATRIMONIAL CASES.

1.15.1 STATE HIGH COURTS

The previous 1900 Supreme Court for the Southern Protectorate was given the jurisdiction of the High Court of England which was in turn extended to the Northern Protectorate in 1907. These High Courts applied the Marriage Ordinance of 1914 (now an Act). It is now contained in the 1990 Laws of the Federation of Nigeria as the applicable law for regulating monogamous marriage while the MCD of 1970 CAP regulates matrimonial causes.

Since Independence the High Courts were established by the Constitution for the various regions and states, which were all, amended by the creation and transitional provisions Act.

Lagos State High Court was created in 1967 by the Federal Constitution. The Constitution in respect of Northern Nigeria created those of Kano, Kwara, Bauchi Benue Borno, Gongola, Kaduna, Niger, Plateau and Sokoto.

The 1999 Constitution (Promulgation) under section 253 states that:

1) There shall be a High Court for each state of the Federation
2) The High court of a state shall consists of -
a) a chief judge of the state and
b) such number of judges of the High court as may be prescribed by a law of the House of Assembly of the state.

Section 254 also provides for the qualifications and appointment of chief Judges and Judges of the states in these words.

1) The appointment of a person to the office of chief Judge of a state shall be made by the Governor of the state acting in his discretion, subject to the confirmation of such appointment by the House of Assembly of the state.
2) The appointment of a person to the office of a judge of a state shall be made by the Governor of the state acting on recommendation of the state judicial service commission.
3) A person shall not be qualified to hold office of chief Judge of a state or a Judge of the High court of a state unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period not less than 10 years.

The High Court's general jurisdiction spells out in section 255 that:

> Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law the High Court of a state shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right power, duty, liability privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, for further punishment or other liability in respect of an offence committed by any person.

To be specific, this and previous constitutions, as already noted, gave the Federal parliament/senate the power to legislation on the formation etc of monogamous marriages; excluding Islamic and customary law marriages. Thus, the High Court is to hear and determine issues arising from marriage, divorce and custody of children i.e. reliefs are to be sought from the High Court regarding statutory monogamous marriage.

Before we conclude, it will be proper to give a simplistic hierarchical order of the judiciary in Nigeria as follows:-

1.16 THE COURT STRUCTURE IN NIGERIA

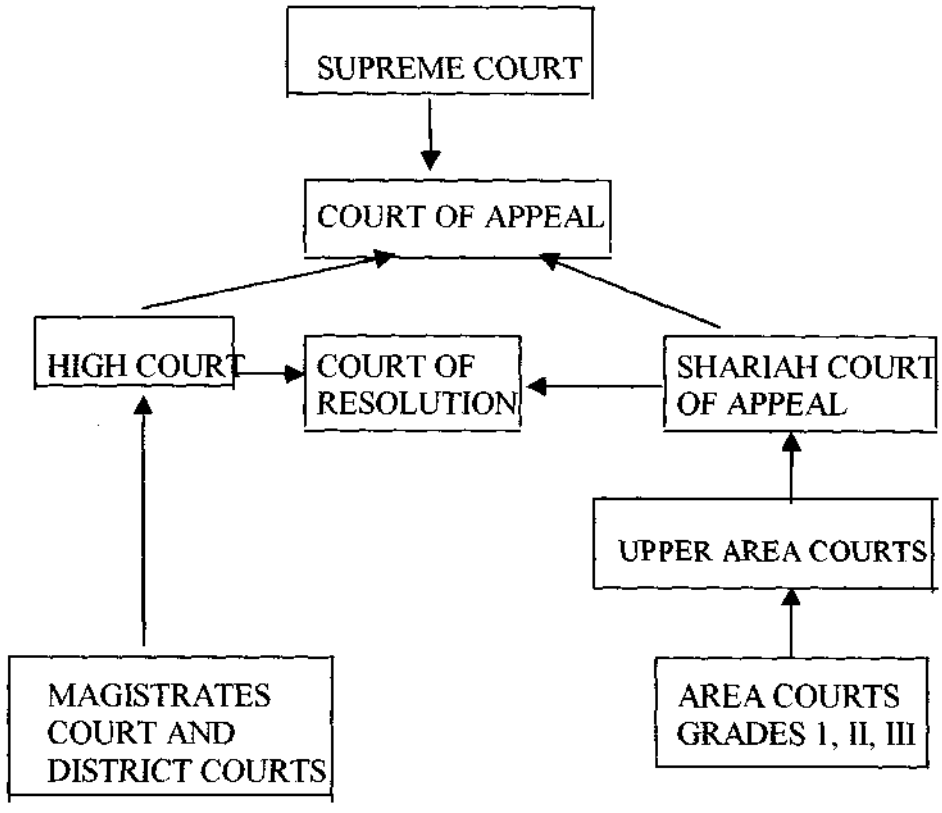


DIAGRAM 1

This diagram shows the trend of movement of cases on marriage, divorce and custody from grass level to the highest courts in Nigeria.

CONCLUSION.

This introduction forms the basis of the chapters that will follow. It focused on the structures of Courts for the application of rights of spouse and children in Nigeria. It also identified the courts that have jurisdiction to

determine matters of marriage showing how they were created and how they function in order to achieve a fair and just decision for all the parties involved.

The ensuing chapter will examine the concepts of family, marriage, and the laws that regulate them both under the English and Islamic law systems in Nigeria.

REFERENCES AND NOTES

1. Federal Government Statistics

2. Statement of the Honourable Chief Justice of Nigeria, Chukwudifu Oputa in his paper "Women and Children as disempowered groups" in Women and Children under the Nigerian Law, (Published by the Federal Ministry of Justice Law Review series, 1992) volume 6. Page 11.

3. See the Introductory note by the editor prince Bola Ajibla (SAN) of Women and Children under Nigerian Law, ibid., P. xii

4. Genesis according to the letter 9-7 28:275 (Viena-Corpus Scriptorume, Eclesiasticoum, 1866

5. (1891) 1 QB 671, CA

5a. (1961) NRNLR 81.

6. No. 10 of 1863

7. No. 21 of 1863

8. No. 2 of 1872 and No. 10 of 1873

9. No. 14 of 1884.

10. No. 1 of 1907, Laws of the Protectorate of Northern Nigeria, 1910

11. Marriage Act, Cap 114, Laws of the Federation, 1958, now Cap 218 Laws of the Federation of Nigeria, 1990.

12. Ordinance No. 7 of 1906.

13. (1934) 2 WACA 348.

14. See item 23 of the Exclusive List.

15. See Gwandu, A. A. "Aspects of the Administration of Justice in the Sokoto caliphate and Sheykh Abdullahi IBN Fodio's contribution to it" in Islamic Law in Nigeria, (Islamic Publication Bureau 1986,) P. 13.

16. See the Native court Proclamation No. 5 of 1900.

17. The Resident was the political agent of the British Colonial Administration then.

18. Kumo, Suleiman, "The application of Islam in Northern Nigeria: Problems and Prospects" in Islamic Law in Nigeria, (Islamic Publications Bureau,) edited by SD. Khalid, 1986, P. 44.

19. Ibid., P. 46

20. Under section 4(2) of the 1967 Edict

21. (1960) NRNLR 81

22. See the Promulgation Act1989 No. 12

23. Suit No. C.A. /J./1BS/84

24. Unreported, Appeal No. SC 25/70 Reported 1971 NRNLR.

25. Suit No. KDH/24A/86.

26. No. 2 1967 (North Central State)

27. No. 2 1967 (Kano State)

28. No. 2 1967 (Kwara State)

29.(a & b) No. 2 1967 (North West State)

29. See for example Area Court Edict, of Benue and Plateau State S.17(1).

CHAPTER 2

THE CONCEPT OF A LEGAL FAMILY AND MARRIAGE UNDER THE STATUTE AND ISLAMIC LAWS IN NIGERIA

2.0 INTRODUCTION:

The concept of "family" exists in every society since time immemorial. Whereas the structure or system differs from place to place. But it is universally recognized that it is the family unit that gives rise to communities which in turn gives rise to a nation. Marriage or "union" of the opposite sex brings about procreation for the continued existence of human race. The marriage itself may take any form depending on the tradition and culture of the localities. Some family units have sacramental undertone, some economic, some both, while others have none, such as those which are loose unions without marriage.

2.1 THE GENERAL CONCEPT OF A LEGAL FAMILY

After having given the introduction, it is necessary to now examine the concept of "family" The general concept of "family" has been a subject of scholarly interest particularly to anthropologists, sociologists, economist, lawyers, etc. There is however, no generally acceptable meaning of the term, as each of them tends to view it from different angles. For example, the anthropologists agree that a "family" is

> A social group characterized by common residence, economic cooperation and production.

> It includes adults of both sexes, two of whom maintained a socially approved sexual relationship and one or more children owned or adopted by the sexually cohabiting adults[1]

The anthropological definition of a "family" has clearly brought out certain elements, which seem to cut across most of the definitions of the other groups mentioned above, that a family can exist without marriage, although it is common in most societies. It is marriage that lays the foundation for the family -which is referred to as a legal family.

That there could be a family:

1. Where the parents are not married, though living together as a family.
2. Those children are not necessarily biological offspring of the couple.
3. That there is the relationship of habitual face to face dealings. However, in the case of several "wives" or "mistresses", only a few of the women are considered as wives in the full legal sense.

There are two distinct types of marriages known in history. They are polyandry and polygamy. Polyandry is the marriage custom of a woman having more than one husband at the same time. The men may be brothers or non-brothers. While polygamy is the custom of having more than one wife at the same time. It therefore comprises of two or more wives and their children joined by marriages, that is, by having one married parent (father) in common. The plural marriages may range from the standard of

two or three wives to the Islamic limit of four, but it is not unknown that in certain Asian and African societies, plural marriages can run up to hundred. The plural marriages may be to sisters (not permitted in Islam) or to unrelated women. Hence, the family descent can be classified in to patriarchal (patrilineal) and matriarchal (matrilineal) systems.

It is descent that affiliates a child from birth to particular relatives from whom he is expected to obtain certain kinds of services that he cannot demand from other relatives or kingsmen.[2] The following is the nature of the two systems of family descents.

2.2 TYPES OF FAMILIES

2.2.1 PATRILINEAL FAMILY

It consist of an older man, his wife or wives, unmarried children where they live under the same roof or cluster of houses in the same compound. The characteristics of these societies are that descent is traced only through males (agnatic). The woman's kin give the man the means of continuing his line and keeping his name alive by building numerous households round him and being remembered as being their ancestor when he dies. The husband pays the dower or dowry as a duty. This is commonly followed. Nigeria is predominantly and customarily based on

patrilineal system. Christianity, Islam and Judaism recognizes descent through males (agnatic).

2.2.2 MATRILINEAL FAMILY

It consist of an older woman, her husband, unmarried children, married daughters and their husband and children. The children the woman bears, whether married or not belong to her lineage, thus, descent is claimed through females. The "bride price" paid by the husband is much less than in the partrilineal system, as by marriage he acquires the right to her domestic services which includes, the growing of food. It is internationally known to be practiced by the Hopi tribes of Northern Arizona.

Thus, the "family" a social unit is found in every society which gives basis to every human communities, but it is not subject to a precise meaning for most times in Africa, the "family" may have a wide definition called the "extended family". Whatever form the 'family' takes "marriage" is the recognised institution all over the world governed by social or religious norms or laws of that given society as the root of the family which in turn is the basis of the communities, regarded as a universal institution since time immemorial. Various laws have been instituted to regulate the rights and obligations of the spouses and their children, this include those under the Islamic and English laws, which are the main focus of this study.

2.4 FORM AND NATURE OF MARRIAGE UNDER ISLAMIC LAW

In Islam, the definition of "family" make no mention of residential home as it is not mandatory for the spouses to live together. The spouses may share a residence or live apart. The family system is basically "extended." Islam also allows the practice of the nuclear type though not fully. An important form of the muslim family is that it has been viewed to be both "polygamous" and monogamous in nature, but there is no injunction that made it either extended or not[3] due to historical continuity of the pre-Islamic practices. To this end, Islam did not see the need to restrict family structure to a particular form, i.e. either to polygamy or monogamy.

2.4.1 POLYGAMY/POLYGYNY

Polygamy in Islam is thus merely a voluntary individualistic behavior and it is neither an offence nor an article of Faith. It is simply permissive.

Hammudah, an Islamic writer, in his book "The Family Structure in Islam" argued that marriage in Islam takes the form of monogamy since man is endowed with a conscience which he is expected to heed to, and that a sense of God mindedness and transcendental responsibility must be taken into account in this issue, even though people react differently to similar situation.[5]

In other words, the capacity by man to adapt to "crisis" situation varies form person to person[6].

The well-known basis for polygyny is found in Quran 4:3,

> If you fear that ye shall not be able to deal justly with the orphans marry women of your choice, two or three or four; But if ye fear that ye shall not be able to deal justly (with them). Then marry only one, or the (a captive) that your right hands posses. That will be more suitable to prevent you from dong injustice.

This verse is the legal basis upon which Islam permits multiple marriages to women. Based on this verse the Prophet (PBUH) asked Ghailan al Thagafi, the Chief at Taif, to divorce and keep only four of his ten wives.

Before the coming of Islam the practice of marriage to many wives was common and unlimited without any religious or legal restrictions. The coming of Islam by its rules placed limitation and conditions for practicing polygamy. We have seen the limitation which places restrictiveness to four wives at a point of time.

The condition for marrying more than one wife is "unless the husband can do justice between the wives". The law obliges the husband to treat them (wives) equally regarding maintenance which comprises of food, shelter and clothing and also regarding the nights and companionship. But the same Quran in Al-Nisa 3:4 again says:-

> .....and if you fear that you cannot do justice then marry only one wife

Then Quran 129 says:

> It is not within your power to be perfectly equitable in your treatment to all your wives, even if you wish to do so, therefore do not lean wholly towards one wife so as not to leave the other in a state of separation.

The Prophet (PBUH) has warned that he who keeps two wives or more and does not do justice in treating them shall become paralysed in the hereafter. The "equal treatment" referred to is concerning maintenance and nights, which can be controlled by the husband unlike affection or love which cannot be controlled, for which there is not much blame on the husband. Thus, Islam favours monogamy than polygamy. Monogamy is the general rule while polygamy is the exception. The exception i.e. polygamy in practice tends to be abused by muslims. Hence statutory laws have been enacted to check such abuses in some muslim countries such as Turkey, Cyprus and Turisian. While many countries have not done so, thereby leaving the issue of plural wives to the discretion and conscience of the muslim individuals in countries such as Nigeria, Sudan, Egypt, Libya, Algeria Saudi Arabia, and the Arab, Emirates. An example of such statutory restriction law is the Tunisian code on Personal Status, 1958.

There are those countries that legislated on prior permission from the government before having plural wives. The government authority is to

investigate the proposed additional marriage, reason(s) and the financial ability of the applicant (i.e. intending husband) if he can reasonably maintain more than the wife or wives he already has. In Iraq this provision is contained in the Iraqi Law of Personal Status, 1959.

Whereas some countries have provided the Quranic injunction of "equal treatment of co-wives" statutory provisions, failure to observe it gives the right to the court to dissolve the marriage. Such countries are Pakistan, Lebanon, Morocco, etc. An example of such law is the Pakistani Dissolution of Muslim Marriage Act, 1939 by the 1961 Ordinance.

In Indonesia, it is a duty of the Registrar of Marriages to explain to the man intending to contract a second marriage the Quranic injunction and his obligations arising from it.

In Ceylon, it is a duty to give notice to his wife(s) and the Kadis in his localities and in which his wife resides or in places where each of his wives resides. The Kadi(s) is under duty to cause a copy of such notice to be exhibited at each of the jumma mosques within his area and in some conspicuous places which is specified in such notice. (Per Article 24 (1) (3) of the Muslim Marriage Act, 1958).

In Nigeria such mechanisms are absent such that abuses of polygamy and the conditions are not uncommon even though the doing of justice to co-wives are left to the conscience of the husband without any legislative support towards the support of Islamic Law marriage as such.

To ensure justice and equity for husbands and wives to comply with their duties and obligations on one hand and for husbands to comply with his duties towards co-wives, the law can be used as we have seen above to assist the husbands and by the enforcement of it, which is very necessary as a support for marriage relationships towards peace and amicable coexistence.

The Quran shows that naturally men cannot behave equitably to their wives, hence multiple marriage is actually merely permissive. Thus, equity is a prerequisite to polygamy in Islamic law marriage. Establishing equitable treatment of co.-wives is practically problematic. The reason being that one is expected to cope with it as men are expected to judge their inclinations or dispositions, and be directed with divine guidance, in preventing such injustice. And unfortunately law can do very little in this area as not all men are responsible and God minded, in the treatment of their wives. Leaving the matter to be sanctioned by the belief in the final judgment may not have impact on men, hence law enforcement agencies like courts duly constituted should put in place to ensure justice and equity between the spouses.

2.4.2 STIPULATIONS/CONDITIONS IN MARRIAGE CONTRACT (SHUROUT) (OR ASH'SHARD)

By virtue of marriage the spouses have certain legal consequences in the form of rights and obligations towards each other. In addition to these sometimes a party or both may include certain conditions or stipulations in the marriage contract Itself. These are sometimes some of the stipulations and their implications to the validity of the marriage itself, though in exhaustible:

1. Stipulations that are unlawful by themselves and consequently invalidates the marriage contract, such as:-

i) A marriage for temporary period, i.e. for Muta'a enjoyment

ii) Nikah "Al sighar" i.e. with exchange of sisters or daughters making each one as dower for the other's marriage. The law requires that each wife be paid her dower as of right and it cannot be forfeited in this manner.

iii) Nikah "Al-tahleel" i.e. to marry a woman who has been divorced three times by a husband with the aim of making it lawful for her to re-marry her by marrying a second husband. But where the marriage is contracted without such aim or intention, the marriage remains valid. If such approved marriage becomes dissolved or the husband dies, the woman's marriage to her first husband who divorced her three times becomes valid.

iv) The stipulation to divorce the already existing wife of the husband before marriage to a subsequent intending wife is unlawful.

All the above four stipulations in the marriage agreement or after consumation invalidates a marriage contract

2. Similarly, stipulations on the right to opt out of marriage invalidates the marriage. For example, to say "I offer my daughter A to B in marriage on condition that she has the option to agree to the marriage or not within a specified period, e.g for three months, nine moths or so.

3. Stipulations which affirms or restates the established ingredients of a valid marriage under Islamic law, e.g. that the intending husband should pay the dower or that the husband should maintain his wife, or that he will treat her justly, and so on. These are in order and acceptable because they do no harm the parties as they are restatement of the law.

4. Stipulations which contradicts the nature and object of the contract, e.g . a muslim wife should not inherit her husband, or that the wife should maintain herself or she should not demand for equal treatment with her other co-wives, or she should not have sexual relation with her husband, and so on. These in effect invalidates the marriage contract, but where the marriage has been consumated, the

stipulations are to be regarded as cancelled while the marriage contract continues to subsist as if those conditions were not made.

5. Stipulations which do not contradicts the nature and object of the marriage e.g. condition that the husband should not marry another wife, or not to take the intending wife out of her family's house or her family's location. Even though such conditions are not encouraged nor liked (Makrouh), they are accepted but without any legal consequence as they are regarded cancelled. The husband may comply with them if he so wishes.

In enforcing stipulations, most schools of thought, accepts and recognise the wife's right to make stipulations in the marriage contract, that the marriage should be considered dissolved if the husband takes another wife in the form of "suspended repudiation". Hence, the emergence of stipulation such as vesting divorce right to the wife where the husband marries additional wife referred to as "delegated repudiation," is recognised.

Though the Hanbali school endorses stipulation against a second marriage of a man as enforceable, the Maliki school which is widely followed in Nigeria, regards it under the concept of "prejudice", meaning a "broad harm to the wife" which is not restricted to taking a second wife.

Such an affected wife could only make it a law suit which may not be successful.

Polygamy in Islam is justified on the grounds of childlessness, chronic illness, moderate sexual needs of the wife, compared to the husbands compelling drive, relatively high tempered, etc of the wife.

Historically, with the advent of Islam in Arabia, it has been stated that the following were the initial reasons for polygamy[7].

1. The Muslims had a great need for progeny to build up, and reinforce the nascent community.
2. There were an increasing number of helpless widows and orphans, who had lost their supporters for one reason or another and who urgently needed providers, fosters, and guardians to take proper care of their moral and material welfare.
3. The lack of public funds or "state budgets" to meet the urgent needs of such helpless dependants was obvious.
4. The marriage bonds were generally laxed at that time and in need of reforms. Polygamy then was a measure of regularization, and stability of the society.

Regarding the historical reasons, Gertrude Stern in her book[8] Marriage in Early, Islam opined that by Islamic Law allowing Polygamy, it had by so doing introduced a regularized form of marriage to meet the emergency of the situation following religious battle, which now replaced the previous undefined institution of marriage under which superfluous or abundant women could be "married". Hummudah is of the view that this chapter of the Quran (4:1-3) recognises the occurrence of evil deeds, and abuses, and that it is within a man's power to adapt with the help of God for guidance.

The discussion above addressed primarily the general nature of marriage in Islam vis-a-vis polygyny. That it is a voluntary course which was legalised only under certain conditions which as we have seen has been grossly abused in the actual realities of muslim life in Nigeria and other countries as well.

The practice of polygamy is not alien to African family life, Nigeria inclusive. The Nigerian traditional society paid more attention to the facts of its advantages as it tends to lead to the having of more children who could assist the father on his farms as well as during old age. On the part of the women, polygamy allowed them more time to nurse their babies longer before weaning as a natural means of spacing children.

In modern times, however, polygamy is on the decline as some educated husbands are avoiding unnecessary added responsibilities of having to take care of several wives and children, especially with the economic hardship experienced nation-wide. Aside from this, in polygamy, household things are usually shared amongst the wives which is not favourable to the women and their children, while in some instances they also lack the necessary intimacy, thereby promoting distrust towards the husband, co-wives and half-sisters and brothers. This in turn may lead to dissatisfaction and unhappiness, which may in variably affect the stability of the marriage.

The women especially in some instances experience emotional problems as the system tend to put the women in a humiliating situation, which makes them seek help from "Mallams" in competing to win the husbands love and undivided attention. It is a well-known fact that the feeling of frustration, depression and anxiety by some of the wives in some instances encourages them to become insincere and disobedient towards the husband. Co-wives' quarrel and confrontations are very common in such relationships and their children are not left out. Thus, it can not be refuted that in some instances it brings about division in the family and family divided amongst itself is bound to collapse.

There are two possible ways to practice polygamy:

1. By complying strictly with the injunction in order to do justice to the wives. or
2. To become unmindful about the injunction by conducting one's family unguided, which is fatal as wives and their children are favoured differently, bringing about hatred and misery in the family.

Another practice of Islamic law marriage is that by nature it could be easily dissolved as it is not a sacrament even though it has been made difficult by the process. It is so dissoluble where there are grievances which makes the marriage irreconciliable. Marriage in Islam thus has a social, legal, and conditional elements as well as religious element.

Islamic Law marriage is not conditional upon being officiated or accompanied with benediction by a priest due to lack of such office in Islam. Since it is dissoluble by nature, it could be at the instance of the husband by way of talaq or the wife through Khul'u i.e. at the instance of the wife as well as through dissolution by the court, though in every given society, as in Islam, divorce is subject to social disapproval. Just as there were reasons for marriage, there are also reasons for dissolution of marriage. Divorce is natural and inevitable in a marriage which is a contract and voluntary union between the parties, hence divorce in this area connotes the systems' responsiveness to the parties feelings as an attempt to prevent family crisis where the parties find it difficult or intolerable to

continue to live together. After divorce, the parties became free to re-marry. It has, however, been noted that the right of talaq on the part of the husband has often times been accompanied with abuses as the rules have been ignored and defied in practice. Talaq as a matrimonial relief has been used to send wives parking out of marriage over a very wide range of reasons, such as wanting to marry another wife, man's arbitrary dislike of his wife, involuntary barrenness etc. The affected wife is usually at a disadvantaged situation socially and economically, especially where such women were denied any form of formal education, training or skill to earn a living while in their teens . Whereas a wife who cannot be expected to continue with the marriage can refund the sadaq paid to her as consideration for her marriage to the husband, she may not succeed where the husband is not agreeable to the Khul'u (amount) itself or the amount to be paid back by the wife. In the case of Talaq the husband has a right to merely pronounce it at any time and any where, whereas for the wife to obtain Khul'u, she must make it a legal suit in the court for which she has to pay certain fees which to her is considerably, unmindful of her economic low standing where the husband disagrees with the amount to be paid.

After having given the general picture of the nature of marriage under shariah, it would also be necessary to examine the one under the statute.

2.5 FORM AND NATURE OF MARRIAGE UNDER THE STATUTE

First, it must be mentioned at the onset that marriage under the statute has its origin from Christianity as practiced in the Roman Catholic Church where marriage is regarded as canonical which gives legal recognition and attaches to the parties civil consequences of monogamy and indissolubility. This system of marriage is thus a sacrament implying these consequences to be officiated by a priest, whereby the "rite" removes the taboo on sexual intercourse between a man and a woman, while imposing a lifelong taboo on the intercourse of either of them with a third party.

Since it is monogamous, sexuality is regarded as a necessary "evil" which has to be minimized. The marriage being a "sacrament" implies that the parties to the marriage are bound by a sacred bond in the presence of God, which suggests that the parties are equally committed to the bond and are equal partners. Since the marriage has a strong ecclesiastical background morally it has to be served in full, thus inescapable, if celibacy will not have a priority. It is this Christian marriage of England that has over the years undergone criticisms leading to its modification now contained in statutes referred to as the Marriage Ordinance or Law, which has been extended to the English Colonies - Nigeria inclusive.

The introduction of the English form of marriage into Nigeria was dictated by the presence of European settlers and residents in the colony of Lagos and Protectorates of Nigeria in order to make also available a legal form of "Christian marriage" for those Nigerians whom on the grounds of religion or "civilization" might require it. This will be dealt with in a greater detail under the history of English Marriage.

The most striking characteristics of a statutory marriage is its insistence on monogamy. In fact legal effect is given to this principle in two folds:-

1) by establishing the impediment of existing marriage under section 3 (1) (a) of the Matrimonial Causes Act, 1970, now Cap 220, Laws of the Federation of Nigeria 1990.
2) by declaring that any marriage which purports to be contracted in disregard of section 35 of the Marriage Act of 1914, Now Cap 115 LFN 1990 and section 370 of the Criminal code Act will be null and void. i.e. "existing marriage" and "bigamy" are prohibited as they negate the very existence of a valid statutory marriage.

The result of such kind of full restriction on sexuality to one wife is adultery in some cases and many husbands have over the years developed ingenuity on how to evade the restriction and obtain a release from the

marriage by resorting to other means like collusion, connivance, adultery, etc in order to dissolve the marriage that naturally is difficult to severe. A valid marriage in this area must comply to the already laid down prohibitions in the Ordinance.

It is pertinent to demarcate the two distinct types of English monogamous marriages. One is the "religious marriage" celebrated according to Christian rite (for those professing Christianity) which do not themselves entail legal consequences. It is regarded in the eyes of the law as a mere "church blessing" though subject to certain rules depending on the type of denomination because it has no relevance or connection with the Marriage Act, though certificate too is issued but different from the one issued under the Marriage Act, 1914 in Form E of the first schedule. A minister of any given church is, however prohibited from solemnizing the marriage, unless the registrars certificate is given to him and there is no legal obligation on the minister to marry persons who produce the Register's certificate under section 107 of the MCA 1970. Thus, the case of ***Obviekwe V. Obiekwe***[10] is an example of where a marriage was celebrated at the Holy Ghost Church Enugu in 1961 to which the court said it was a mere "church blessing" as it did not constitute marriage under the Act.

Palmer J. said,

> A good deal has been said about church marriage or marriage under Roman Catholic law ... legally a marriage in a church is either a marriage under the Ordinance or it is nothing. In this case if the parties had not been validly married under the Ordinance, then either they are married under Native law and custom or they are not married at all.

A statutory marriage recognized by the High Court would be deemed valid if the marriage satisfies the requirements of the statute, which is, the Marriage Ordinance, which only the Registrar of marriages can officiate under the High Court of Justice.

2.6 DEFINITION OF MARRIAGE UNDER THE STATUTE.

The classical definition of marriage in English law is found in the historical statement of Lord Penzance in the case of ***Hyde V Hyde***[11] where he said,

> I conceive that marriage as understood in Christendom, may... be defined as the voluntary union of one man and one woman to the exclusion of all others for life.

Two conditions are identifiable as emanating from this definition.

1. That it is contracted for life. This is the view taken by Western European Roman Catholic Church. We later saw that it does not mean that English marriage is really indissoluble. The gloss put on the dictum of the court of Appeal in the case of ***Nzchimson V. Nachimson***[12], that the parties must intend to enter into the marriage for life, stands

criticized as unsatisfactory facts. If it is so it means that under English law two people are not by any means capable of entering into a marriage agreement for the sole purpose of bearing a legitimate child without intending to live with each other, but to obtain a divorce by their consent which could be by way of collusion or connivance. Therefore, the statement of Lord Penzance regarding this issue should be that marriage must last for life unless determined by a court decree and;

2. That the marriage must be monogamous. This means that neither party may enter into another valid marriage while the first union exists. The Interpretation Act of 1964 of England provides that monogamous marriage is ..... a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others[13].

The borrowed and corresponding law which governs the celebration and incidents of monogamous marriage in Nigeria are contained in the Marriage Act of 1914[14] and the Matrimonial Act of 1970[15]. These will be examined further in the next chapter.

2.7 DEFINITION OF MARRIAGE UNDER ISLAMIC LAW

In shariah (Islamic Law) marriage is known as *NIKAH*. The former literally means "the entering of one thing into another" i.e. marriage by parties involved in the relationship. It also means marital copulation

between spouses. While the other name HISAN generally means "fortress." YUSUF Ali though not an authority in Islamic Law but as a scholar succinctly explains that it is a "fortress of chastity" against illicit sex/copulation.

In his translation of the Qur'an he said:

> The Prophet (SAW) said, Marriage is my tradition, whosoever runs away from it is not with me. Get married and beget children. [16]

Thus, in shariah marriage is merely permissive not compulsory like fasting and prayer i.e. mubah. It is obligatory upon those who are able to and capable of getting married with a high propensity for indulgence in illicit sex for the purposes of procreation and preservation of dignity. Therefore, marriage in Islam is only recommended and it is disapproved for some one who is impotent. It is worth noting that shariah did not actually prescribe a particular system of marriage, it could either be monogamous or polygamous. It can also be endogamous (marriage with one's kins and relations like cousins) or exogamous (marriage from outside one's group of kins).

Marriage has been accepted as an institution in different cultures, but is marriage under shariah (Islamic Law) a different institution altogether from the European one? Inspite of the differences, Islamic Law marriage is a marriage, which is similar in concept as it exists in Western society. It draws a clear distinction between marriage and any other loose or informal

association between a man and woman e.g. concubine-age. Also there are distinctive features in it which are not to be found in the European marriage which shall also be examined in the following two chapters. Both systems of marriages legalises the union of man and woman giving rise to rights and duties for the parties towards each other. Similarly, only the legal union (marriage) makes the family and their children legal and legitimate. In shariah, it is necessary that the child be legitimate only through marriage or concubine-age, no more no less.

2.8 CONCLUSION:

A family is created through marriage between a man and a woman or women since time immemorial but there is no record of a legal marriage between a man and a man or between a woman and a woman which is publicized in recent times by print and electronic media. Union of this kind does not lead to biological children unless adopted. Also the rights and obligations of the persons who are not "spouses" is uncertain. This is a "relationship" different from those under the church, statute and Islamic Law marriages. It is doubtful as to whether this relationship can lay any foundation for a family. It is also uncertain about the existence of rights and duties for an orderly coexistence. Whereas marriages recognized by the Laws are responsive to procreation for human continued existence liberal approach to marriage through the means of making it a contract.

CHAPTER 2

NOTES AND REFERENCES

1. Murdock, G. P. Social Structure, (Colli ex-Macmillan Ltd. London 1965,) P.1.
2. Ibid., P.15
3. Abdu al Ati, Hammudah The Family Structure in Islam, (Islamic Publications Bureau Nigeria, 1982,) P.21.
4. Ibid., P. 31
5. Ibid., P. 32
6. Ibid., P. 117
7. Ibid., P. 121
8. Stern, G. H., Marriage in Early Islam, (Published by the Royal Asiatic Society, London, 1939,) P. 81.
9. See: Adamu, L. F. "Muslim Women and Family Life in Contemporary Africa. The Case Study of Nigeria," a Paper presented at an International Workshop Organised by Islam in Africa Organization, Zaria, Nigeria June 18-21, 1984.
10. (1963) IENLR 196
11. (1866) LRIP & D PP 130, 133.
12. (1930) C.A. P. 2117
13. See No. 1, S. 18
14. See Cap. 115, Law of the Federation of Nigeria. 1990
15. No. 18 of 1970.

16. Sahih al-Buhari, quoted by Muhammad Ali, The Religion of Islam, Lahore, 1973 P. 496.

17. Asqalami 1. Buhigul-Muram Min 'Adillatil Ahka'm, Nikah Edited by Al Faqi P. 200

CHAPTER 3

CONTRACT TO MARRY UNDER THE STATUTE IN NIGERIA

3.0 INTRODUCTION.

This is the type of marriage that is recognized under the law of England which was introduced to all former English colonies including Nigeria as explained in chapter one. It started as a Church/Ecclestical type of marriage which is basically monogamous in nature i.e. a marriage between one man and one woman to the exclusion of all others till death part the parties. This system of marriage was bisetted with practical problems such as its being indissoluble which made it necessary for review. One of the modifications made it dissoluble under certain statutory conditions, thereafter making it a statutory marriage.

Nigeria received the marriage law under The General Reception clause as part of the laws of Nigeria which has been dealt with in chapter two.

Statutory marriage in Nigeria does not include marriage between man and man. The content of this chapter is to restate the Laws particularly areas, which are prone to legal difficulties, which will be the contribution in this chapter. The topic focused on controversial issues such as age and rights of the parties in one document which most traditional textbooks have failed to include.

3.1 DEFINITION OF CONTRACT OF MARRIAGE UNDER THE STATUTE

For a better understanding of this chapter we would attempt a definition of some of the key words that are contained therein, and shall therefore look at the terms such as contract, marry and marriage under the statute.

A contract has been defined by professor Atiya as "...a promise or a set of promises for the breach of which the law gives a remedy or the performances of which the law in some way recognises as a duty."[1] The verb` to marry` is concisely defined on page 763 in the Advance learners Dictionary as to "take as a husband or wife" while a `statute` means "An Act of parliament, particularly a public Act[2]".

The definition is necessary in order to know that a marriage takes place following promises which consequently leads to rights and duties; The breach of the promise would give rise to remedies.

Having defined the key words, the topic can thus be better defined as a contractual promise between two persons, under an Act which has been enacted by Parliament regulating the procedure for becoming husband and wife. As a recap, more apt and concise definition of marriage under statute has been proffered by Lord Penzance in the case of ***Hyde V Hyde***[3]. He said,

> I conceive that marriage, understood in Christendom, may..... be defined as a voluntary union for life of one man and one woman to the exclusion of all others[4].

From the above definition, one can deduce that marriage under the statute is predominantly monogamous and for life- everything being equal. Having seen

the definition of marriage, we shall now proceed to examining some of the basic attributes of a valid marriage contract.

There is the need to look at the prerequisites of a valid statutory marriage. They are capacity to marry, essential elements such as age, consent, prohibited degrees of consanguinity and affinity, single status and sanity. These are distinct from the forms and ceremonies of marriage and they are determined by reference to the lex domicile (i.e. place where the parties are domiciled)

There are also the formalities and ceremonies which are prescribed by the law of place of residence of the parties. The formalities required are notice of marriage, registrar's certificate, special liscence, caveat, while the celebrations could take place either at the registrars office or at a liscenced place of worship.

The chapter also looked at breach of promise to marry and its legal consequence. Furthermore, the matrimonial relief available to the parties are examined as well. This chapter will now proceed to examine the above mentioned topics.

3.2 CAPACITY TO MARRY:

The parties intending to marry under the statute must possess the capacity to marry. Capacity to marry is tied to certain factors such as single status, infancy (age) and parental consent, which will be looked at below.

3.2.1 SINGLE STATUS

"Single Status" is a prerequisite as well as an essential element for a valid statutory marriage. Consequently the parties must be single persons in terms of capacity. In the case of ***Wilson V Carnley***[5] the Court of Appeal laid the general principle that a contract to marry to which one of the parties is already married is contrary to public policy immoral and void.

In another case of **Spier V Hunt,**[6] the lady was of the knowledge that the man was a married person when he promised to marry her. The court said their agreement to marry was unenforceable as it was against public policy. In later years the House of Lords in the case of **Fender V St. John Midmay**[7] distinguished the above earlier two cases, from **Wilson V Carnley** in which the defendant had obtained a decree nisi in anticipation of a divorce before he promised to marry the plaintiff lady. By a majority vote the House decided that the contract was not void hence the plaintiff could recover damages for its breach while it recognized that the marriage was subsisting even at the stage of decree nisi. It also said that generally decree nisi was a strong evidence, as there are few cases in the experience of the judges where such decree did not reach absolute. Lastly, the House of Lords saw a distinction in the cases in the sense that in the earlier two cases the spouses were still living together such that their promise to marry was likely to impair the marriage and an encouragement to adultery. While in ***Fender's*** case, the couples were already living apart as there was very little of the marriage.

The decision in this case leads one to question the extent to which Policy can be extended to invalidate a marriage contract between married persons.

In deciding a matter of this sort, the relevant factor for consideration is the state of the person's knowledge arising from the moral turpitude of the agreement itself. In conclusion, where the plaintiff had such knowledge of existing marriage at the time of the promise the claim will not succeed because a valid claim cannot be made from a base cause – ***ex turpi causa non oritur actio***. Whereas a plaintiff who lacks knowledge of existing marriage status is not in ***pari dilictor*** with the defendant, damages can be recovered.

3.2.2 LACK OF CAPACITY:

Previous marriages concluded under the Customary Law in England have been invalidated by S. 33(1) of the Marriage Act of 1914, due to clash of legal systems. The general rule of domicile becomes applicable i.e. Nigerian Law, since England did not recognise the polygamous marriage under which the parties have no capacity to contract a polygamous marriage celebrated abroad such as in the case of ***Oshodi V Oshodi.***[8] The respondent earlier on contracted a valid marriage in 1954 with Sikiratu under Islamic Law. In 1955 the respondent and petitioner became married under Yoruba Customary Law with another woman, now the petitioner. The petitioner knew of the respondent's marriage of 1954, and actually the three lived together before the petitioner and respondent travelled to England. In 1956 they went through English form of marriage. The Court said if the 1956

Marriage was concluded in Nigeria a caveat would have successfully been lodged as there was an existing marriage and on the validity of English marriage the Court said that since the respondent has not renounced his religion as a Muslim, the 1954, marriage was still subsisting and the English Marriage a nullity, as in the case of ***Asiata V Goncallo***.[9] Section 35 of the Marriage Act invalidates a Customary Law Marriage, which follows a statutory marriage in Nigeria. In ***Onwudinjoh V Onwudinjoh,***[10] Jeremiah married Agnes in 1926 under the Act and purported to Marry one Chinelo under native law and custom while Agnes was alive. The court held that by virtue of section 35, the customary law marriage was null and void. If the monogamous marriage was celebrated abroad on principle it should invalidate a subsequent customary law marriage. ***Asiata V Goncallo*** case stated a different view but it has been correctly stated that this decision should be limited to its special facts. The facts areas follows:-

A yoruba was taken to Brazil as a slave where he married Selia an African freed slave, first under Islamic Law and then in the Church. They had two daughters. He returned to Lagos with Selia where he married Asiatu under Islamic Law and begot one child – Asiatu the plaintiff in this case. The Divisional court held the Christian marriage contracted abroad valid while the second invalid. On appeal the full court held that the Christian marriage was "merely one as to form as such Alli Elese's marriage to Asiatu was valid to entitle her child to share in the distribution of Alli's estate.

3.2.3 INFANCY

Infants have no legal capacity to enter into any kind of contract both at Common Law and Statute Law unless they become of age or the contract was to do with goods of necessaries. The age of capacity to enter into contract was twenty one years at Common Law while the English Family Law Reform Act of 1969 has reduced it to eighteen.

Even under Section 2 of the English Infants Relief Act of 1874 which was of general application in Nigeria did not give accord to any promise made by an infant who was not of age legal significance after attaining full age. It provides that:

> No action shall be brought whereby to charge any person upon any promise made after full age to pay debt contracted during infancy, or upon any ratification made after full age of any promise or contract during infancy, whether there shall be or shall not be any new consideration for such promise or ratification after full age.

In the case of ***Coxhead V Mallis,***[11] the parties were engaged when the defendant was an infant but continued the relationship when he (the defendant) came of age on the same terms as before. The defendant later broke off the engagement. The plaintiff's action failed on the ground that the defendant's action was no more than a plaintiffs mere ratification of the earlier promise he made. While in the case of ***Ditchman V Worrall***[12] which was similar to the above case of ***Coxhead,*** except that after the defendant's twenty first birthday, the plaintiff fixed a date for their wedding at the request of the defendant, which he (the defendant) approved. He

however failed to marry her. She brought an action for breach of promise to marry. The court held that the defendant's conduct could be interpreted to mean a fresh promise to marry, hence the plaintiff could recover.

3.2.4 PARENTAL CONSENT

The issue here is whether the parties to an intending statutory marriage need the consent of their parents if they are of age in order to have the necessary capacity to marry. This issue arose in the case of ***Ugboma V Morah***[13] in which two Ibos agreed to marry when they were infants. When they became adult, they repeated the promise as a new agreement. The plaintiff sued the defendant for breaching the promise to marry on the ground that an Ibo woman does not customarily have the capacity to contract herself out for marriage without her parental consent. It was also argued that there was no consideration given for the promise due to lack of consent and therefore that no action could lie for the breach of the promise. Hence in that case Waddington, J. did not accept such argument in the following statement which he made:

> It cannot possibly be argued that where the parties are of age the withholding of consent by their parents is a bar to them contracting a Christian marriage. Parties can undoubtedly contract a valid marriage under the Marriage Ordinance without their parent's consents if they are of age. It cannot therefore be a defense to this action to say that plaintiff lacked the necessary capacity to make a valid promise to marry the defendant unless her parents consented to him.

Simply put, capacity to marry is the ability to legally enter into a contract of marriage. The notion of capacity to marry in family law entails two different

things. There is what is regarded as `essentials` (as distinct from the forms and ceremonies) of marriage. In many countries including Nigeria, the courts act on the principle that, the forms and ceremonies of marriage is prescribed by the lex loci (place of residence of the -parties) while the `essentials` are determined by reference to the lex domicile (place where parties are domiciled) or to the national law of a party. The Nigerian Statute has further made the celebration of marriages a purely civil function while leaving it open to the parties to observe any religious ceremony they think fit.

It is important to note that the celebration of monogamous marriage is regulated in Nigeria by the Marriage Act of 1914 now cap 220 LFN, 1990. Such marriage, which is analogous to statutory marriage, is our focus in this study.

It is now necessary to go ahead and examine the essential ingredients, and the formalities of marriage.

As a contract, marriage creates and imposes mutual rights on the parties thereto, but it is quite different from a commercial contract, consequently it is **sui-generis** in many respects - especially with regard to capacity and termination. A contract of marriage is different from a commercial contract because it creates status i.e. "the condition of belonging to a particular class of persons (i.e., married person) to whom the law assigns certain peculiar legal capacities or incapacities."

Also unlike a commercial contract, which cannot affect the legal position of anyone, who is not a party to it, Marriage affect the rights and duties of third persons. Thus a husband has an action against any one depriving him of his wife's consortium, and it is not opened to the tortfeasor to argue that the marriage is

intaglio's acts. (i.e. transaction between others does not prejudice a person who was not a party to it.)

From Lord Penzance's definition of Marriage cited in this chapter, three conditions presents themselves for a valid statutory marriage. First, it must have been a voluntary act of both parties. The implication here is that if consent was sought by force, misrepresentation or undue influence, the marriage will be vitiated. Secondly, it must be between a man and a woman i.e. monogamous marriage. The definition did not say between a man and more than one wife. So polygamy is completely ruled out. Another aspect of this is that a marriage must be between one man and one wife not between a man and a man or a woman and a woman.

Thirdly, the marriage must be for life. This does not insinuate that a marriage cannot be dissolved. It simply means that at least the parties must intend the relationship to continue till death departs them.

3.3.0 ESSENTIAL ELEMENTS OF A VALID MARRIAGE:

As it has already been noted the essential elements of marriage is governed by the **lex loci**. The essentials' include the age of the parties, consent, prohibited degree of consanguinity and affinity, single status and finally, sanity or state of mind of the parties.

3.3.1 AGE:

The age requirements to enter into a valid marriage agreement vary in time and space. It has been said that where Africans have the option of contracting a

statutory marriage in accordance with general law of their territory, they are normally subjected to the ordinary requirement of that law respecting the age of marriage. It is however, sad to note that, the Nigerian Marriage Act is still silent on this issue. In fact before the coming of the Matrimonial Causes Act (MCA) in March 1970, some scholars were of the view that the lacunae in the Act be filled by having recourse to the law and practice for the time being in England. If this view point was accepted, then the English 16 years age of marriage prescribed by the Marriage Act of 1949 would be applicable in Nigeria. This argument was debunked since the introduction of the 1970 Act, which categorically backed the application of English laws in Nigeria.

Section 3 (1) (e) of that same Act went ahead to render void a marriage where either of the parties is not of "marriageable age". To fill this gap, the High Court of Enugu had to make use of the Australian Marriage Act of 1961 (No. 12) to dispose of the case of ***Agu V Agu***[14] *as void.* In this case, reference was made to section 11 of the Australian Act which defined marriageable age as 18 years for the male and 16 years for the female. In some African countries namely (Nigeria, and Gambia)[15], marriageable age is when the parties have attained puberty.

The Nigeria Act is also silent as to whether the defect in a void marriage could be rectified by ratification of the marriage after the party in question have attained the statutory age, as it is the case in South Africa.[16]

3.3.2 CONSENT:

Though this has been partly discussed under the heading capacity, it will now be looked at as an essential element. Another prerequisite of a valid marriage is that of a voluntary consent of the parties if they are of age or that they have obtained consent of their parents if they are not. The absence of such a consent, or the granting of it under duress or misrepresentation will vitiate the agreement[17].

Parental consent must be sought and obtained in writing if the parties are below the ages of marriage. The father's consent is very material, but if he is dead or of unsound mind or absent from Nigeria, the mother can give the consent. Where she cannot give the consent for reasons like that of the father's absence, then the guardian of the minor can give the required consent [18].

In the absence of a parent or guardian consenting to the marriage, then the person in the office of the grade of Assistant Secretary in the Civil Service authorized to give it may affix his mark to the document at the presence of a (a) Governor (b) A Judge of a High Court of the Federal Capital Territory, Abuja, or any officer of or above the grade of Assistant secretary, or a person of similar status [19]

As already noted, parental consent under section 8 of the Marriage Act is only necessary when the parties are not of age, when they attain the marriageable age, they will no longer be subject to such necessity i.e. they will be deemed to have attained the age of majority with full independent capacity to enter into a marriage with their consent.

It should be borne in mind that there is a marked conflict between statutory law and African customary law. The latter seems in general to regard women (whether single, married, widowed, or divorced) as subject to perpetual minority. However, this African customary law substratum is gradually facing out since the statute allows women to enter into a statutory marriage regardless of the wishes of her parents or guardians if she is of age.

The effect of failure to comply with the law as to parental consent will not invalidate the marriage, the marriage will only be voidable a defect which could be cured by either seeking the consent or by lapse of time i.e. when they come of age.

3.3.3 PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY:

Most if not all civilized and primitive states prohibit and regard marriages based on consanguinity and affinity as incestuous. The general rule in Nigeria is that the parties to a statutory marriage must not be related within the prohibited degrees of consanguinity and affinity.[20] Consanguinity is a relationship that may arise from blood relationship while affinity is that which may arise by dint of marriage. In the former, the prohibition is based principally on moral and eugenic grounds. Infact, most people view the idea of sexual intercourse (and therefore marriage) between, say father and daughter or brother and sister with abhorrence.[21] At the same time also, the more closely related the parties are the greater will be the risk of their children inheriting undesirable genetic characteristics. With regard to affinity, prohibition was regionally predicated on the theological concept that

husband and wife were one flesh so marriage with one's sister-in-law was as incestuous as marriage with one owns sister.[22]

This later view, it is said, commands very little support today, so justification must be sought on social and moral grounds.[23]

In Nigeria before 1970, the Marriage Act, of 1914 section 33 (1) prescribed the prohibited degrees of consanguinity and affinity. Now it is governed by sections 3 and 4 of the MCA 1990. Under this latter statute, a marriage is prohibited if the woman is, or has been the man's ancestress, descendant, sister, father's sister, mother's sister, brother's daughter, and sister's daughter. On the ground of affinity marriage is also prohibited between a man and his wife's mother, wife's grandmother, wife's daughter, father's wife. The reverse position applies to the man. The law is very categorical on this issue and it is immaterial whether the relationship is of the whole blood or half blood, or whether it is traced through, or to any person of an illegitimate birth.[24]

The law however, provide for exception to the general rule in section 4 of the MCA 1990 which enable two persons within the prohibited degrees of affinity who desire to marry each other to apply in writing to a High Court judge for permission to do so. If the judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought for he can grant the application.[25]

The statute is silent on what will tantamount to an exceptional circumstance. It is submitted that it must be circumstances that has gone beyond the ordinary as to be sufficiently serious to permit the celebration of a marriage which otherwise would be void.[26] An example of such a case may be where parties who come from the same village live together in a town without knowing the relationship between them, and beget a child. If such a party marry in pursuance of a permission granted by the High Court Judge, their marriage will nonetheless be valid notwithstanding the prohibited degree of affinity[27]. The High Court's Judge jurisdiction in such matter is, however, subject to the President's consent[28] before the application could be granted.

This exception seems not to cover a marriage where the parties are related by blood. Where the parties are related by blood and not by marriage, the marriage cannot be permitted even if they have already begotten a child.

3.3.4 SINGLE STATUS:

As has already been noted, marriage under the 1990 Act is essentially monogamous by nature - a union of one man and one woman to the exclusion of others for life. Thus section 3(1)(a) renders a marriage void if either of the parties is, at the time of the marriage already married to some other person. The parties involved in such a marriage will be held criminally liable in addition to the 5 years imprisonment term prescribed by section 39 of the MCA. The criminal liability arises by virtue of section 370 of the criminal code Act, cap 42 which provides that:

> Any person who having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife is guilty of a felony...

Therefore a party to a subsisting customary marriage has no capacity to contract a statutory marriage with a third party.[29] However the same parties to the customary law marriage may contract a subsequent and valid statutory marriage.[30] In fact, the decision of Reed J. in the Northern Nigerian case of ***R. V. Princewill***[31] is held to have expressly stated the intention of the Act. In that case, the learned Judge held that a person who being a party to a subsisting potentially polygamous marriage, who went through a monogamous marriage ceremony with a third party cannot be convicted. The court is held to be wrong because even before the commencement of the Act, Section 33 (1) of the Marriage Act 1914 had declared such a purported statutory marriage void.

In the Princewill's case the defendant was married under the Statute, then went through another marriage (customary) while the first one was subsisting.

Princewill was charged with bigamy. It was argued for him that the second marriage was not a "marriage" under the Marriage Ordinance to make him liable for bigamy, the court consequently decided that the word "marries in Section 6 of the Criminal Code Act does not amount to a valid marriage.

3.3.5 SANITY:

Another element of capacity is whether the parties to a statutory marriage are sane. The parties must be mentally capable of understanding the nature of the

marriage contract under sections 3 (1) (d) (iii) and 5 (1) (b) of the MCA 1990. If one of the parties is insane the marriage will be void abinitio.[32]

3.4.0 FORMALITIES TOWARDS MARRIAGE UNDER THE MARRIAGE ACT 1990, CAP 218

As has already been stated, historically marriage according to European Law (statute) meant Christian marriage. This Christian element regulated not only the essentials of marriage but also the mode of celebration. In modern times however, there has been secular incursions exemplified by the extension of state control over the celebration of marriages. These incursions notwithstanding, there are provisions in Nigeria for both the celebration of civil and Christian rites marriages. The requirements of the celebration of marriage are contained in the Marriage Act, which are the lex celebrations here in Nigeria. Contained from section 7 to 29 of the Act.

We shall now examine the various steps that are required for the celebration of a valid statutory marriage. These steps are in turn divided into two - the preliminaries and the actual.

3.4.1 THE PRELIMINARIES OF MARRIAGE:

These are contained in sections 7 to 17 of the Act and formed the background preparations or what is supposed to be done before the actual celebration of the marriage in civil Registry or in the Church.

3.4.2 Notice of Marriage: (section 7)

Parties intending to marry must as the first step under the Act, complete and sign a notice of marriage form[33]. This form may be filled by either of the two parties. The form which is given free by the registrar is completed and lodged with the registrar in whose district the marriage is intended to be celebrated. After having entered the details in the Marriage Notice Book the registrar will thereafter display the same on the public notice board for three months. Members of public are given free access to the Marriage Notice Book. The notice gives any one the opportunity to raise an objection, if any, to the intended marriage.

3.4.3 Registrar's Certificate. (section 11)

This is a certificate issued by the registrar to the parties after 21 days and up to three months from the date of the notice. This is done after the applicant has paid the prescribed fees and the registrar is satisfied by means of an affidavit that:

a) one of the parties has been resident within the district in which the marriage is intended to be celebrated for at least 15 days preceding the granting of the certificate.

b) each of the parties to the intended marriage, if not a widow or widower, is 21 years old or, where he or she is under that age, the requisite consent has been obtained in writing and attached to the affidavit.

c) there is no impediment of kindred or affinity or any other lawful hindrance to the marriage, and

d) Neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted.[34]

The sworn affidavit may either be made before a registrar, an administrative officer or a recognized religious minister. The law lays down certain basic things that must be made known to the applicant. The applicant is required to be told what the prohibited degrees of consanguinity and affinity are, and the penalty imposed on bigamy. After this, the registrar or who ever must sign a declaration to the effect that he has discharged the required statutory duty of explaining to the applicant and that the latter appeared to fully understood it. Failure to discharge this duty is punishable with imprisonment for up to two years.[35]

After all these have been done, the marriage must be celebrated within three months of the date of the notice or else, all the proceedings and declarations, that have already been made will be void. A fresh additional three months and all the above procedures must be taken all over again before the marriage can be valid in the eyes of the law.[36] Note should be taken of the fact that this certificate is only evident of the marriage but does not replace the marriage celebration.[37]

3.4.4 SPECIAL LICENSE.

Special license is issued by a governor of a state in a case where the notice of marriage and the registrar's certificates are to be circumvented. It is granted in cases where the parties cannot wait for the prescribed period of 21 days after

lodging a notice with the registrar e.g. where a public personality wants to contract a marriage quietly, or an Army Officer going back to duty. If the governor is satisfied by an affidavit that there are no lawful impediments and that the necessary consent had been sought and obtained, he can grant the special license. This special license will warrant the marriage celebration to go ahead either by a registrar or a recognized minister of a religious body which ever the parties prefer.

3.4.5 CAVEAT: (SECTION 14)

A Caveat for this purpose is a warning, usually in the form of an entry in a register intended to prevent the registrar of Marriage from issuing the Certificate of Marriage to the parties giving notice to the their intended marriage.

The purpose of a caveat is to stop the registrar from issuing a marriage certificate. The reasons for the entering of a caveat may range from lack of consent, to charges of subsisting marriage. The caveat is entered by writing the word "Forbidden" opposite the entry of the notice in the Marriage Notice Book. The name and address of the caveator must also be written stating clearly the reasons alleged for prohibiting the issuing of the certificate. The registrar can only issue the certificate if the caveat is removed. Where the caveator is an illiterate, the caveat shall be entered on his behalf in the Marriage Notice Book by the registrar in the verbal notice of such a person.[38] When a caveat is entered against any marriage, the Act enjoins the registrar to refer the matter to a Judge of a High Court of a state under section 15, who is empowered to summon the parties for a

summary disposal of the issue. If the Judge is satisfied that the action of the person for opposing the granting of the certificate is baseless and frivolous, he may remove the caveat by simply canceling the words "Forbidden" in the Marriage Notice Book, and write below the words "Canceled by" rider of the High Court and sign his name. The registrar can then issue the certificate as if no caveat had been entered.[39] It has been held in the case of ***Olikagbue V. Olikagbue,***[40] that a caveat entered of an alleged engagement betrothal will not be enough to stop the granting of marriage certificate. However in this case, the caveatrix, Victoria Olikagbua entered a caveat against a proposed marriage between Christopher Olikagbua and a woman, Anthony E. Oghobanghase on the grounds that she is married to Christopher in accordance to the customary law of the Owariealubor people. The respondent had paid the customary law dowry and she was later 'led home' as his wife, and they had six children. After that the respondent deserted her and arranged to marry the correspondent. Idigbe, C .J. in disposing of the case, held that a valid customary - law marriage was subsisting between the petitioner and the respondent. The respondent was therefore barred from marrying the lady in question.

The above case could, however, be contrasted with that of ***Beckley V Abiodun.***[41] In this latter case, the respondent Beckley a Lagosian had become engaged to Miss Alade of Lagos when he was in Lagos before moving over to Jos. While in Jos, he requested his father to effect the payment of the dowry and celebration of the 'Idoma' ceremony in accordance with their cultural rites. After all was set and done, Miss Alade was still living with her own parents in Lagos.

While in Jos, Beckley met Miss Abiodun and they agreed to get married. A caveat was however entered by Beckley's father on the ground that under Yoruba tradition the rites he had already performed was tantamount to a valid customary - law marriage, which precluded a second marriage to Miss Abiodun. The Court held that:

> The performance of the Idoma ceremony without a subsequent taking of the girl to the intended husband's house did not effect a marriage by Yoruba (Lagos) law and custom so as to preclude the intended husband from making a marriage with another person under the provision of the Marriage Ordinance.

3.4.6 CELEBRATION OF MARRIAGE (SECTION 21-29)

After the issuing of either the registrar's certificate or the special license the parties intending to get married may choose one of two ways for the celebration. This is either in a recognized place of worship (Church) or in the registrar's office.

3.4.7 MARRIAGE IN A LICENCED PLACE OF WORSHIP (SECTION 21)

Before a marriage could be celebrated in a place of worship, the place must have been authorised by the governor of the state by virtue of the powers conferred on him by the Marriage Act. He is to publish in the State Gazette that a licensee authorising marriages to be celebrated had either been issued or revoked in such a place.[41] In celebrating the marriage, section 21 requires the church to conduct it in accordance with the rites or usages observed in such a church and it must be done in open doors between: 8 a.m. and 6 p.m. in the presence of at least two witnesses

besides the officiating priest. The priest must also be a recognized minister of religion of the church otherwise the marriage will be void.[43]

Upon the deliverance of the marriage certificate or the special licence the priest goes ahead with the celebration after he must have satisfied himself that to the best of his knowledge there is no impediments to such a marriage. Despite this the Marriage Act makes no provision for the publication of banns. But most churches in Nigeria in order to be sure that there are no impediments to a marriage insist on the publication of banns before the parties could be wedded in holy matrimony in their churches. A banns of Marriage is a proclamation of an intended marriage between the persons named.

It may be of interest to ascertain at what moment in time during the church proceedings did the marriage become a defecate contract. Marriages in churches are said to be a marriage per verb de present i.e. a declaration that you are taking the other as husband or wife before an ordained priest in the presence of witnesses. This reciprocal taking of the other as husband or wife is thus the essentials in such a celebration in the eyes of the law. The subsequent giving of the wedding ring, joining of hand and publication are symbolisms, of a marriage that had already taken place by the consent of the parties.[44] Immediately after the celebration, the officiating minister is required to complete the marriage certificate in duplicate. He must sign and enter the names of the parties, the date and place of birth of the parties and finally the names of the witnesses on the counterfoil of the witnesses.[45] The duplicate copies are also signed by the religious minister, the parties and two, or more witnesses to the marriage. One of the copies is given to the parties while

the other one is transmitted within seven days to the registrar of the district in which the marriage took place. The registrar's copy is filed in a file kept specially for it.[46]

3.4.8 MARRIAGE IN THE REGISTRAR'S OFFICE: (SECTION 27)

As an alternative to the above, parties who had obtained a registrar's certificate or a special license may celebrate or contract the marriage before a marriage registrar in his office in the presence of two witnesses. The marriage must also be concluded in open doors between 10 a.m. and 4 p.m.[47] In celebrating the marriage, the registrar is required to ask the parties the following questions. "Do I understand that you A.B and you C.D. come here for the purpose of becoming husband and wife?" If the answer is in the affirmative, he is enjoined to explain the character of the proposed marriage to them, emphasizing that such a celebration is very valid without the need for any other civil or religious rites, that the marriage cannot be dissolved during the life time of the parties save by a decree of a court of competent jurisdiction, and finally that it is an offence of bigamy for any of the parties to contract another marriage during the subsistence of the marriage.

The registrar like the religious minister, completes the marriage certificate in duplicate and the parties and their witnesses sign it. One of the copies is given to the married couple while the other is filed in the registrar's office. Note should be taken of the reference of this type of marriage as a 'court marriage'. This

terminology is a misnomer as there is nothing as 'a court marriage'. Another type of celebration aside the traditional two which have just been discussed above and which are also recognized, by the Act are "marriage under special license" and "marriage in Nigerian Diplomatic Missions". The former as the name implies is a special license authorizing the parties to have their marriage celebrated at a place other than a licensed place of worship or the office of a registrar of marriages. Despite this, the marriage must still be celebrated by either a minister of a recognised church or a registrar as if it were in the licenced place of worship or the office of the registrar respectively.[48]

The latter-marriage in Nigerian Diplomatic Missions is a celebration done by virtue of the Marriage Act (Amendment Decree 1971).[49] The Act provides for a valid celebration of marriage in Nigerian Diplomatic or consular mission office by an officer of the rank of secretary or above. Such marriages have the same legal effect as those contracted before a marriage registrar in Nigeria, but it is essential that one of the parties of the marriage be a Nigerian citizen.

3.5.0 LACK OF FORM

Formalities laid down in the Marriage Act must be complied with. The effect of non-compliance is stated in S. 32(2) as follows:

> The marriage shall be null and void if both parties knowingly and willfully acquiesced celebrations in any:
>
> a. Place other than the office of Registrars of Marriage or a licenced placed of worship or;
>
> b. Under a false name or names or;

c. Without the Registrar's Certificate of Notice or Licence under S. 13 or;

d. By a person not being a recognised Minister or some registered denomination or registrar of marriages.

But S. 32(2) says no marriage shall after celebration be deemed invalid by reason that any provision of the Act than the foregoing has not been complied with. Non-compliance with the above per se does not invalidate the marriage. Knowledge of both parties in the defect has been made a prior condition.

In the case of ***Akuwuidike V Akuwuidike***[50a] The parties were married in 1958 at St. Mary's Church Port-Harcourt presided over by a Roman Catholic Priest and two other witnesses. Notice of marriage was not given as required under the marriage Act and the Registrar's Certificate was not issued to the parties. Later the wife petitioned for divorce. The judge found out that the petitioner had no knowledge of the legal requirement of a valid marriage under the Act, therefore she did not willfully and knowingly acquiesced in any irregularity intended by her husband and the officiating minister. The Court therefore held the marriage valid. In ***Obiekwe V Obiekwe (1963)***[50b] the parties were married at the Holy Ghost Roman Catholic Church Enugu in 1961. Notice of the Statutory Marriage was given but the Registrar's Certificate was not obtained. In her action for judicial separation the respondent alleged that there was no marriage as there was no certificate from the Registrar. She did not know the necessary formalities for a valid marriage under the Act, because of which she did not knowingly and

willfully, acquiesced in the celebration of the marriage. The Judge said "willfully" means a deliberate act or intentions. However the judge said both parties are guilty of celebrating the marriage in spite of the known defect.

In Anyaegbunam V Anyaegbunam[51] the facts showed that there was a Church Solemnization of the marriage purported to be concluded under the Act claimed by a party who was not able to provide a certificate of marriage signed by the officiating priest. The marriage was not in the form described by the Act. The wife did not give evidence or call witnesses but tendered a photograph showing the parties signing in the registrar's office. The marriage was declared void for failure to obtain the registrar's certificate.

Also marriages that are not solemnized in a liscened place of worship and by a proper minister, such marriages in principle should be void irrespective of intention of the parties.

3.6.0 BREACH OF PROMISE TO MARRY

A breach occurs when one of the parties to the agreement fails or refuses to honour his/her obligation. For an injured party succeeds under this case he/she must first of all prove that there existed a promise of marriage under the Act, even damages may be recovered.

> ....Unless his or her testimony is corroborated by some other material evidence in support of such promise. The fact that the defendants did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration. (sic)[53]

There is no hard and fast rule as to what will amount to material evidence. It has been submitted that it is a question of law for the court to decide. A breach of promise to marry may either be a non-performance of an obligation or it may be anticipated. These two facts of breach of contract to marry would be discussed below.

3.6.1 NON-PERFORMANCE

A breach of non-performance occurs when one of the parties to the agreement fails to perform an agreed obligation. Thus when one party fails to turn up for the marriage on a fixed date and place with no justification, a breach is said to have occurred, if no date is fixed, the law, however, presumes that the marriage should be done within a reasonable time, so if one part is unreasonably delaying the marriage a breach of the agreement would be inferred by a court.

An instance of non-performance is in the case of ***Martins V. Adenugba***[54]. In this case, the defendant in September 1942 informed the parents about his fiancé that he was through with all the preliminaries so the plaintiff's marriage could be celebrated on the 17th of September. On that date, the defendant went into the registry alone leaving the plaintiff outside. In a little while he came out and informed the plaintiff and her relations that they were already married. The parties then proceeded to St. Peters Church Lagos for the divine blessing. The plaintiff

who believed that a valid statutory marriage had been contracted, lived with the "husband" for three years and later abandoned him because of his cruel behaviour towards her. On enquiry she discovered to her greatest dismay that no valid marriage had actually been contracted. She instituted an action for a breach of promise to marry. Brooke acting C. J. ruled in her favour, holding that the Plaintiff was entitled to recover damages as the cause of action was very proper.

It has, however been held in the case of ***Aiyede V Norman Williams***[55] that where promises were made subject to a condition precedent, there can be no breach prior to the fulfillment of the said condition. In this case, the parties who were studying in England and Ireland respectively agreed to marry. But the defendant's promise was subject to his father's consent. The father's consent was sought, but he refused to grant it for various undisclosed family reasons. The defendant later married another woman and was sued by the plaintiff for a breach of his promise to marry her. Coker J. (as he then was) who found as a fact that there was a condition precedent to the defendant's promise, held that:

> Where the promise is only to be carried into effect on or after the happening of a certain contingency that contingency must happen before the promise becomes actionable. The promisee is however, entitled to sue as on the breach of an executory contract where the promisor does any act whereby he would be incapable of performing the contract if and when the agreed contingency arrives.[56]

As the necessary consent was not received in this case, the plaintiff's suit fell to the ground.

3.6.2 ANTICIPATORY BREACH

This type of breach may occur when one of the parties to a promise to marry out rightly repudiate her/his obligation or by such conduct as may put him out in performing his obligation.[53] In the first case a party to the contract may announce his intention not to perform well before the contractual date of performance. The other party may either treat it as a wrongful termination of the agreement or he/she might treat it as inoperative termination and wait until the actual date of performance has elapsed. In the case of ***Frost V Knight,***[57] the plaintiff promised to marry the defendant after the death of his (defendant's) father. He later announced his intention of not fulfilling his promise while the father was still alive. The defendant without waiting for the condition precedent to occur sued for an action of breach of premise to marry her. It was held that she was entitled to recover damages for plaintiff's anticipatory breach of their contract.

The other aspect of anticipatory breach may occur where one party to the agreement by his own act puts it out of his power to perform his obligation. An example of such a case is where a party to a contract of marriage married another person. The case of ***Uso V Iketubosin***[58] is very instructive here. The defendant in this case who had promised to marry the plaintiff in 1947, went ahead to marry another woman in 1957 in breach of the former agreement. Irwin, J. held that the defendant's act constituted a breach for which damages must be exacted.

3.7.0 MATRIMONIAL RELIEF BASED ON STATUTORY MARRIAGE:

Matrimonial relief in the case of monogamous marriage was governed by English Law until 1970 when the Matrimonial Causes Act (MCA) replaced it with a complete code. Before 1970 by virtue of the State Federal Jurisdiction Court 1958; the High Court was vested with jurisdiction over matrimonial causes to be exercised in conformity with the laws and practice for the time being in enforce in England. Under this provision, the English Matrimonial Causes Act 1937 and MCD 1965 were applied in the Nigerian Courts. Substantial changes in English Law were introduced by the Divorce Law 1969. But before this Act became part of Nigerian Law, the MCD was enacted in 1970. The Act took its inspiration more from the Australian Matrimonial Causes Act, 1959.

One of the criticisms made of the 1970 Act now of 1990 is that it was not preceded by discussion which also could have brought out relevant local facts on customs, and practice, the view of acknowledgeable people and evaluation of the existing law. The new law, which apparently does not take into account these matters, is likely to be as the old law.

These relieves available under the MCD 1990 are listed below as explained there under.

1. Only the Court can grant relief.
2. The obtaining of relief is more formalized.
3. There is a greater variety in kinds of relief, which are available.
4. The Law is more certain
5. Reconciliation of parties has been given special emphasis.

3.7.1 RELIEF CAN BE GRANTED ONLY BY THE COURT (SECTION 1)

The High Court has exclusive jurisdiction over a statutory marriage. Under the Common Law before a court exercises matrimonial jurisdiction the petitioner must be satisfied that the Court has jurisdiction either on the bases of domicile or in some cases residence. This Common Law rule applied in Nigeria until the Federal Constitution, which posed the problem, as to whether domicile for this purpose meant a Nigerian domicile i.e. Federal regional or State domicile.

Section 2 of the MCD requires the High Court to exercise matrimonial Jurisdiction on the basis of a Nigerian domicile. S.2 (3) has resolved the controversy whether in addition declaring that a person domiciled in any State is domiciled in Nigeria for the purposes of the Act requires state domicile. This makes it possible for the petitioner to seek the Court at will and also for the respondent to cross-petition in another site. But S.9 (3) together with S.3 has taken care of this situation by enabling the Court where an action has been instituted, to stay the case and or transfer it to another high court if this is in the interests of justice. Since a wife acquires her husband's domicile automatically after marriage, unless the husband is domiciled in Nigeria at the time of the petition, the wife could not obtain relief from any court in Nigeria. This caused particular hardship to the deserted wife when she was in Nigeria. On the issue of domicile, following

English Law an exception has been taken to the general rule that only domicile at the time of institution gave jurisdiction to the Court to grant relief.

If the petitioner is a deserted wife and if immediately before marriage or the desertion, she was domiciled in Nigeria or if she has been residing for 3 years in Nigeria the Court has jurisdiction to hear her petition under S.7.

3.7.2 OBTAINING RELIEF IS MUCH MORE FORMALISED.

Divorce proceedings take the course of a normal civil action. Previously State Court Federal Jurisdiction Act and the Matrimonial Causes Rules made the practice and procedure of England applicable. The MCA 1990 has repealed this provision and authorized the Chief Justice to make procedural rules for a divorce action under section 112 (1). This was apparently not been done and the old English rules continue to apply as a transition under S. 112(4).

3.7.3 AVAILABILITY OF GREATER VARIETY OF RELIEF

3.7.3.1 ACTION FOR RESTITUTION OF CONJUGAL RIGHTS

This can be resorted to by a spouse when the other spouse refuses to cohabit with him or her without just cause or excuse under S. 47 MCD. The Court will make an order for the deserter to resume cohabitation only if satisfied that the petitioner is sincere in deserving restoration of conjugal rights under S.45.

3.7.3.2 TERMINATION OF MARRIAGE

Termination of Marriage from the date of the decree for divorce up to the point of time all the consequences of a valid marriage will follow, but the decree puts an end to the marriage for all purposes and reverts the parties to their former position of an unmarried person in relation to each other. They have no right and obligations other than those specified in a divorce decree. Since divorce goes counter to indissolubility of marriage in Christianity it creates a change of status, making it difficult to obtain a divorce and only recently has there been a liberalization of the divorce laws.

3.6.3.3 VOID MARRIAGES:

S. 3 (1) MCA lists the grounds on which marriage may be void abinitio as follows:

1. Where either of the parties are lawfully married to some other persons.
2. Where the parties are within the prohibited degree contained in Schedule I.
3. Where there has been failure to comply with the requirement of solemnization.
4. Lack of real consent of the parties due to fraud, duress, etc.
5. Where either of the parties is not of marriageable age.

Note that 1, 2, & 5 above relate to lack of capacity, and 3 & 4 relate to lack of form.

3.7.3.4 VOIDABLE MARRIAGES

The grounds of voidable marriages are in S. 5. MCD as follows:

1. Incapacity to consummate the marriage (this is distinguished from lack of cooperation) S. 36 (1) defined "incapacity" to include commencement, which continued up to the time of petition.
2. Unsoundness of the mind - S. 5 (1) (b)
3. Veneral diseases S. 5(c)
4. Pregnancy of the woman by another man i.e. stuprum i.e. married and conceived by another.

To what extent can a person plead his own defect for petition of nullity - S. 35.

An action for nullity on any of the above grounds can be brought only by the innocent party, and a person cannot plead his own defect generally.

EXCEPTION S. 5. IN RESPECT TO VOIDABLE MARRIAGES

Under the doctrine of approbation there are no bars to the granting of a decree where the marriage is void under the English Law and MCA. But in the case of a voidable marriage English Law recognized the doctrine as qualifying the right of the innocent spouse to petition for nullity. Approbation means a conduct which implies recognition of the existence and validity of the marriage though there was a fact which renders it inequitable and contrary to public policy that the validity of such marriage should now be questioned by the spouse who has kept quiet.

In England, the Nullity of Marriage Act 1971 introduced a statutory qualification of the law, which was intended to remove the uncertainty and obscurity of the Old Ecclesiastical Law. In Nigeria one could say also that the law has been codified, but not with the same exactness as found in England. In the case of impotency approbation is to be found in S. 36 (2) MCA - a decree of nullity of marriage shall not be made on the ground that the marriage is voidable where the court is of the opinion that: (a) by reason of

i) the petitioner's knowledge of the incapacity at the time of the marriage; or
ii) the conduct of the petitioner since the marriage or
iii) the lapse of time or

(b) for any other reason it would in the particular circumstances of the case be harsh and oppressive to the respondent if contrary to the public interest, to make a decree.

In other cases the restriction is placed by S. 37 i.e. pregnancy by another other than him.

3.7.3 .5 NULLITY

An action for nullity unlike an action for divorce is bought in order to obtain from the Court an order that there was no valid marriage between the parties. There are two types of marriages that can be annulled, void and voidable. In a void marriage there is a fundamental defect which prevents marriage between persons who are being legally prevented as void abinitio. And strictly speaking no order of Court is necessary because the parties had never been husband and

wife. In a voidable marriage there is a defect, which entitles one spouse to have the marriage annulled but unless and until this is done the marriage is valid. The effect of the decree of nullity is to declare that there never was a marriage, i.e. it has retroactive effect.

3.7.3.6 THE LAW IS MORE CERTAIN.

Previously the Court had to apply English Laws and decisions. The MCA 1970 has abrogated this and is the only law, which Nigerian Courts have to apply. For the interpretation of the provision, the Court can be guided by English and Australian cases, which are of persuasive authority.

3.8.0 RECONCILIATION HAS BEEN GIVEN SPECIAL EMPHASIS.

Previously the Nigerian Courts had tried informally to reconcile the parties before the trial stage of divorce proceedings, and even thereafter up to the entering of decree absolute, it is only in MCA that the reconciliation aspects have received statutory recognition.

The Matrimonial Causes Act (Cap. 220) in Part II under Matrimonial Relief has been given Statutory Special emphasis in Sections 11 to 14 and in Section 17 Section 11(1) makes it a duty of the court to give consideration from time to time to the possibility of a reconciliation, the Judge may under sections -

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in Chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

(c) nominate a person with experience or training in marriage conciliation or in special circumstances, some other suitable person to endeavour with the consent of the parties, to effect a reconciliation.

While (2) provides that:

> If, not less than fourteen days after an adjournment under subsection (1) of this section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judge shall resume the hearing, or the proceedings may be dealt with by another judge, as the case may require, as soon as practicable.

Whereas under section 12 the judge who acted as conciliator under section 11(1) (b) above and the attempt to effect a reconciliation fails, the judge shall not continue to hear the proceedings the proceedings, shall be dealt by another judge, except at the request of the parties.

Section 13 ensures confidentiality of the parties' testimonies and shall not be admissible in evidence in any kind of proceedings; while the conciliator must take an affidavit before an authorized person an oath of affirmation of secrecy in the form provided in the second Schedule to this Act. Additional provisions to encourage reconciliation are contained in Section 17 of the Act.

Section 17(1) of the Act stipulates, within six months or less as the trial period to encourage reconciliation and the periods of reconciliation could be one or more provided it is with six months. In arriving at six months, the trial judge in the case

of desertion, would not take into account the trial period in computing the period of desertion.

In effecting reconciliation, the judge is under duty to restore the broken relationship and as much as possible to remove the causes of conflict in the marriage. The conciliator only assists the parties to agree without imposing ideas. The intervention is to assist in building confidence addressing feelings and healing each other for peaceful co-existence, through acknowledgment, remorsefulness, forgiveness and restoration.

3.9.0 LEGAL CONSEQUENCES OF STATUTORY MARRIAGE

In the distant past, in the evolution of Common Law the husband was given the exclusive power and dominion over his wife and the latter's personality was even fussed into that of the former. These powers included amongst others, moderate chastisement of the wife and control of her movements. There was, however a radical incursion of these powers when the decision in the case of ***R. V Jackson***[59] came out. Since, then the shackles of servitude fell from the limb of married women and they acquired considerable freedom of action. Today the married woman is almost a (feme sole) mistress of her house - hold. Despite this, the statutory marriage confers on both the husband and wife certain rights and obligations as an offshoot of their new found status. These rights and obligations which will hence preoccupy our discussion here as legal consequences of marriage and as rights in chapter five includes right to consortium, maintenance, property and other civil matters.

These days there are stories of "marriage" between the sexes. For the purpose of the Marriage Act, marriage between a man and a man or between a woman and a woman is excluded. The English Law passed to Nigeria did not include these and Nigerian Law did not also give it a lee-way.

CONCLUSION:

Statutory marriage leads to the creation of family like those under Islamic Law as an Institution. It is preceded with civil and religious ceremonies. It was a marriage in which the entity of the wife was submerged into that of the man under the doctrine of "unity of Spouse" where the marriage was indissoluble, under the total control of the husband. Due to its impractical nature it was subjected to reform and it became a voluntary marriage and the "Shakkles were removed from the limbs of married women such that they go into marriage and out of it where the marriage breaks down. It is essentially a monogamous marriage and registered in the marriage Registry. Divorce here is well regulated in a law which makes it ascertainable.

NOTES AND REFERENCES

1. Atiyah, P. S. An Introduction to the Law of Contract, 3rd Edition, (Clarendon law series Oxford 1981,) P. 28.

2. Roger B. Osborn's Concise Law Dictionary 7th Edition, (Sweet and Maxwell, 1983,) P. 311

3. (1966) LR. IP & D

4. Ibid at Pp. 30, 133.

5. (1908) 1 KB 729

6. (1908) I KB 720, 724

7. (1938) AC 1

8. (1963) 2 All N.L.R. 214

9. (1900) N.L.R. 41

10. (1957) 1 E.N.L.R. 1

11. (1878) 3 CPD 439

12. (1880) 5 CPD 410

13. (1940) 15 NLR 78

14. Suit No. E/5D/70 (Unreported)

15. See Marriage Law in South Africa P. 154.

16. Ibid, P. 153

17. Section 3 (1) (d) of the MCA 1990 LFN: Celebration of Marriage.

18. Section 18 Marriage Act.

19. Ibid, Section 20

20. Section 3(1)(b). It makes void.

21. Under Section 3, Schedule 1 MDC 1990.

22. Bromley, P.M Family Law 3rd edition (Butter worth London, 1966).

23. Ibid, P. 31.

24. Schedule 1 Section 3 MCD 1990.

25. Section 4 (1) and (2) MCA 1990 LFN

26. Nwogugu, E. I Family Law in Nigeria, Revised ed. (Heinemann education Books Nigeria Ltd, 1990 P. 25.

27. Section 4 (3) MCA 1990 LFN

28. See Section 4(4) and 4(5) MCA 1990 LFN

29. Section 33 (1) of the Marriage Act and Obele Iniya V Obele (1973) 1. NMLR 155.

30. See Section 33 of Marriage Act of 1914.

31. (1963) NRLR 54

32. Jurisdiction of the Court.

33. Sections 7 and 8 of the M.A 1990.: Preliminaries to Marriage and FORM A of the First Schedule, where parties are Illiterates FORM B, First Schedule.

34. See S. 33 M.A. 1914 as well.

35. Section 11 (3) Marriage Act, 1990

36. See Section 12 Marriage Act, 1990

37. See Section 11(1) MA 1990

38. See Section 14(2) M.A. 1990 LFN Preliminaries to Marriage.

39. See Section 16 MA 1990.

40. Suit No N/17/66 (Unreported), Benin High Court 22 Sept. 1966.

41. (1943) 17 NLR 59.

42. See Section 6

43. See Section 21 M.A. 1990

44. Beamish V Beamish (1859-61) 9 HL. 274

45. See Section 25 MA 1990

46. Section 26

47. Section 27

48. See Section 29 ma 1990

49. See Section 49 MA 1990

50. (1963) 7 E N.L.R. 5.

51. (1963) E N.L.R. 196.

52. (1973) 3 E.C.S.L 243

53. See Section 176 Evidence Act. Cap 62 Laws of Nigeria.

54. (1946) 18 N.L.R. 63.

55. (1960) L.L.R 253

56. Supra, P. 266

57. (1872) L.R. Exch 111.

58. (1957) W.R.N.L.R 187.

59. (1888) 22 QB.D 23 AT Pp. 53-54.

CHAPTER 4

CONTRACT TO MARRY UNDER ISLAMIC LAW IN NIGERIA

4.0 INTRODUCTION

Contract to marry under Islamic Law is a very wide topic which should be read as a whole together with its sub-headings for it to be meaningful.

This marriage has its legal religious basis in the Quran, the hadith and Islamic Juristic interpretations and opinions. The juristic opinions/views are guide to the application of the Quranic injunctions and the hadiths, which are prophetic sayings of Prophet Muhammed (PBUH). These views or opinions are many and varied according to the issues. On some issues they agree unanimously while on others they differ with justification(s).

The Chapter looked at betrothal up to marriage itself with a cursory look at all the essential elements that make the marriage valid, or void. Nigeria subscribes to the Maliki view; officially by the Shariah Courts.

4.1 PRELIMINARIES OF MARRIAGE.

Under Islamic Law, marriage institution commands great attention and respect. Like what applies in other branches of law relating to marriage, Islam attaches great importance to this all-embracing institution simply because family which is considered as the basic unit of the society is founded purely on the institution of marriage.

In Islam, marriage is referred to, as Nikah and it is a very important institution, which joins the lives of two people of opposite sex and in return brings into existence children as a result of that union.

The importance of marriage in Islam has been clearly expressed in both the Quran and the Sunnah of the Holy Prophet. In Quran 25:54 Allah says:

> It is He who has created man from water; and has appointed for him kindred by blood, and kindred by marriage and your Lord is ever all-powerful to do what He wills.

Marriage institution is very important in sustaining creation. Allah further stated in Quran 16:72.

> And Allah has made for you mates (and companions) of your own nature and made for you out of them children and grand children, provided for you sustenance of the best....

Commenting on the above Quranic verses, Abdullahi Yusuf has this to say:

> There is the mystic union in marriage; it is not only like the physical union of animals but it gives rise to relationship arising of the sexes of individuals who were not otherwise related to each other.[1]

In various Traditions the Prophet (P.B.U.H.) has said much regarding the importance of marriage to the Muslim Umma. In one of those traditions, he was reported to have said:

> Marriage is my Sunnah whoever refrains from my Sunnah is not of me, whoever loves me, let him follow my Sunnah.[2]

He also said in another tradition that:

> O you men whoever is able to marry should marry for that will help you to lower your gage and guide your modesty.[3]

Similarly, the Prophet (P.B.U.H.) was reported to have said:

> Whoever marries safeguards half of faith. Let him fear Allah for the second half.[4]

Marriage in Islam is preceded with a well-defined betrothal which will now be examined below.

Preliminaries of Marriage Contract

4.1.1 BETROTHAL (Khitba)

The first step towards a marriage contract is the expression of intention to marry, when it is found out that the girl or woman is not committed to another man. The proposal of such intention may come from either the man or girl or woman or through their parents or guardians. The intention is also preceded by inquiries about the girl or woman's social family background, reputation and these days educational background, and the man must have the opportunity to see the intended wife before making such choice. In Islam betrothal means Khitba. It refers to the declaration of

a man's intention to marry a particular woman or girl who is absolutely free from any legal prohibition.

Gifts are some times given to the girl's family, which depends on the traditions or custom of localities though Islam did not prescribe any such payments. Whenever the Khitba is accepted it becomes concluded.
The request of betrothal for marriage may be evident in writing but it is not part of the procedure that a registration of any kind is made. Registration or the non-registration of betrothal for marriage does not affect the validity of it.

The notion of betrothal is heavily akin to a marriage involving a minor. This is simply a formal intention to marry the minor with, the enjoinment that copulation is deferred to a later date during which the minor would have grown and be physically ready for it. This type of marriage involving minors is said to be best explained as a social integration. No age limit is set for betrothal in Islam. Infact, Islam seems to prescribe that no matter at what age a betrothal may be made, but consummation must be delayed until the parties are both ready for marital relations - a condition usually determined by puberty and conclusion of marriage contract.[5] The law also emphasizes that marriage arrangements must be made in the best interest of the minor involved. It is therefore unlawful to do any thing, which is contrary to their interests, aspirations and wishes. To guard against this, Islam has laid down certain conditions which must be adhered

to. First, betrothal/marriage in minority will be null and void without the consent and participation of the guardian. Second, Islam does not entrust this responsibility to just any parent or guardian, but to those who in addition to parenthood have certain qualities sufficient under normal circumstances to ensure a good sense of judgment and consciousness. Third, Islam has given to minors the so-called "option of majority." This simply means that a minor who has reached the age of puberty is given the free-hand to either upheld or abrogate a betrothal/marriage contract that was concluded on his or her behalf while in minority.

Despite these safe guards, it is sad to note/observe that, the interest of minors are often relegated to the background as guardians have been known to marry off their wards at a very tender ages for their selfish interest without reiterating the deferment of copulation. This aspect leads some muslim girls to suffer from vesico vaginal fistula (V.V.F), a condition of uncontrollable discharge of urine and faeces due to the destruction of the bladder and rectum by early pregnancy during child delivery and gishiri cut.

In Islam betrothal means Khitbah. It is referred to as the declaration of a man's intention to marry a particular woman or girl who is absolutely free from any legal prohibition. Such intention is communicated to the woman or girl or to her guardian, which may or may not be accepted. Whenever the Khitbah is accepted it becomes concluded.

For a Khitbah to be valid in Islam it must fulfill two basic conditions namely:

i. There must be no legal prohibitions and or impediments between the would be husband and would be wife, thus since Khitbah is a mere preliminary to a marriage then all the rules applying to a marriage in respect of the woman that is lawful and unlawful applies to the agreement to marry.

ii. That the woman should not have already been betrothed to another muslim man where the woman has already been betrothed to some one else, the betrothal to her by another muslim man is prohibited. This position is supported by the tradition of the Prophet (P.B.U.H.) who was reported to have said:

> A believer is a brother to another believer. It is therefore not lawful for him to outbid his brother in buying something or to propose to a woman when his brother has already betrothed to her unless he withdraws.[7]

He was also reported in another tradition to have said:

> A man must not propose to another man's proposed woman unless he withdraws or gives him permission.[8]

This prohibition however stands where the woman accepted the first proposal. If otherwise, nothing precluded another muslim from making a khitbah.

There are divergent views among the muslim jurists regarding this prohibitions where the woman does not expressly give her consent or otherwise. The majority of the jurists hold that another proposal is lawful and they relied on the hadith in which it was reported that Fatima Bin Qays was approached for betrothal by three suitors, among the companions Mu'awiyya Ibn Abu Sufyan, Abu, Jaham Ibin Haalifa and Usama Ibn Zayd and she went to the prophet (P.B.U.H.) for advice. He told her that Mu'awiyyah is a poor man; Abu Jaham habitually beats women. Therefore she should marry Usama.

And when she show some hesitation, the Prophet (P.B.U.H.) told her that she should obey the instruction of Allah and His Apostle. So she agreed and married Usama. And as a result Allah blessed her marriage. This hadith has been criticized by a contemporary jurist such as Zakiyuddin Shaabah in view of the believe that it cannot be a sound authority because there is nothing to indicate that each of the three companions knew about the proposal of the other to the woman.

On the other hand, the Hanafi Jurists hold that a proposal by another suitor is lawful when there is no clear assertion or otherwise to the initial proposal.

In Islam, a woman does not make a Khitbah to a man. This is because they said women by their nature are not to make it in order to keep their modesty especially when they fail to woo the man. Khitbah is

therefore left exclusively to men who can bear defeat without losing courage and in good faith.[9] This is arguable looking back to the prophets marriage to Khadijah and the present day when a woman may make her interest known to a man to marry him.

Khitbah can be made to a woman observing Iddah. The lawfulness or otherwise of the proposal will depend on the type and reasons of the Iddah and the kind of proposal expressed.

Where the Iddah is in respect of death or divorce the jurists are unanimous that such a Khitbah is unlawful. But where the Khitbah is an implied or indirect one and the Iddah is in respect of death then the Khitbah will be regarded lawful. The authority for the lawfulness is based on the provision of Quran 2:235 where Allah says:

> There is no sin for you in that which ye proclaim or hide in your mind concerning your truth with women. Allah knoweth that ye will remember them. But plight not your truth with women except by uttering a recognised form of words. And do not consummate the marriage until the term prescribed is run. Know that Allah knoweth what is in your minds so beware of Him; and know that Allah is forgiving clement.

Where the divorce is a revocable talaq all the jurists agree that a direct khitbah is unlawful. Where the iddah is in respect of an irrevocable talaq the juristic opinions differ. The majority is of the view that an indirect proposal is lawful. The Hanafi Jurists are of the view that it is not lawful

especially where the divorce is of the imperfect and irrevocable as it may hinder a direct re-marriage between the parties after the expiration of the iddah. But where the divorce is a perfect and revocable type, the wife may be tempted to lie on the duration of the iddah for fear of losing the proposal.

Since khitbah is just a preliminary to a marriage contract, all incidences of marriage contract does follow. Therefore where the woman is not in a lawful condition a khitbah made to her is unlawful. Some scholars including Dawud Zahiree are of the view that an invalid khitbah such as where there is already a proposal of another in spite of which the man goes ahead to marry the woman the marriage is unlawful and it should be annulled even if consummated.

The Maliki Jurists hold three views on the issue of an invalid khitbah as follows:-

i. a void khitbah invalidates marriage before or after consummation
ii. the marriage is valid and should not be annulled before or after consummation.
iii. the marriage should be annulled after consummation. If the marriage is not consummated the parties should be separated and a new contract made.

As stated earlier, khitbah is not a marriage contract per-se. Each of the parties have a right to withdraw from the proposal legally, though morally the withdrawing party will be at blame especially where there are

no justifiable grounds. In most cases the withdrawing party will be deemed to have committed a sin. In respect of presents or gifts given to the woman during the khitbah, there are divergent views among the schools. According to Maliki jurists, if it is the woman that withdraws from the agreement, the husband can claim back his gifts but if it is the husband that does so he has no right to claim back what he has given. The Hanafi jurists on the other hand regards such gifts as presents applying the law of gift (siba) to the effect that the donor can withdraw if the articles can be traced in their original state or else, he cannot claim for their value. Similarly items like consumable goods and money can not be re-claimed.

As for injuries like psychological and emotional pains suffered, the jurists are unanimous in holding the other liable in exercising his/ her legal rights. In cases relating to personal injuries, the victim can sue, particularly where as a result of the others promise to marry, the victim's status has changed tremendously. For instance, as a result of the others promise the victim has left his/her work to join the other party as a result of which an injury is sustained. The victim can sue in law for damages in respect of the injuries suffered as a result of the other's failure to continue with the earlier promise to marry the other under Islamic Law.

4.2.0 ASPECTS OF MARRIAGE IN ISLAM

Like any other branches of Law Islamic law attaches great importance to the institution of marriage. Marriage under Islam is considered as the foundation upon which family life is built the same way perhaps that the family is considered and regarded as the basic unit of the community. Abdullahi Yusuf Ali has expressed the importance of the marriage institution under Islamic law in his book while commenting on a Quranic verse relating to marriage in the following manner:

> ....There is the mystic union in marriage: It is not only like the physical union of animals but it gives rise to relationships arising out of the sexes of individuals who were not otherwise related to each other.[10]

The nature of marriage under Islam will be considered from three angles; ... religious, social and legal aspects of marriage.

4.2.1 RELIGIOUS ASPECT.

Marriage under Islam is a sacred contract and not a sacrament because the parties concerned whenever it becomes impossible for them to continue the relationship can terminate marriage here.

Thus Quran 24:32-33 enjoined men respectively as follows:

32. And marry those among you who are single (i.e. a man who has no wife and the woman who has no husband) and (also marry) the salihun (pious, fit and capable ones) of your (male) slaves and maid, servants (female slaves). If they were poor, Allah will enrich them out of His)

Bounty. And Allah is All-sufficient for His creatures' needs, All-knowing about the state of the people).

33. And let those who find not the financial means for marriage keep themselves chaste, until Allah enriches them of His Bounty. And such of your slaves as seek a writing (of emancipation), give them such writing, if you find that there is good and honesty in them. And give them something (yourselves) out of the wealth of Allah, which He has bestowed upon you. And force not your maids to prostitution, if they desire chastity, in order that you may make a gain in the goods of this worldly life. But if any one compels them (to prostitution), then after such compulsion, Allah is Oft-Forgiving, Most Merciful (to those women will be forgiven because they acted un willingly).

Also the Prophet was quoted in Sahih al-Bukhari saying the two following traditions:

> I keep a fast and I break it and I pray and I sleep, and I am married, so whoever inclines to any other way than my sunnah, he is not of me.
>
> And
>
> O assembly of young people! Whoever of you has the means to support a wife, he should get married, for this (i.e. marriage) is the best means of keeping the looks cast down and guarding the chastity, and he who has not the means, let him keep fast for this will act as castration.

All the above quotations have been interpreted to mean that marriage is a religious duty for safe guarding morality as a necessity. It is a duty only on those who have the financial means to do so. As to the obligatory aspect the Islamic juristic views differs. The Maliki jurists regard marriage recommendable generally and exceptionally for certain individuals it may be deemed obligatory for men who have strong sexual desires, and he has

the means; for women who can not earn a living or fear of illicit sex; And some times forbidden for a man who has no means, can control himself or has a contagious illness.

The Hanafis and Hambalis are in agreement with the Maliki views. Whereas the Shafi' is regard marriage from its origin as supererogatory i.e. muba (Nafi) for a man who can control his sexual desires and goes not hope to procreate while refusal to marry cannot prevent him from performing his other obligations to Allah.

While the Zahiris named after Da'ud Ali al-Isfahari, who relied only on the Quran and the Sunnah. He rejected the consensus unless all the jurists of the nation unanimously approved it.

To them marriage is obligatory (i.e. makruh) therefore it is not a light commitment. The husband must be certain of his ability to have the dower and the means to maintain the wife before he goes into marriage.

In Islam poverty should not bar one from marriage, while it also recognize that every one cannot have the means to marry but Allah can provide for every living creatures maintenance.

Thus marriage and sex have not been taken lightly in Islam.

In his book, Hammudah 'Abdal Ali[11] describes marriage as... a solemn covenant between Allah and human parties as well as between the parties themselves. In the view of Mutahhari Murtada in his book [12] relying on Shiite school which is the prevailing law in Islamic Republic of Iran, said, that the two aspects of religious marriages prevailing are the permanent and the fixed term marriage. The two forms of marriages are alike in some of their arrangements and are different in certain other areas. One of the features that distinguish them in the first instance is that in a fixed marriage a woman and a man take a decision that they will undertake a marriage for a fixed period and at the end of that period if they are not inclined to extend that period they may separate from each other. Another feature is that both parties have more freedom in setting the terms and

conditions according to how they wish the marriage to be. This is not prevalent in Nigeria.

In a permanent marriage the wife must accept the man as the head of the household and carry out the duties assigned to her by him in the interest of the family. All the rules guarding a marriage contract in Islam applies strictly between the parties whereas in a fixed term marriage the determining factor is the agreement between the parties.

Marriage in Islam cannot be regarded a purely contract because of its religious aspect a contract even-though it has the characteristics of a contract because mutual consent of both parties is its basis, and because it is dissoluble. Again marriage in Islam cannot be regarded as a sacrament as in a Christian sense even though it is regarded as an act of worship for it preserves mankind from pollution. This is because sacramental marriage is regarded as indissoluble (because God is a party to it) which must be officiated and grant benediction by a Priest; and that it is a necessary evil, which is only better than illicit inter-course to which celibacy is preferred.[13]

The basis of marriage in Islam unlike in other systems of law is to discourage celibacy, which has been condemned in its totality by various traditions of the Prophet (P.B.U.H.) in one tradition he was reported to have said:

> Whoever refrains from my Sunnah is not of me, and marriage is part of my Sunnah; whoever loves me, let him follow my Sunnah. [14]

In another tradition, Abdullahi narrated that.

> We used to participate in the Holy Battles led by Allah's Apostle and we had nothing (no wives) with us so we said should we get ourselves castrated? He forbade us that and them allowed us to marry women with a temporary contract, which was later on forbidden forever.

In respect of this issue people are guided with the provision of Quran 5:90 as follows:

> O you who believe! Make not unlawful the good things, which Allah has made lawful for you, but do not transgress the bound of what is right. Verily Allah does not love those who transgress the bounds of what is lawful.

4.2.2 SOCIAL ASPECT

The social aspect of marriage under Islam can be seen clearly in the aims and objectives marriage plays in the society like other systems of law, Islam recognises the need for sexual control, which is why marriage is institutionalized. The essence for the control of sexual behavior is to maintain a balance. This pre-supposes that no society allows sex without guidance. Any society that fails to accept and recognise this fact is bound to be in problem.

Unlike the doctrine of the Hebrew "Essences" and of the Christians', which encourages celibacy, Islam has common features with the Jewish practice. Other human tradition recognises the value of sex and advocates marriage in order to establish a conjugal family for procreation.

All the jurists are unanimous on the social aspects of marriage and interpreted marriage following the Quranic provision as a social necessity that the entire society will not be a meaningful place if sexual behavior is left uncontrolled and it is for this reason that Islam recommends marriage. Muslims of early centuries believed that sexual deprivation could lead to mental and physical disturbances bordering on insanity. Similarly, it was widely believed that sexual deprivation was contrary to the preservation of human species, harmful to health and destructive of moral integrity. It was therefore in the interest of the individual and society that sexual relationship be sanctioned and regulated.

Because it is a social necessity, it is absolutely necessary for every individual muslim. Jurists have developed a rough typology to classify individuals with regards to their marriage ability from the point of view of religion in order to enhance the continuity of human race.

Though in Quran 24:33 Allah says in part:

> And let those who find not the financial means for marriage keep themselves chaste, until Allah enriches them of His Bounty...

In a tradition, the Prophet (P.B.U.H.) was reported to have said:

> Whosoever marries safeguards half of faith let him fear Allah for the Second half.[15]

The social aspect of marriage under Islam can be seen from the objectives which marriage seeks to achieve. The following are some of the aims and objectives in the society.

(i) Preservation and continuation of the human race

This is one of the purposes of marriage for which

the Quran 4:1 provides:

> O mankind! Be careful of your duty to your Lord who created you from a single soul and from it created its males and females from them twain hath spread abroad a multitude of men and women and fear Allah through whom you demand your rights.

(ii) Psocho-emotional stability and kindness.

The Quran 30:21 provides that:

> And of the signs is this: He created for you mates from among yourselves so that ye might find rest in them and He ordained between you love and mercy. Lo, herein indeed are signs for those who reflect.

(iii) It serves as a means of social and economic stability especially for the woman. A woman previously could not earn a living because the did not have a source for living because she did not have the access for self reliance while she did not have time due to house chores and child raising to earn a living. Thus through marriage she acquires a right to have a marital home with husband solely responsible for her and her children.

(iv) It serves as a means of socialization and value orientation for the entire society. By virtue of marriage the spouses attain a high social status, particularly on the part of the woman. The marriage Ideally should lead to mutual companionship, love and peace. It brings about new generations and furthers their civilization of each person born is determined enabling them to play a role in the society. Ideally, it is to create legitimate societal morality in order not to have problems of e.g. Paternity, inheritance etc, and to have limit to one's own family. Marriage created and regulated the relationship, which in turn creates stability through love and affection.

(v) Marriage also widens ones horizon and creates cohesion and social solidarity in the society. It also provides motivation for efforts and sacrifice for it enables the husband as the bread-winner to put in more towards achieving his responsibility.

4.2.3 LEGAL ASPECT.

Like the religious and social aspects of marriage the legal aspect of marriage under Islam refers to the laws governing the parties to a marriage. The strong emphasis that Islam has put on marriage may be seen more clearly in the context of the purposes that marriage is designed to serve.

The above view is emphasized by Quran 25:54 which provides that:

> It was Allah who created mankind out of one living soul and created of that soul a spouse so that he might find comfort and rest in her.

Similarly in another provision Quran 30:21 Allah says:

> And it is a sign of Allah that He has created for men of themselves mates to seek in their company peace and tranquillity and has set between them mutual love and mercy. Surely in that are signs for those who contemplate.

From the above Quranic verses it is evidently clear that the legal aspect of marriage centres purely on that branch of marital laws which teleguide and safeguards harmonious relations between the parties and Allah on the other hand.

The various legal aspect of marriage centres on the rights of Allah; mutual rights of the spouses; the rights of the wife, that is, the obligations of the husband and the rights of the husband among other rights. This will be discussed briefly here, but greatly under Chapter 6. Under the rights of Allah the Almighty requires the couples even at the most trying times of their marital life and in the midst of legal disputes and litigation to be kind and charitable to one-another and to be mindful of their duty to Him. In Quran 4:19 Allah says:

> O ye who believe! It is not lawful for you to inherit the woman (of your deceased kinsmen) nor (that) ye should put constraint upon them that ye may take away a part of that which ye have given them unless they be guilty of flagrant lewdness. But consort with them in kindness for if ye hate them it may happen that ye hate a thing wherein Allah hath placed much good.

The rights which Allah demands from the spouses includes the prohibitions of all impediments relating to marriage like the rules of consanguinity; affinity and fosterages; the rights of inheritance if both spouses adhered to

the same religious beliefs, rules relating to iddah whether of death or divorce; paternity and legitimacy of children of the marriage which is obligatory on the husband. It is also incumbent on the wife to disclose the real biological father of her child where there is such dispute.

The mutual rights of the spouses under Islamic law marriage include among others, spouses' rights to sexual intercourse; inheritance and paternity of children of the marriage. Generally, Islamic Law grants some rights to and impose some obligations on the spouses. On spouses rights to sexual intercourse.

Allah in Quran 2:187 says:

> ... They, your (wives) are garment for you, and you (husbands) are garment to them.

There are many other Quranic verses and traditions of the Prophet (P.B.U.H.) on this point. The spouses have been enjoined to have good relations with one another and treat each other honourably and kindly.

In Quran 2:228 Allah said that:

> And divorced women shall wait for three menstrual periods, and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the last day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And they have rights similar over them to what is reasonable, but men have a degree of responsibility over them. And Allah is All might, All-wise.

In another provision of the Quran 4:34 Allah said:

> Men are the protectors of women and managers of their affairs because God has made some excel others and because men expend of their means. The righteous women are therefore devoutly obedient and conscientiously guard in the husband's absence what Allah orders them to guard...

As regards the rights of the husband, he has the right to receive obedience from his wife; he should be allowed to have sexual intercourse with his wife unless there is a legal excuse such as menstruation, Ihram etc. which may entitle her to refuse. In emphasis, the prophet (P.B.U.H.) in a tradition was reported to have said:

> Oh my people you have certain rights over your wives and so have your wives over you. They are not to admit to your house any one whom you do not like and they have to keep their virtue if they fail to do so God has permitted you to desert them in bed and then beat them lightly, they are the trust of Allah in your care so you must treat them with kindness.[17]

Like the husband, the wife has corresponding rights over the husband. Amongst the wives' rights are the following; ... receipt of dower; equitable benevolent and honourable treatment, maintenance and a host of them.

The wife's right to receive dower is an important legal aspect of marriage under Islamic Law. The husband is duty bound to pay the dower. Either immediately or subsequently. Where she dies before the final payment her heirs would be entitled to receive the dower as part of her estate. The same applies after the death of the husband or the dissolution of the marriage.

In Quran 4:4 Allah say:

> And give unto the woman (who ye marry) free gift of their marriage portions; but if they of their own accord remit unto you a part thereof then ye are welcome to absorb it in your wealth.

Equitable benevolent and honourable treatments are also to be accorded to women.

The Quran 2:231 provides:

> And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them, and whosoever does that, then he has wronged himself. And treat not the verses (law) of Allah as a jest, but remember Allah's favours on you and that which he had sent down to you of the Book whereby he instruct you.

4.3.0 PRE-REQUISITES OF CONTRACT TO MARRY UNDER ISLAMIC LAW.

After having discussed betrothal period under contract to marry under Islamic Law attention shall now be turned to some ingredients, which makes a marriage valid, which is referred to as the pre-requisites of marriage.

4.3.1 PRE-REQUISITES OF MARRIAGE

The general principles governing marriage under Islamic law is that after the completion of the preliminary steps of the betrothal and the final agreement a time and a place is fixed for concluding the marriage contract. Unlike what applies in other systems of law the marriage contract is a simple one just like any other civil contract. The contract is simple, as it can be concluded anywhere, whether in a Mosque, house, office etc. and at anytime.

4.3.2. COMPATIBILITY OF PARTIES TO THE MARRIAGE.

One basic pre-requisites of marriage under Islamic Law is that both parties to the marriage contract must be compatible to each other.

The spouses are said to be compatible when both of them are Muslims or when the man is a Muslim and the woman is a, Kitabiyya

(people of the book) chaste and righteous provided the woman is not within the prohibited categories of marriage.

The basis of compatibility is founded on the firm and solemn believe that all Muslims are equal in the sight of God, and they are regarded as brothers and sisters of one another.

In Quran 49:10, Allah says:

> All the believers are but a single brotherhood.

Similarly in Quran 4:24 Allah says:

> Also forbidden are women already married, except those (slaves) whom your right hand possesses. Thus has Allah ordained for you. All others are lawful, provided you seek them in marriage with mehr from your property, desiring chastity, not committing illegal sexual inter-course, so with those of whom you have enjoined sexual relations, give them their mehr as prescribed.
>
> ... But lawful to you are all women beyond this.

In his book, Hammudah Abdal' Ati said:

> The only recognizable criterion of ultimate distinction was that of piety or God mindedness.[22]

There are many traditions of the Prophet (P.B.U.H.) supporting the question of compatibility of parties as well as jurists views. In one of such traditions, it was reported that the Prophet (P.B.U.H) married Zainab bint Jahazh who was his cousin to Zayd Ibn Harithah who was a free slave. He also gave the hand of Dababah bint az-zubani Ibn Mutallib to Migdad in marriage.

Most of the jurists agreed on this position but differed as to what constitutes it. The Maliki jurists hold that what constitutes compatibility is

righteousness and moral uprightness and not occupation, wealth or any other material thing. Therefore a man of lower birth can marry a wealthy woman provided the man is chaste and righteous. The Maliki jurists substantiated their argument with a provision of Quran 49:13 which provides that:

> O men behold we have created you all out of a male and a female and have made you into nations and tribes so that you might come to know one another. Verily the noblest of you in the sight of Allah is the one who is most deeply conscious of Him. Behold Allah is all conscious of him. Behold Allah is all knowing all wise.

They also supported their position with a tradition of the Prophet (P.B.U.H) on the authority of Abu Hatim al Muzani who reported that the Prophet said:

> If a person comes (to seek the hand of your daughters or sisters in marriage) then you should give him the marriage if you are sure of his religiosity and good characters for if you do not do so there will be a lot of commotion and corruption on earth.[23]

There are conditions, which the spouses must fulfill for marriage to become valid. These conditions are as follows ... that the prospective husband must not be in Ihram when the marriage is contracted. This is the view of the majority of jurists while some companions of the Prophet hold that such a marriage is valid. They rely on the tradition of the Prophet (P.B.U.H) on the authority of Uthman Ibn Affan in which it was reported that the Prophet said:

> A man in Ihram should not marry or give in marriage or get betrothed.[24]

Abu Hanifah holds that it is lawful for a muslim to marry during Ihram and that what is prohibited is sexual intercourse.

That neither of the parties should be suffering from death sickness.[25] To Maliki, if either is suffering from a death sickness when the marriage is contracted, it becomes void. The wife-to-be must be specifically distinguished from others by pointing at her if she is present at the making of the contract or by mentioning her name or description if she is not present. The husband-to-be has to possess full legal capacity, that is, he has to be sane. Any marriage contracted by any person lacking capacity is void. However, the marriage may be valid provided all the conditions of validity are fulfilled even though it is subject to ratification of his guardian. The woman should not be one of the prohibited women for marriage. Thus, if the woman is within the prohibited category of women to the man, there is a legal impediment which would render the marriage of such woman void. This will be discussed further below.

4.3.3 CAPACITIES OF THE PARTIES.

Like other system, Islamic law requires parties to a marriage contract to posses' legal capacity for the contract to be regarded as valid. Any marriage contract without the parties possessing legal capacity as required

by law is considered void. If the marriage is contracted by person of incomplete legal capacity (naqisul-alliyyah) the marriage may be valid, provided that all the conditions of validity are fulfilled even though it is subject to ratification of his guardian.[26] The legal capacity of parties to a marriage contract centres on age and mental capacity.

4.3.4 AGE.

A male muslim who has attained maturity can enter into a marriage contract. The general presumption under Islam is that a person attains the age of maturity at fifteen but Hedaya [27] lays down that the earliest period for a boy is twelve years and nine years for a girl. Their guardians can contract the marriage of minors though the minors have the right to repudiate the marriage when they become mature according to the Hanafi School. It is known that the marriage with a minor girl should not be consummated until she attains puberty.

4.3.5 MENTAL CAPACITY.

Generally, the parties are required to be sane at the period of contracting the marriage. However, unsoundness of mind is not an impediment to marriage under Islam. It allows the guardians of the insane woman to coerced her to get married if it is known that doing so could be of benefit to her.

4.3.6 ABSENCE OF LEGAL IMPEDIMENT

Impediment simply put is a condition, which will vitiate another wise good marriage owning to the presence of some encumbrances. Like under the statute, Islamic Law marriages between men and women standing in certain degree of relationship to one another are also prohibited. These prohibitory circumstances may either be of a permanent or a temporary nature. The study will start with the permanent impediments.

4.3.7 PERMANENT IMPEDIMENTS

The permanent impediment is the one that prevents marriage to a woman permanently. In Islamic societies like in other non-Islamic societies and civilization sex between certain classes of relatives is a taboo. The reasons for this prohibition are diverse, ranging from the insurance of a healthy sexual relationship to the improvement of the quality of human descent - this is principally on biological grounds. It would however appear that unlike temporary impediment an individual caught in the web of a permanent impediment can hardly do anything to change or ameliorate the situation or predicament. These impediments are indelibly enshrined in the Quran 4:23 which reads:-

> Prohibited for you (man) in marriage are your mothers daughters; sisters; father's sisters, mother's sisters, brothers daughters, sisters daughters also foster mother, foster sister and also the mothers of your

> wives, step daughter under the care of your wives whom you have already gone to bed with but if you have not already gone to bed with, there is no blame on you if you marry the daughter, also those who, have been to your sons proceeding from your loins and joining together of two sisters - excepts as to what has already pre-occurred. Verily Allah is ever forgiving ever merciful.

From the above Quranic passage three prohibited degrees can easily be divided in to these categories, first, is that based on consanguinity or what is called blood relation, second is that based on lactation, fosterage and lastly is the prohibition predicated on affinity.

4.3.8 PROHIBITION BASED ON CONSANGUINITY

This prohibition as already have been stated, is based on blood relationship - Thus any marriage between persons falling within the prohibited degree is regarded as incestuous and a taboo. They are the mother (including grandmother how high so ever) daughter and grand daughters, the sister irrespective of whether maternal or paternal, and their offspring and the offspring of their of brothers, the paternal and maternal aunts but their off springs are excluded i.e. cousins. This prohibition is of a permanent nature and can therefore not be waived by whatever means/reason. Persons within the prohibited category can legally contract no marriage. And all previously contracted marriages falling within the same are null and void.

4.3.9 LACTATIONAL FOSTERAGE

This is another ground for the prohibition of marriages. This type of relationship is brought about by the fact that the person wanting to get married was breast fed by a woman other than his actual mother. By virtue of such a relationship the person is prohibited from getting married to the foster mother and her daughters just like his direct sister, because both of them were nourished from the same source. With regard to this particular prohibition the prophet (S.A.W) said:

> Whatever is prohibited on grounds of consanguinity is also prohibited on grounds of fosterage.[28]

The prohibition on lactation period as interpreted by some jurists is two years in a period during which a woman is obliged to breast feed her child. The jurists however differed on the number of times a woman is to suck a child in order to create such a relationship. Some say five times. But the two great Islamic jurists Imam Abu Hannifa and Imam Maliki agreed that even a single suckling would be sufficient to create a lactation-fosterage relationship. This view seems to be the most widely applied.

4.3.10 PROHIBITION BASED ON AFFINITY

Affinial ties refer to relationship of persons through marriage. This prohibition can be of a permanent nature. The later are wives' mothers (including grand mothers, how high so ever) wife's daughters, son's wife, fathers father's wives.

The Quran 4:23 provides:

> And do not marry women whom your fathers have previously married, although what is past is past. This verily is a shameful deed and a hateful thing and evil way.

The law is very strict here; in fact the act of marriage even without copulation having taken place brings some one under this prohibitory range. But where a man marries a woman, her daughter becomes prohibited to him only after the man has copulated with the mother; whereas if after marriage sexual act did not take place the man can make a turn around to marry the daughter of the divorced wife.

Note should be taken of the fact that the indigenous laws and customs in Nigeria vary from one ethnic group to the other and that the influence of the Islamic principles such as this is inevitable.

These differences notwithstanding almost all indigenous customs seem to frown at marriage between persons who are related by blood i.e. consanguinity. But in some non-muslim communities in the Eastern states of Nigeria, it is a typical Ibo custom for a son to marry his late father's wives (levirate) with perhaps the exception of his own biological mother.

4.3.11 TEMPORARY IMPEDIMENTS

Temporal impediments as the name implies are those prohibitions that arise by virtue of some special circumstances, in which the parties momentarily find themselves, and if the special circumstances change, the prohibition will be lifted. Some of these special circumstances may include the following.

Where a man is married, he cannot at the same time take in the wife's sister or aunt as second, third or fourth wife. But, where the wife dies or is divorced by him, he can proceed to contract a valid marriage with the divorced wife's sister, niece or aunt.

Another temporary prohibition is that a man cannot marry a married woman. This prohibition is immediately removed on the dissolution of her marriage either by death of her husband (after a completion of the iddah period) or by divorce.

Quran 4:24 provides that:

> And all married women are forbidden unto you save those (captives) whom your right hands posses; It is a decree of Allah for you....

The sharia law permits a man to have the maximum of four wives at a time.

The marriage to four wives temporarily barred the man from marrying the

fifth, etc. However, this impediment will be removed as soon as one of the four wives dies or is divorced.

The law also prohibits the marriage of a woman during the period of observing "Iddah" (waiting period following divorce or death of husband) when a woman is observing this "retreat" she cannot enter into a contract of marriage legally. After the 'retreat" she immediately becomes free to contract a legal marriage.

Quran 2:234 provides in part that:

> And those of you who die and leave wives behind them, they (wives) shall wait for four months and ten days, then when they have fulfilled their term, there is no sin on you if they (wives) dispose of themselves in a just and honourable manner

Further more the Quran in 2:235 provides that:

> And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from marrying their (former) husbands, if they mutually agree on reasonable basis.

The only Quran and traditions of the Prophet (PBUH) expects every muslim to obey these basic tenets. In fact, a specific proposal of marriage to a woman undergoing iddah after the death of her husband must be refrained from. Also parties in state of Ihram are not allowed to contract marriage until after the Ihram. In a tradition the prophet was reported to have said:

> A man in Ihram should not marry or give in marriage or get betrothed.[29]

4.4.0 MARRIAGE FORMULAS

Marriage formula constitutes the essentials of marriage. These are four. Marriage formula in Islam means sighah and this includes offer and acceptance; witnesses (Ash-shuhud) sadaq, (dower) marriage guardian (waliy). They will now be examined.

4.4.1 OFFER AND ACCEPTANCE

In Islam, offer and acceptance means sighah. The former is called "Ijab" and the later "Qabul". The jurists are of the view that the basic elements are only two, namely al-Ijab (offer) and al-Qabul (acceptance).

In every marriage contract under Islamic law, offer and acceptance are very essential in order to validate it. The offer al-Ijab is a declaration expressed to create the contract. Acceptance, al-Qabul is the mutual consent expressed by the other party signifying the acceptance of the offer and agreeing with the contract.

According to all jurists it does not matter who makes the offer or the acceptance. The offer and acceptance can be made orally where all the parties are present or by writing, where both parties are absent. Regarding the expression to be used all the jurists agreed that if the expression of the offer is such that it denotes marriage, with words such as Zawwajtu or An-kaltum meaning "I have married you", or I have wedded you", the marriage will be valid. The Shafii and Hambali Jurists insisted that only words

derived from Az-zawat and An-Nikkah both meaning marriages, are accepted. The Hanafi jurists hold that any expression used that is understood to be an offer is valid except such terms that its meaning signified Ijarah (lending) Rahan (pledge) Ihlal (legalizing) Tamattu (enjoyment). All such marriages have been prohibited by both the Quran and traditions of the prophet (PHUH).

With regards to acceptance Qabul, the Maliki Hambali and Hanafi agreed that it can be by any expression that denotes agreement and acceptance of the offer such as "Qabiltu" (I have accepted)" Wafagtu (I have concurred) "Raditu" (I have agreed). But the Shafii held a contrary view. According to them it should be the term "Az-zawwah an-Nikkah and Qabiltu Tazwijaha or Qabiltu Nikkahaha, meaning.... I have accepted her marriage or agreed to it.

Where both intending parties to the marriage are present and are capable of expressing the offer verbally, they must express it verbally. Signs or writing is not necessary unless where one party is absent. The offer and acceptance must be at "one meeting place" (Majilisilaqd). Accordingly, if the "meeting" is broken before the offer is accepted that offer lapses. Hambali and Hanafi jurists are of the view that the acceptance needs not to be immediate, provided that it is made at the same meeting. The Shafii and Maliki jurists are of the view that it must be immediate even though they allow a minor or slight interruption.

The acceptance must correspond with the offer. Thus, if the offeror (guardian) said I have married you to my daughter Zainab and the offeree (husband) said, "I have accepted your daughter "Maryam", the marriage is void. But if this inconsistency between offer and the acceptance concerns the sadaq as where the offeror (guardian) said "I have married you to my daughter "Fatima" with the sadaq of ₦500.00 and the offeree said I accept her with the sadaq of ₦1000.00 then the marriage is valid. The same rule applies where the suitor offers to marry a woman with ₦1000.00 sadaq and she or her guardian accepts ₦800.00 sadaq.

The offer and acceptance must be immediate and where it is made subject to certain happenings in the future it becomes invalid.

For example, if the suitor said to the woman or her guardian that I will marry her if I get a job in future and the woman or her guardian accepts, then the offer and acceptance is not valid. Both parties should hear and understand each other irrespective of the mode of communication used. This means that the offeree or suitor must ascertain clearly what the offeror intends and the offeree must know that the offeree genuinely accepts the offer.

4.4.2 STIPULATIONS IN MARRIAGE CONTRACT. (SHUROUT/ASH'SHARD)

Stipulations are those conditions that either of the party to the marriage contract may require the other to fulfill at the time or before the

conclusion of an Islamic Law marriage. For the purpose of convenience, the stipulations are categorized into four groups.

Stipulations that strengthens and enhance the legal effects of marriage are valid and enforceable; Examples are stipulations on maintenance, feeding and clothing of the wife. And also a reciprocal on the woman of obeying the husband and that she must not go out without the husband's permission. Both parties must fulfill these conditions even without their express mentioning.

Stipulations that negate the legal effects of marriage; Examples are stipulations that wife would maintain herself, or that there will be no sexual intercourse by the parties, no payment of sadaq. Such stipulations are unlawful because they negate the legal effects of marriage even though they are valid as between the parties. All the jurists agreed that, such conditions should not be fulfilled.

Stipulations that are to the exclusive benefits of the wife; For example, a condition that she will not be taken away from her parent's house or that the husband will not marry another woman throughout the subsistence of their marriage. As regards this position, the jurists differ. The Maliki, Hanafi and Shaffii are of the view that the marriage is valid but the conditions are not operative and must be removed. They support their

view with the following traditions and Quranic provisions. Quran 5:1. It provides that:

> O ye who believe! Fulfill all obligations.

In one tradition, the prophet (PBUH) said:

> Muslims are bound by their conditions or stipulation except a condition or stipulation that legalizes the unlawful or prohibits the lawful.[31]

In another tradition the prophet (PBUH) said:

> Any condition, which is not in Allah's book is invalid even if it is stipulated hundred times.[32]

The Hambali and other jurists are of the view that such conditions must be fulfilled. Thus if the husband does not fulfill it the marriage should be annulled. They supported their views with the decision of Umar Ibn AL-Khattab who decided a case in favour of a woman over a condition which her husband accepted before they concluded a marriage contract on the basis that: .... "The rights and obligations are decided or determined at the time of entering the contract." The jurists further argued that accepting any condition do not amount to the prohibition of the lawful things, it is only a voluntary sacrifice of the one's right in return for another's woman favour without which the marriage contract cannot be concluded.

Commenting on the above tradition, the Maliki jurists hold that any marriage, which is contracted in the light of such forbidden stipulation, must be annulled, provided that marriage is not consummated. But where the marriage is consummated the marriage continues and the stipulation is inoperative and the wife does not deserve the specified sadaq but only the proper sadaq because the presence of any unlawful conditions causes defects in the specified sadaq.

The Hambali jurists are of same view with Hanafi, except that they consider some conditions as exceptional and that such condition invalidates the marriage contract. Among such conditions are: to stipulate that the wife will be divorced within a specified time and to stipulate that the marriage can be repudiated within a specified period, by either or both of the parties.[35]

4.5.0 MARRIAGE GUARDIANSHIP

A Marriage guardian for a muslim woman must be a free muslim male who is Islamically competent to run his affairs by himself. It is said to be the legal authority vested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently.[36] It could be the authority of the father or a nearest male relative over the minor, insane or inexperienced person who

need protection and guardianship.[37] However, distinction must be made between a marriage guardian and other legal representatives. The former is normally the nearest male relation in whose absence a community official may assume the responsibility.

The right conferred on or the duty assigned to the guardians is ascribed by law and cannot as a matter of fact be unilaterally terminated.

A legal representative on the other hand, is any person who agrees through private negotiations to represent another party within the authority delegated to him by the principal party and in some cases by the guardian. As regards who should have a guardian in a marriage there has not been consensus amongst the different Islamic schools of thought. The general view however is that minors, insane, inexperienced, and irresponsible persons of either sex must have marriage guardian.[38] Despite this, emphasis has always been laid on the woman and little is said about the corresponding need of the same for men. The reason for this may be due to the fact that men are generally believed to be relatively more experienced than women who tend to marry women/girls by far their juniors. Hence the provision of guardianship for minors and in-experienced women.

It is the woman who needs a guardian in Islam because she is usually considered inexperienced in practical affairs and, as she may be intrigued into commitments contrary to her interests. It is argued that if marriage is

not contracted on her behalf, she may appear to be inconsiderate, presumptions and inclined to inter-mingle with men, such actions would customarily stigmatized her character. Because of these, some jurists agreed that a guardian is required to protect the woman's interest in order to safeguard her moral integrity and to take possible precaution to maximize the probability of a successful marriage.[39] And because the father love and care for his daughter are usually taken for granted, he is the first man to qualify as her guardian provided of course he meets the requisites of guardianship.[40]

4.5.1 AUTHORITIES ON MARRIAGE GUARDIANSHIP.

Marriage guardianship is one of the essential pillars of a valid marriage contract under shariah. And marriage guardianship is the power invested in a person who is fully qualified and competent to safeguard the interest and rights of a woman in the circumstances of contracting her marriage.

There seems to be an over lapping of the right to guardians in this sense and other forms of legal representation and delegation already discussed. There is a lack of agreement among the jurists on the guardian's authority and the extent of the ward's right, but they differ on whether guardianship in marriage is a condition for the validity of the marriage. The majority are of the view that marriage guardianship is a condition any

marriage contracted without it is void. Saydina Umar, Ali Ibn Masud, Ibn Abbas, Abu Hurairah, Aisha as well as Imam Maliki and Shaffii accepted the view. They rely on the provisions of Quran and traditions of the prophet (PBUH). In Quran 24:32 provides that:

> And (you ought) to marry the single from among you as well as your male and female slaves as are fit (for marriage).

Quran 2:221 provides:

> And do not give your woman in marriage to mushriks.

The point here is that the guardians (men) are being addressed regarding the marriage of their wards. It was reported on the authority of Abu Musa that the Prophet (PBUH) said:

> There is no valid marriage without a waliy (guardian)[41]

Like the Quran, the tradition cited above also addressed the guardians. The supporters of this view argued that marriage has a number of objectives and purposes and that many women are emotional and sentiment in choosing partner for marriage as result of which they make wrong choices and consequently misses the opportunity of attaining these objectives. It is for reasons such as these that she is prevented from pursuing her own marriage directly, but through a guardian in order to achieve these objectives and purposes sufficiently and effectively.[42]

Abu Hanifa and Abu Yusuf are of the view that a woman of full age and full legal capacity has the right to directly contract her marriage

whether she is a virgin (Birk) or a matron (Thayyib). They however agreed that it is better for her to assign her agnatic guardian to contract her marriage on her behalf so as not to appear inconsiderate. They further argued that since a woman has the right to deal directly in all commercial transactions, she should have the right to contract her own marriage. They argued that the prophetic tradition in respect of guardians are referring to women of incomplete legal capacity like minors, insane and the inexperienced. The supporters of this view substantiated their view with the provision of the Quran 2:230 in which Allah said:

> So if a husband divorces his wife (irrevocably) he cannot after that re-marry her until she has remarried another husband (and he has divorced her)...

Marriage in the above verse has been prescribed to the women exclusively and not guardians. Therefore guardians are not a condition precedent or an essential ingredient for the validity of the marriage contract of an adults, divorcee or widow. Similarly, from the prophetic traditions they relied on the tradition narrated by Abu Hurairah that the Prophet (PBUH) said:

> A matron should not be given in marriage except after consulting her, and a virgin should not be given in marriage except after her permission is sought for. The people asked O Allah's Apostle how could we know she has given her permission? He said: Her silence is her permission[43]

The importance of guardianship cannot be over emphasized and it was on this basis that Allah in Quran 2:232 provides:

> When ye divorce women and they fulfilled the term of their iddah do not prevent them from marrying their former husband if they agreed on equitable terms.

Similarly, there are various traditions of the prophet (PBUH) supporting the above verse of the Quran on the importance of marriage guardians. In one tradition reported by Aisha (May Allah be pleased with her), she said that marriage during the days of Jahilliyah was of four types, one of them is where a man becomes betrothed to another man's daughter or ward, the guardian specifies the dower and the bride-groom pays it in consideration of her marriage. In another report she narrated that the prophet (PBUH) said:

> The marriage of a woman without the consent of her marriage guardian is null and void.[44]

4.5.2 CLASSES OF MARRIAGE GUARDIANS

In discussing marriage guardians it is necessary to know the followings and their roles in a marriage contract.

(1) Wali Mujbir (i.e. with the prerogative power)

Wali Mujbir refers to all male nearest relations (agnate) to the girl/woman or ward who has the right to impose their power on such females to marry regardless of their choice. In the absence of the nearest male relation, the community may assign a person such power.

The Maliki law provides that only the father or his executors have the power of Ijbar (compulsion) over his son or daughter in respect to marriage as follows:

(a) his young virgin daughter

(b) his young daughter who has lost her virginity

(c) his adult virgin daughter until she becomes an adult

(d) his insane daughter whether adult or young and his adult thayyib daughter who lost her virginity outside wedlock

(e) his young son.

The Hanbali law agrees with the Maliki law but restricts it to only the minor daughters, virgin or otherwise. The Hannafi law provides that the power of Ijbar (compulsion) can be exercised only in respect of his minor daughter virgin or otherwise which do a father and agnatic relations deemed to lapse when he attains puberty. And a woman has the right to opt out of the marriage contracted by a marriage guardian other than a father or grandfather after attaining puberty, i.e. repudiating the marriage which is known as the doctrine of Khiyar al-Bulugh[45]. The right would be considered to lapse by lapse of time, receiving the dower or if the marriage is consummated. The Shafi'i law gives the father and the father's father only the right of Ijbar on a virgin daughter only. They maintained that to give any other this right would amount to oppression on the child since not all relations are equally interested in its welfare and happiness as the father

and grandfather, that the more distant the relation is to the child the matter would be less important to them than their person.

(ii) Wali not Mujbir: these are marriage guardians who are legally authorized to possess the power of Ijbar (compulsion) to contract a marriage for a ward. This power is assignable to many people whereas the order of priority differs as seen below:

The Maliki and Hanafi Laws:

In the absence of Wali Mujbir, the agnate relations of the woman take precedence over those of agnatic ones. This is the order of the agnates priority;

(a) the woman's son and his descendants even if the son were a son of zina.

(b) the father and the father's father how high so ever

(c) the brothers germane and consanguine and their sons with the germanes taking precedence over the consanguine.

(d) Paternal uncle's germane and consanguine and their descendants with the germanes taking precedence over the consanguine.

The Shafi'i Law:

The rule of priority for wali not mujbir is the same as in Maliki and Hanafi laws, but excludes the son and his descendants as wali (guardians).

The Hanbali Law:

The rule here agrees with that of the Shafi'i, and also agrees with the Malikis but where the Wali Mujbir refused for no just cause to marry his ward off, the political leader i.e. the judge can step in as the wali for the interest of the ward. The Law of Maliki is followed and applied by the courts in Nigeria.

There are two distinct classes of guardianship. There is that which is based on consanguinity relationship and that which is merely conferred. In the latter case, the guardian is conferred an authority by a superior body to act as one if, he fulfills all the conditions of a proper guardian. With regard to blood relationship as a determinant of a guardian, it is regulated with special laid dawn specification, and it follows a hierarchical order. Priority is given to the son or the grandson of the woman who intends to contract the marriage according to Hanafi School, and under Maliki, Shafi'i and Hanbali.

The woman's father takes precedence over her son and brothers. The guiding force behind the hierarchy is the affinity or closeness of the person to the woman as reflected in the hierarchy of inheritance. The son and the father, for example, are the closest to the woman but the son comes first before the father because in the estate of a woman, he is the most qualified.

It is worth noting here that if the father-hood or the biological father has not been recognized, i.e. no qualified e.g. he cannot have the right of a marriage guardian at any point in time. In such an instance the son or other agnatic relatives of the woman will be the person to be considered for guardianship. This is just an exception because ordinarily a father takes precedence over the brother, next to the father in terms of closeness is the grandfather, followed by her brothers full or consanguine and their children. In the same vein, her cousin, who is the son of the father's full brother takes precedence over the cousin who is son of her father's half brother.

In the occasion where the woman does not have any relations, or former master in the case of a freed slave, the right automatically falls on the person who brought the woman up or the person under whose care she spent a period of not less than 10 years. However, in the absence of the above class of persons, the government becomes the guardian - This is usually done via the office of the judge or his agent or any muslim person.

It should be borne in mind that the right of the guardian to decide whom his ward should marry (power of ijbar) is exerciseable only by the father of the woman who falls within the following categories;

(a) A "birk" i.e a woman who has never married before. Age is of no barrier here also of no relevance is the fact whether she is still a virgin or she has lost the virginity as a result of adultery or any other cause.

(b) The father in his capacity as waliy can exercise the power of Ijbar on his daughter who has ceased to be a virgin due to a valid marriage in which the husband later died or obtained a divorce before the girl attains the age of puberty.

(c) Where the bride remains a minor and a virgin after the dissolution of the marriage, which lasted less than one year.

(d) The father has the right to exercise the power of Ijbar on his daughter whether married or not; minor or adult, if the daughter does not possess full reasoning faculty.

(e) In all the above, if the father had however stopped taking care of the daughter, his right in respect of determining the choice of his daughter's husband will be forfeited. It should be borne in mind that the above situation does not per-se give the father an unfettered right on the choice of her daughter's husband. His acceptance or denial of any husband must be in the best interest of the girl child. He can therefore not compel his daughter to marry a man who is suffering from diseases such as leprosy, mental disorder or gynecological ailment. In a nutshell, while other categories of guardian such as son, brother, uncle, etc. need to obtain the consent of their ward before giving their hands out in marriage, the father need not seek their consent but must prove to be acting in the interest of the daughter so to speak.

Failure to abide by the above categories of guardian the marriage would be declared null and void if she later resents it. A case in point was that of ***Muhammad Abubakar V Hadiza Muhammad and Ibrahim Ndagali Chakyail***[st46]. The plaintiff urged the court to annul the purported marriage caused to be conducted by the *Etsu Patigi* in his palace on 21st April, 1991 because he as the father of the 1st defendant/ Plaintiff did not consent to the marriage.

After obtaining evidences for the parties and witnesses, the trial court came to the conclusion that, the marriage was void ab-initio, but however refused to grant the plaintiff's prayer for a perpetual ban on the parties to contract any other marriage.

The plaintiff dissatisfied with the decision of the lower court took the matter on appeal. The Appeal Court confirmed the judgment of the trial court in refusing to bar the defendant and respondents from contracting any further marriage. It also upheld the lower court's decision to dissolve the marriage.

(ii) Wali not Mujbir

Some cases on the application of Ijbar in Nigeria will be studied below. In the following case the power of Ijbar studied below, was exercised by an uncle who was the brother of the girl's father:

Mairo Baba Nasidi V Alhaji[47] at the Kano upper Area Court. Mairo Baba Nasidi was a fourteen years old student of W.T.C. Bajoga in Bauchi State.

Her father's senior brother went to her school to seek for her transfer letter to Queen Amina School, Kaduna that the principle in good faith granted. Instead of taking her to Queen Amina College he married her out to Alhaji Sani, a businessman in Kano who was about seventy years old. She refused to be led to the Alhaji's house and remained in her mother's house. It was reported that he chained the hands and feet of Mairo while he beat her. The matter was taken to the court where the lower court upheld the marriage. On appeal to the Sharia Court of Appeal, Kano, it was held that the uncle did not have power of Ijbar. In ***Alhaji Isa Bida V Baiwa***[48], the father of Baiwa had initially intended to many his daughter to his brother's son, he changed his mind and requested her to bring the man she would like to many. She then proposed to marry one Mamman which she informed her father. He agreed but later changed his mind and rejected him. The court actually found out that the father had authorized his daughter to bring the man she would like to marry, which she did. The court was told that the mother refused her to marry her father's brother's son, while the father rejected Mamman because his (Mamman's) mother and brother were suffering from leprosy. The court found out that Mamman's mother and brother were not suffering from leprosy as claimed by Baiwa's father. The court said there is no valid reason for the girl's gather to refuse the marriage.

The father, Alhaji Isa appealed against the decision of the Upper Area Court Minna, to the Sharia Court of Appeal, Sokoto on the ground that he has the right of Wali Mijbir over his daughter. The court said that he the father had authorized his daughter to conclude her marriage and her affairs with some one of her choice. That the father had no right to force her to marry some one else. The court said the source of this right of the daughter in this circumstance is in Jawahir ul – Ihlil, a commentary on Mukhtasar Vol.1 p 280. Similarly, in the case of ***Karimatu Yakubu & Anor V Yakubu Paiko &Anor***[49] the Kaduna Court of Appeal said:

> In the Maliki Islamic School of Law, a father has a right to compel his virgin daughter in marriage without her consent: but where he gives her the right to choose between two or more suitors, he has lost his power of Ijbar and marriage contracted without her consent is in valid.

In this case a nineteen years old girl had three suitors. The gather talked to her against one and she had to choose one from the remaining two. Her father objected the one she chose on the ground that he did not know him. This led to the dispute now before the court.

The Limit of Ijbar

i. The right of a father to decide whom his daughter or ward should marry does not extend to allow him to compel her to marry a man who is not mentally fit or with diseases such as mental sickness, leprosy or those that affects the reproductive system.

ii. He does not have such right on a Thayyi woman (i.e a woman who had been married before) provided she has reached puberty and sane

iii. The father can delegate his right of Ijbar over his female slave whether she is Bikr (i.e a woman who has never married, whether minor or adult of over forty years old) or Thayyib

iv. Express consent of a widowed or divorced woman is needed before giving her out for marriage. And a woman who has never married should not be given out for marriage without her consent. Her silence indicates her consent.

4.5.3 WITNESSES

It is an important requirement of Islamic law that the solemnization of marriage should be witnessed by at-least two honest and pious people in order to remove doubt and the absence of pious people arouse the need for a good-number of people to witness that the Waliy (Guardian) makes the offer and the suitor accepts it.[50]

The muslim jurists differ as to whether the presence of witnesses at the time of the marriage contract is essential or not. The majority is of the view that the presence of at least two witnesses is essential for the validity of the marriage contract. According to Hanafis no marriage is valid unless it is contracted in the presence of at least two competent witnesses. They

relied on numerous traditions of the prophet (PBUH). One of such authorities was reported on the authority of Abdullahi (May Allah be pleased with him) who narrated that the prophet (PBUH) said:

> It is only the "Bagaya" (prostitutes) that get them married without witnesses.[51]

In another tradition it was narrated by Abu Zubair al-Maliki, that a case was brought to Caliph Umar of a marriage, which have been witnessed by only one man and one woman in respect of whom he said:

> This is a secret marriage and I will not permit it. Had I been the first to come upon it, I would have ordered that they should be stoned to death.[52]

The Maliki jurists on the other hand are of the view that although witnesses are one of the essential conditions for the validity of marriage, their presence when the marriage is taking place is not necessary, it is only mandatory. However, the presence of the witnesses is obligatory when or before the marriage is consummated.

Thus, if the marriage is consummated without witnesses, it must be repudiated with one irrevocable divorce. No woman in Islam gives, herself out for marriage. As one scholar puts it.....

> Women and children are under the exclusive control of the man even in the egalitarian society[53].

However, where the marriage is contracted in the absence of witnesses and the guardian after that informed two witnesses that he had married his daughter (or sister) to somebody (mentioning the name of the husband) and

the husband also met two witnesses and informed them that he had married a woman (mentioning the name of the wife), the marriage in this case is valid.

According to another group of jurists, they hold the view that there is no need for witnesses to be present so long as the marriage is publicised before consummation by walimah. This has been the view of Ibn Abi Layia, Abu Thawr, Abdulrahman Ibn Mahdi, Yazid Ibn Harun, Dawud Ahmad Ibn Hanbal, Abdullahi Ibn Idris, al-Anbari and Zuhri. This was also practiced by Abdullahi Ibn Umar al-Hassan Ibn Aly, Abdullahi Ibn az-Zubair, Salim and Hamzah the sons of Abdullahi Ibn Umar Iman Mali also has the same view.[54]

4.5.4 CONDITIONS OF WITNESSES.

All the jurists are unanimous in opinion that the witnesses to a valid marriage under shariah must be sane, adults, muslim, if both parties are muslims they must possess the full legal capacity and must all hear and understand what the parties to the contract say. They however differ on the following conditions; Moral integrity (**Adalah**) according to the Maliki, Shaffii and Hambali Jurists, moral integrity which means being on the right path, and not deviating from the teachings of Islamic tenets is a condition regarding the requirement of witnesses. Thus, any marriage contracted upon the testimony of "**fasiq**" (one who transgress the boundaries of Allah)

is void. The Hanafi jurists on the other hand, are of the view that **adalah** (uprightness) is not a condition and that marriage which has been witnessed by a **fasiq** remains valid because whoever can be a guardian in marriage can also be a witness to it. Moreover the purpose of witnesses in marriage contract is to publicise and announce it.

4.5.5 FEMALE WITNESSES:

According to the Hanbali and Maliki jurists witnesses in marriage contract must be male. Thus even if a marriage contract is witnessed by one man and two women or one man and one woman or (married women alone) no matter how great their number is it remains void. This is because it has been narrated by Abu Ubaid on the authority of az-zuhri who said:

> It is a Sunnah (a practice) that has been reported from the prophet (PBUH) that female witness in hudud, or in marriage, or in divorce, is not lawful and therefore inadmissible[55].

Malik also reported it in his book Al-MUWATTA (already stated above) that a case was brought before Caliph Umar of a marriage which has been witnessed by only one man and one woman and he said:

> This is a secret marriage, which I do not permit. And had I been the first to come upon it I would have ordered them to be stoned.[56]

Whereas the Hanafi jurists are of the view that a marriage witnessed by a man and two women is valid and they supported their view with the provision of Quran 2:282 which says in part...

> And call upon two of your men as witnesses and if two men are not available, then a man and two women from among such are acceptable to you as witnesses.

The argued that though this verse concerns commercial transaction it can by analogy (Qiyas) be extended and applied to the contract of marriage. Ibn Hazam is of the view that it is legally right to contract a marriage with the witness of one man and two women alone, because the prophet (PBUH) was reported to have said:

> The testimony of a woman is equivalent to half of the testimony of one man[57].

The Qualification of a witness

FREEDOM: Abu Hanafi and shafii are of the view that the witnesses must be free and that the testimony of a slave is not valid. Imam Maliki Ibn Abi Laila, Abuzzinad and Shuraih have the same view. Ahmad Ibn Hambali on the other-hand is of the view that the witnesses of two slaves to a marriage is valid since there is no Quranic verse or tradition to the contrary.

MUSLIM : If the spouses to be married are muslims then the muslim jurist unanimously agreed that the witnesses also must be muslims. But if the husband is a muslim and the wife is a (kitabiyyah) people of the book,"

the jurists differ on this. Hambali and Shafii are of the view that the witnesses must be muslims and that the testimony of a non muslim is not accepted because the marriage is that of a muslim. Abu Hanafah and Abu Yusuf on the other hand hold that the witnesses of two kitabi are valid if a muslim marries kitabiyyah.

4.5.6 NECESSITIES OF WITNESSES

Marriage under shariah is a declaration by the marrying couples that they will be united in wedlock and that they want public to know this fact about them in order that they may in future be treated as such for all social purposes. The prophet (PBUH) strongly urged his companions and followers to publicize their marriages with at least two witnesses.

The need for witnesses in a marriage contract is akin to publicity of the marriage and to publicize a marriage means to be performed in public (among friends' relatives and well wishers) through festivities like walimah drum beating and dancing. However, indecent and luxurious amusements are against the practice of the Prophet (PBUH) and the spirit and teaching of Islam.

Similarly, the necessities of witnesses also arise in future relating to the issue of legitimacy of children of such marriage. This is also the reasons why the witnesses to any marriage contract are required to be

governed by certain conditions before they can become competent to serve as a witness or witnesses to any marriage contract.

4.6.0 PUBLICITY

Like the payment of dower is a pre-condition for a valid cohabitation of husband and wife, marriage made in secret is a nullity in the eyes of islamic law according to some jurists. Others hold that the contract is valid, but the secrecy only makes it non-religious and therefore reprehensive. The general view is however that publicity is an element, which distinguishes legitimate unions from illicit ones. In fact, the prophet (PBUH) recommends marriage feasts and sanction folk music and singing during wedding ceremonies[58]. The probable reason for this is to show to the whole world that the two persons have become one and therefore judicial notice must be taken thereof. The implication of this is that any body dealing with either of the party should be taken to know of the existence of the marriage whether he was present at the time it took place or not. Thus frivolous justification that he did not know of the existence of such a relationship will not be acceptable.

4.7.0 SADAQ/DOWER; PAYMENT OF DOWER

The term dower is given the appellation "sadaq" in shariah. Sadaq epistemologically speaking comes from the arabic word "sidiq" which

means truthfulness and sincerity. Therefore the offer of sadaq indicates sincerity of the love of the man for the woman while on the other hand, the acceptance by the latter of the sadaq connotes a sincere response to the formers' offer. The two (offer and acceptance) put together symbolizes a sincere vow by both parties to live together as husband and wife according to the dictates of Islam. Whereas sadaq usually consists of money property or any movable object. It may also consist of services rendered by the bridegroom to the bride or to the latter's family. There are however some cases in some non-Islamic societies in Nigeria, Africa and others where it was the bride that pays the price to the groom.[59]

It was a practice before the coming of Islam that for a daughter or sister price is paid, is as old as mankind itself, yet it is still very obscure to many and of interest to the legal minds. The motive or origin of "bride price" according to a contemporary anthropologist must be sought in a family set up in which a young girl was an economic asset for her father's family. The departure of the girl from her own family was an economic loss and this was compensated by the "bride price". From the point of view of bridegroom's family the acquisition of a wife meant the addition of a pair of working hand in exchange for the amount paid over the bride's family[60]. This view point as useful as it may be can only partly explain the origin of the indigenous custom but it cannot explain its continuos existence particularly where there are no such extended families, or where the woman herself is the recipient of the dower as it is the case in Islam. Apart from this economic justification, there is another one based on the father's loss of his

daughter's services and all her future progeny. The father who suffers such irreparable loses should receive some material compensation.

In the rare situation where the bride's family pays the price to the groom or his family it has been held to be a purchase sum by which a father buys a husband for his daughter[61]. This is frequent in societies where the sex ratio is low or where a large number of females never marry, and finally where the married women are noted for living indolent lives. In some societies like Athens, it is seen as "the wife's contribution towards the expenses of marriage and at the same time served as an obstacle to the dissolution of the union for frivolous reasons[62].

It should be noted that the payment of a sadaq is enjoined by the Quran, and the tradition of the prophet (PBUH) as earlier said it may consist of money, property, movable immovable objects or services rendered to the bride which must however, be valuable and regarded as a lawful articles for a muslim to own. But items like alcohol, pigs, or musical instruments are not valid for a dower.

It is said that a companion of the prophet (PBUH) wanted to marry a certain woman but had nothing to offer to her as dower. The prophet (PBUH) asked him to teach her whatever he knew out of the Quran and that was said to tantamount to a good dower. It is also worth of mention here that dower is the exclusive right of the bride and she can dispose of it as she deems fit. Thus it has been agreed that her right eliminates or reduces the

element of self-interest and power of the guardian in his choice of a husband for the ward. He will therefore be concerned only with what is in the best interest of the woman since he does not have any thing to gain by way of a high dower. This aspect is also believed to "remove control over their affairs from the woman's relatives and protectors and to vest it in themselves[63].

Islam does not set any specific amount as the minimum dower. The general principle however is that dower should be estimated according to circumstances with emphasis on moderation. The prophet (PBUH) is reported to have said that the most blessed marriage is that which is least costly and most easy. In fact, there were instances during the prophet's (PBUH) time where dower was as low as two dirham's or less than one dollar.[64]

Apart from the various shade of opinion as to the reason of dower modern muslim jurists have held the view that dower is enjoined in return for the man's right at least potentially to have legitimate access to cohabit with the woman in question.[65] And that she is entitled to the same because she has consented to marriage and made herself assessable. There is however no hard and fast explanation to account for the institution of dower in Islam. Hammudah Abdal Ati suggest that dower is probably a symbolic expression of the groom's cognizance of the economic responsibility of marriage and his readiness to discharge all such responsibilities subsequent

to the marriage. It may be thought of as a manifest assurance on his part that the bride's economic security and rights will be maintained. It is a symbolic acknowledgment that he does or will dissociate the purpose of marriage from the design of economic exploitation.[66]

4.7.1 THE NATURE OF DOWER

One of the oldest customs in the relationships within the human family is that man has to pay a dower or on the occasion of marriage. Not withstanding, the payment of dower, the man was responsible during the whole period of marriage for the maintenance and up keep (nafaqah) of his wife and children.[67]

As one of the first steps to seeing her pleasure and as a token of respect for her acceptance, a gift was given to her. There are various provisions of the Quran on the issue of dower. In Quran 33:50, it provides:

> O prophet! Lo! We have made lawful unto thee thy wives unto whom thou hast paid their dowers and those who thy right hand possesseth, of those whom Allah hath given thee as spoils of war, and the daughters of thine aunts on the fathers side, and the daughters of thine unless on the mothers side who emigrated with thee and a believing woman if she gives herself unto the prophet and the prophet desire to ask her in marriage - a privilege for the only not for (rest of) believers - we are aware of that which we enjoined upon them concerning their wives and those whom their right hand possess - that thou mayst be free from blame, for Allah is forgiving merciful.

All the Islamic jurists agreed that dower is a basic requirement for the validity of marriage. The obligatory nature of dower is clearly expressed in both the Quran, and Sunnah. In Quran 4:4 it provides.

> And give unto woman their marriage portions in the spirit of gift.

Also in Quran 4:24 it provides:

> And those of whom ye seek content (by marrying them) give them their portion as a duty.

The prophet (PBUH) paid dower to all his wives and all those who married his daughters were made to pay dower to their wives.

Again, as to what could be given as dower, the nature ranges from money, property or any movable object. It may also consist of services rendered by the bridegroom to the bride or to the latter's family. On the nature of dower, the jurists are unanimous that it has to be a valuable property (Mal-muthgawwam) the quantum or value of which is certain and the delivery of which is certain, possible and specified. It can be moveable (Manqul) or immovable (Aqar). And it can be usufruct (Manfa'ah) or services rendered to the bride.

The above pre-supposes that it is only something that is valuable that can be given as dower and all that is forbidden in Islam cannot be given as dower. For example, pig, alcoholic drinks or wine cannot be given as dower, which is the unanimous view of the jurists. However the jurists

differ as to whether the invalidity of the dower affects the validity of the marriage.

The Maliki jurists hold that if the sadaq is not valid the marriage becomes invalid and must therefore be annulled, unless it has been consummated, then it becomes valid and the wife deserves proper sadaq.[68]

The Hanafi, Hambali and Shafii jurists on the other hand are of the view that the invalidity of dower does not invalidate the marriage. This is because even if sadaq is totally not mentioned when the marriage is contracted this will not affect the validity of the marriage likewise an invalid sadaq cannot affect its validity.[69]

The Maliki Law – Shafi'i Hanbali[70] hold the view that sadaq is paid in cash or kind, but whatever form it takes its value should not be less than ¼ (one-quarter) dinar or 3 dirhams. The payment of sadaq is not only limited to cash. Its flexibility shows the design of Islam to put marriage within the reach of all cadres of men (rich or poor) that is best reflected by its being allowed to be paid in cash or in kind. The above instances are good examples to illustrate the modesty of Islamic mode of marriage. Amir Ibn Rabia reported that a woman belonging to the tribe of Fazarah married with sadaq of a pair of shoes. The prophet (PBUH) asked her: Are you satisfied with a pair of shoes considering yourself and your wealth. When she answered in affirmative, he approved the marriage.

4.7.2 CLASSIFICATION OF DOWER:

Dower is categorized into two:

1. Specified sadaq and 2. Unspecified sadaq.

i. Specified sadaq (as-sadaqul-Masamma) is the one, which is fixed and agreed upon by both parties to the marriage contract before or at the time when the marriage is being contracted.

ii. Unspecified or proper sadaq (sadaqul Mithl) is that which is commensurate and equal to the woman's value from among the bride's father's family, like her germane or consanguine sister, her paternal aunt, her paternal aunt daughter etc. what is thought of or considered in this equality is the qualities that are generally desired in a woman like age, beauty, religion, wealth, virginity or lack of it, standard of education, intelligence, country, etc. If there is no woman, beside her, in the family from her father with whom she could be compared with regarding the above mentioned qualities, then her proper sadaq of a woman from such a family equal to her father's family status is payable.

In considering *sadaqul-mithl,* the social status and condition and the financial means of the husband should be considered.

In terms of payment dower is divided into two:

i) Prompt dower which is payable during the time of contracting the marriage or immediately after, thus once it is agree upon by the parties, it must be paid or delivered.

ii) Deferred dower whose payment is postponed to a period in the future.

On deffered dower also the jurists differ, in their views:-

The Maliki jurists holds that if the dower is specific and is readily available, such as a car, house at the place where the marriage is contracted then it is compulsory that it should be handed over to the wife or her guardian on the day of the contract. It is lawful to stipulate its deferment. Whereas the wife has the right to agree (or disagree) with the deferment because prompt dower is her right and as such she has the right to waive it.

But if the dower is specific and it is not available at the place of the contract of marriage its deferment is allowed to a reasonable period within which the property does not transform. However the Maliki jurists hold that the wife can refuse consummation when she is not paid the whole dower or part of it.

Where the dower is not something specific, for example, money or other property which is usually weighed or measured but whose description is known, its deferment is allowed but the period must be mentioned. Where the period is not mentioned if the marriage is consummated in which case she becomes entitled to *sadaq Mithl*. In all cases the period must not exceed fifty years or above[71].

The Hanafi jurists on the other hand are of the view that spouses can agree that the dower be prompt or deferred or part of it prompt and the other part be deferred, over to the time of death or divorce because this is

customarily practiced and custom is considered to be one of the source of Islamic law. It is also rightful to pay the dower instalmentally. If the dower is deferred to any other time than the event of divorce or death) such as deferring it to the time when the husband becomes rich or when it rains then the whole of dower must be paid immediately after the event.

If the marriage is contracted with dower, but no specification is made as to whether its payments is to be prompt or deferred, then the custom of the people of the place where the marriage is contracted must be enforced. If there is custom and regarding differed or prompt paid dower, it must be paid promptly because the general rule is that dower becomes binding immediately after the conclusion of the marriage contract.

Where the dower is not fixed, and there is no mention as to whether it is prompt or deferred, the wife must be paid a part of the dower which people (in the area where the marriage is contracted) pay equal, to her status.

If the payment of half of the dower is made to be prompt and the other half thereof is deferred without specifying the time when it will be paid, the Hanafi jurists have two different views, one of which is that the whole of the dower must be paid promptly. And the other view is that deferment (even though the time is not specified) is right and the time of its payment is either the time of divorce or the time of death which ever is shorter[72] according to the Hanafi.

4.7.3 ELIGIBILITY TO DOWER.

Generally, there are instances relating to eligibility of dower/sadaq to the wife; i.e. there are cases in which the wife becomes entitled to a fixed dower and also cases in which she becomes entitled to half dower as well as instances where the wife does not become entitled to anything at all.

Before proceeding to its full analysis it is important to state first circumstances under which a wife becomes entitled to dower.

Once the marriage is valid the dower is due to the wife immediately after the contract though it could be specific or proper. Conversely, where the specification is valid and the contract is invalid the specified dower is not due unless there is actual consummation of the marriage. The authority for this is the prophetic tradition in which the prophet (PBUH) said:

> Any woman who marries without the consent of her guardian then her marriage is void. And if the husband had sexual intercourse with her then she has a (complete) dower for what he has got legally (i.e. the sexual intercourse with her)[73].

If on the other-hand the dower is unspecified, it is deserved by the wife in the following circumstances: When the marriage is valid but the sadaq is not fixed by the husband nor is it claimed by the wife and rather she kept silent from claiming it until the husband consummated the marriage then in such a case, she deserves a proper dower.

But if either of the spouses died before consummation and before the fixing of the dower the wife deserves the proper one according to the Hanafi school. And according to the Maliki School, she deserves no dower. However, the preponderant view is that of the Hanafi School reported by Abdullahi Mas'ud on this subject and that of the tradition of the Prophet (PBUH) explained below.

Mutual agreement by the spouses to waive and forfeit the dower is illegal. This is because dower is one of and essential legal conditions of a valid marriage contract. Therefore, no one has the right to waive or to forfeit it. Thus, if the parties agreed on this, the agreement is considered an invalid stipulation and an invalid stipulation does not invalidate the contract and the wife is entitled to proper dower in the absence of specified one. This rule applies whether the husband has consummated the marriage or he died (before consummation). This is the view of the Hanafi jurists. Whereas according to the Maliki jurists such marriage is invalid. That, if the husband cohabits with the woman, she deserves proper dower. But if he divorces her or one of them died before consummation, the woman deserves nothing.

Where the specified dower is invalid, it becomes invalid in the following instances:

i. When the specified dower is not a legal property such as a dead animal, a grain of wheat, a drop of water and all other things, which are not used, or are used but are not usually regarded with value by people.

ii. When the specified dower is a property but not inviotile such as a bird in the sky minerals beneath the earth, and things like wine or pig (to a muslim) even if the wife is a kitabiyya.

iii. When although it is an immoveable property it is nevertheless unknown.

If in any of the above cases marriage is concluded, the wife deserves a proper dower. The rule applies if either of the spouses died before the marriage is consummated.

4.7.4 FULL FIXED DOWER/SADAQ

Dower - dower is payable under Islamic Law whether it has been fixed and agreed upon or not, or where it is stated in the contract that there should be no payment of dower. Hence there are two kinds of dower; specified (Mu'ajjal) or unspecified (Muwajjal) stated below.

(i) Specified Dower – Mahr-al. Musamma.

It implies therefore that there was an express agreement on what will amount to dower in consideration to the marriage contract. The husband shall be compelled to pay the whole of the specified dower irrespective of its being excessive.

The Law did not fix any limit to the amount of dower that is to be payable to the bride, due to the difference in the peoples' financial circumstances and means. Islamic Law provides that any thing that is legal can constitute dower.[74]

(ii) Unspecified Dower – Mahar al-Mithli

In cases where dower has not been fixed either before or at the time of the contract, or after the contract it is fixed with reference to the social position of the woman's father's family and her own personal qualifications. The most important yardstick that should inform the amount to be paid also is the amount of dower paid to her sisters and paternal aunts. Hamilton's Hedaya summed up the factors to be taken in consideration:

> In regulating the proper dower of a woman, attention must be paid to her quality with the woman from whose dower the value is to be taken, in point of age, beauty, fortune, understanding and virtue, because it varies according to any differences in all these circumstances; and in like manner it differs according to place of residence or time.[75]

The wife becomes entitled to the whole of the fixed dower in the following circumstances:

Where the marriage is consummated, by virtue of the provisions of the Quran 4:20-21.

> But if you desire the exchange of a wife in place of a wife, and you have given one of them a whole treasure (Qintar or sadaq) take not any thing of it back. Would

> you take it by slander and manifest sin? And how could you take it away after you have taken yourselves to one-another and they (the women) have received a most solemn pledge from you.

Also all the jurists are unanimous that in the above situation, the wife becomes entitled to a whole dower even if the marriage is invalidated later because of one reason or the other.

If either of the spouses died, before consummation Hanafi and Hambali added that if there is "*khalwah sahihah*" (valid retirement) is sufficient even if sexual intercourse does not take place. The Maliki and Shafii on the other hand are of the view that if there is "*Khalwah Sahihah*" alone without sexual inter-course then the wife only become entitled to half the fixed dower and if the dower is not fixed she becomes entitled to what is called *"Mut'ah*" (gift).

The Hanafi and Hambali supported their view with a prophetic provision, of the prophet (PBUH), which was related by Ad-Dar Qutni that the prophet said:

> He who uncovered the veil of his wife and looked at her, dower becomes binding (on him) whether or not the marriage is consummated with her.

They further argued the fact that the husband isolated the wife in such an enclusive atmosphere and refused to have sexual intercourse with her, when there is no obstacle preventing him is not the wife's fault and so the

husband is bound to pay the full dower, since the wife is not responsible for refusing the husband to fulfill his right.

The Maliki jurists on the other hand supported their view with a verse from Quran 2:237 which provides:

> And if you divorce them before having touched them but after having settled a dower upon them then give them half of what you have settled - unless it be that they forgo their claim or he in whose hand is the marriage.

A wife also deserves complete sadaq if she lives with the husband for a complete year in the matrimonial house provided she attained puberty and she is capable of sexual inter-course with the husband even if the husband did not actually have sexual inter-curse with her. This is because consummation within this period is presumed. The argument in favour of the above view is that the presence of the wife at the conjugal house is a mark of married status to the man in the sense of honour, pride, responsibility and duty. Similarly, with the marriage, the woman becomes reasonable and respectful in the eyes of the society even if consummation does not take place. This is the view of the Maliki.

(iii) WHEN THE WIFE IS TO HAVE HALF-FIXED SADAQ/DOWER

Like what applies in full dower the wife becomes entitled to half dower in the following circumstances:

(a) If she is divorced by the husband before consummation of the marriage and the divorce originated from the husband's side. All the muslim jurists agreed on this provided the dower is a specified one and the specification is valid. This is by virtue of the provision of Quran 2:237 which provides:

> And if you divorce them before having touched them, but after having settled a dower upon them, then (give them) half of what you have settled.

(b) Thus, if the dower is not specified, or the parties mutually agreed to waive or forfeit it, or it is specified but the specification is not valid and then separation occurs before specifying (or fixing the dower and before consummation or *Khalwah Sahihah* (valid retirement) then the wife deserves no dower instead she gets a *Mut'ah* (gift). Because she deserve dower in the event of divorce before consummation it is half of the proper dower and there is no authoritative reason in Islamic law to reduce it.

However they differ regarding two issues: If dower is not fixed during the contract but it is fixed and specified after or by the decision of a judge it shall be regarded as a specified dower and therefore if the husband divorces her before consummation she deserves half of the dower.

On this Abu Hanafi is of the view that such dower shall not be regarded as specified dower like the one which is fixed during the contract. Therefore, if the husband divorces the wife before consummation or before *Khalwah Sahiha* (valid retirement) the wife does not deserve half of the

dower, which is fixed after the contract. Instead, she is entitled to *Mut'ah* (gift).

Where a specific dower is mentioned during the contract and the husband made an increase of certain amount after that and he divorces the wife before consummation or *khalwah* will the wife in this case can she be entitled to both half of the dower and half of the increase, or will she be entitled to only half of the dower?

The view of the Hanafi jurists regarding this is that she is only entitled to half of the dower while the majority of jurists opined that she is entitled to both half of the dower and half the increase.

(iv) WHEN THE WIFE DESERVES NO SADAQ/DOWER

Dower will be forfeited and the wife will not deserve it, in the following circumstances.

(a) Where separation between the spouses occurs before consummation and the separation is originated by the wife or it is due to her fault such as when she apostates; (ridda) or when she refuses to accept Islam after her husband has done so and she is not a "kitabiyya" the repudiation of the marriage for a defect in the husband (to those who legalize such repudiation to her) the same rule applies where the separation originates from the guardian of the wife.

(b) Where the separation is as a result of the husband's conduct and it occurs before consummation or Khalwah and it is an annulment and not divorce as where the minor or insane chooses repudiation after attaining majority or after regaining sanity respectively.

(c) Where it is discovered that the parties are related within the prohibited degree of marriage.

4.8.0 CONCLUSION.

Marriage under Islamic Law as evident from the aforementioned has been given much time and thinking of almost every conceivable problem by the Quran and hadith which helped the jurist to proffer the way out. Islamic countries tend to have bias for one or two School of thought's views than the other in their codified laws. Nigeria subscribes to the Maliki view officially and unofficially muslims blend it with others.

Marriage in Islam is very well regulated, with the minutest conceivable problems explained, for easy resolution and guide. The jurists have provided detailed arguments, analysis and justification for their views on the issues thereby providing a ready made thought for instant guide for the spouses, and the public at large. This has reduced confusion and disputes by making available interpretations of the Quranic injunctions and hadiths easily comprehensibly home to muslims who can read.

Islamic Law has raised the status of women in the family as well as n the society particularly through marriage by guarding and protecting their interests and welfare. She is to be led and guided by a guardian in recognition of her welfare being paramount because it is the girl about to be wedded or wedded that later becomes the mother and grandmother of both the men and women. By so doing the woman is dignified. The dignity is also seen in giving her the right of fixing her dower. Where these rights are denied to the girl or woman the community leader who could be the judge would challenge it and make corrections. In addition to these, the marriage contract is accompanied with some legal consequences, which are in the form of rights and duties of the spouses. The aim of the provision for rights and duties in Islamic Law is to lead the marriage to a happy life and complimentary roles. These rights and obligations shall be discussed in chapter six.

NOTES AND REFERENCES

1. Ali, A. Y.: The Holy Quran, Test, Translation and Commentaries (Islamic Foundation) Page 939.

2. Sahih al-Buhari.

3. Sahih al-Buhari Translated by Dr. Muhammed Muhsin Khan Vol. 7 1967 P.3

4. Related by Ibn al-Jawzi in Al-Muhallah.

5. Abdal, Ati, H.A: The Family Structure in Islam (Islamic Publications Bureau Lagos, Nigeria 1982) Page 77.

6. Ibid at Page 70

7. Khan, M. M.(Trans) Sahihil Al-Bukhari, Hilal Yayinlari, 1976, Vol. v.

8. Ibid at Page 6.

9. Murtada, M.: The Rights of Women in Islam (Word Organisation for Islamic Services Tehran Iran, 1981) Pages 15 and 17.

10. Ali, A. Y: The Holy Quran: Page 939.

11. Abdal, Ati A. H.: The Family Structure in Islam (Islamic Publications Bureau Lagos, Nigeria, 1982) Page 57.

12. Murtada, M.: pp. 15-17.

13. Aliyu, I. A: Legal Basis and Objectives of Marriage Under Islamic Law, (unpublished LL.M. Thesis 1988, Ahmadu Bello University, Zaria). P. 117-132

14. Khan, M. M. (Trans) Vol. V. P. 64.

15. Related by Ibn al-Jawzi in the Illah.

16. Siddiq, A. H. (Trans) Sahihul Muslim, Daul 'Arabiyyah Beirut Vol. 4, 1972, P. 104

17. Khan, M. M. (Trans), P. 70.

18. Siddiqi A. H. P

19. Ali H. A: Op cit. (Islamic Publication Bureau Lagos, Nigeria 1982 Page 149

20. Siddiq, A. H. (Trans) P.

21. Muhammed, J. A: The Legal and Social Implications of interference with Spouses Right to Consortium (Unpublished LL.B. Thesis, ABU., Zaria. 1999) Pages 28-29

22. Ali, A.Y: Op. cit. Page 87

23. Isah, Ibn, Sunan Tirmidi; Mustapha Halabio; Egypt (ND) Vol. 3.

24. Ibid.

25. Death Sickness is that sickness that cause apprehension of death by the sufferer and in most cases leads to death.

26. Sabiq A. (Fiqhu-Sunnah Darul Fikr, Beirut, 1978, Vol. 2 Pages 117.

27. A Statute Book on Islamic Law.

28. Narrated by al-Muthana Ibn as- Sabbah.

29. Isa Ibn Vol. 3.

30. Murtada, M.: Op cit., Page 15.

31. Khan, M. M. (Trans)

32. Ibid.

33. Khan, M. M. (Trans) and Siddiq A. H. (Trans)

34. Ibid.

35. Aliyu I. A.: Legal Basis and Objectives of Marriage Under Islamic Law, (L.M. Thesis, 1988, ABU Zaria,) Pages 117-132.

36. Shorter Encyclopedia of Islam, Page 447

37. Magnniyyah, M. J. Al-Fighu 'Alal – Madhahibil – Khamsah, Darul-ilm Beirut, Vol. 2 (1975) P. 42.

38. Abdal Ati. H. Op cit page 72.

39. Ibn Qudama Al-Mugni, Maktabatul – Jumhuriyyatu-Arabiyyah, Egypt, (ND) Vol. 6, PP 485, 515-18

40. Isa A. K. Ishalut-Madarik, Dar'ul–Firk Vol. 11, P. 58

41. Related by Ahmad, Abu Dawud, Tirmidhi Ibn Majah and al-Hanim

42. Sabiq S.: Fiqhus-Sunnah, (Darul-Firk, Beirut 1978) Vol. 2 Pages 111-113.

43. Khan, M. M. (Trans)

44. Muhammad Ibn Far Muz. (Dur-al-Hukkan) P. 337

45. Abdur Rahman al-Taziriy, Figh al-madha hib al-ar-ar-ba'a Vol. iv. P. 36.

46. (Unreported) Muhammad Abubakar V Hadiza Muhammad and Ibrahim Ndagali Chakyagi KWA/SCA/AP/24/91

47. Shariah Law Reports, Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria, Vol. 1. P. 38.

48. (Un reported) Suit No. SCA/NWS/CV/47/70.

49. (Unreported) Suit No. CA/K/805/85.

50. Ambali, M.A.: The Practice of Muslim Family Law in Nigeria (Tamaza Publishing Co. Ltd. Zaria 1998), Page 130.

51. Isa Ibn.

52. Tar jumana, A.A. and Johnson, Y (Trans) Al-muwatta by Imam Malik, Diwan Press, England.

53. Murtada, M:, Op. cit. page 20

54. Maliki, I. N. (ND) Al-Mudawwanah Al-Kubra (Halabi Foundation Cairo 1933) P. 7

55. Khan, M. M. and Saddiqi, A. A. (Trans)

56. Maliki in Al-Muwwatta.

57. Ibn Hazam – A. M. Al- Muhalla, Al-Maktabatut Tijariyyah Beirut (ND)

58. Doi, A. I, Women in Shariah (Islamic Law), Gaskiya Co-operation, Zaria, 1983, P.63.

59. Shukuri, A.; Muhammadan Law of Marriage and Divorce, (A.M.S. Press. Inc. New York, 1966,) P.56.

60. Westermarck, K., Muhammadan Civilization, Philo Press, Amsterdam, 1933, P. 183.

61. This cannot be said to be true in Nigeria.

62. Stern, H. A. Wandering Among Falashar, Frank Cass, London 1968, P.58.

63. Abdal Ati H. Op. cit. Page 65.

64. Ibid at Page 68

65. Ibid at Page 70

66. Jeffery M. D. W., "Libolo is Child Price" (1951) 10 Afr. Stud., No.4 page 50.

67. Murtada, M., Op cit page 191

68. Maliki, I. N. (N.A.) Al-Mudawwannah, Al-kubra (Halabi Foundation Cairo) pages 216-217

69. Sha'aban Z.D; Al-Ahkamush-Shariyyah, Faculty of Law, University of Libya 1971 pages 216-217

70. Hambali, A. M. Page 145.

71. Tar jumana A. A. and Johnson Y. (Trans) P. 263.

72. Shaaban Z.D, page 272

73. Khan, M. M. (Trans)

74. Isa Ibn, Vol. 3.

75. Translations, 1979, New Delhi, P. 53.

CHAPTER 5

THE RIGHTS OF SPOUSES UNDER THE STATUTE IN NIGERIA

5.0 INTRODUCTION.

Marriage under the Statute is governed by statutory regulations, though such marriages emanated from the ecclesiastical laws which is later known as the "Common Law" of marriage, with the passage of time these laws became modified and enacted as Statutory Laws.

In this chapter, the rights of spouses, inter-twined with those of their children will be examined. Though the law as it is today is statutorily based, the rights of the parties to the marriage emanated basically from the Common Law (i.e. case law). Therefore, most of the rights are derived through the enforcement of the courts of law. In addition to these rights, there are also rights created by the Statutes. The laws in Nigeria are basically English law by virtue of Nigeria being a former Colony of Britain, through the General Reception Clause of 1st January 1900.

In Nigeria, the English Law became codified in some respect particularly in the areas of regulating cohabitation, maintenance, adultery, welfare of children, etc. Therefore, this chapter will focus on the rights under statutory and case law, based on Marriage under the statute.

5.1 CONSENT

In English law, Consent is of paramount importance for every valid marriage because it leads to the creation of all other legal and moral relationship as well as the rights and duties in the marriage. A marriage is preceded by an agreement to marry. It is the rights of the parties to give consent. At Common Law such agreements amounted to contracts provided that there was an intention to enter into legal relations (as there probably would not be in the case of an "unofficial engagement".) Because marriages are highly personal and non-commercial in nature, they possessed certain peculiar characteristics, but as a general rule they were governed by the general principles of the law of contract.

The Law therefore made it mandatory that both parties to a marriage consent to it before entering such a relationship. English law also imposes a requirement of parental consent for the marriage of persons under the age of eighteen. So long as this requirement exists, the system has to provide checks to ensure that the requisite consent has been given.

Until statute intervened marriage law was simply a Canon Law, which allowed marriage to be contracted with great ease and absent of ceremony. For the early Church it was spiritually desirable to have a religious ceremony. Christian marriage has already been discussed in the

previous chapter. Surfice to say that consummation was the essential factor in the creation of the marriage.[1] This caused problems with regard to the marriage of Joseph and the virgin Mary[2] who , according to interpretation, had exchanged vows of life-long chastity.

In the twelfth century, therefore it became accepted that a valid marriage could be formed by the mere exchange of consents. The vital requirement was that the words should be in the present tense: Sponsalia per verba de praesenti (An engagement or betrothal through words concerning the present tense). No other ceremony was needed, the church might, as a matter of discipline, order the parties to go through a religious ceremony, but it was the prior consent, which created the marriage.

If the consent was in the future tense (not "I do marry you", but "I promise I will marry you") a marriage was not immediately created. But if sexual intercourse took place between the parties after the promise they immediately become husband and wife. The reason was that the sponsalia per verba de futuro (an engagement or betrothal through words concerning the future) "implied such a present tense consent at the time of the sexual intercourse which is meant to complete the marriage in substance and give to it equal validity with the contract de praesenti"[3]. Thus, the church reconciled the two views: that of the early church that agrees that

consummation was necessary to form a marriage derived from the Roman Law, and that consent was the vital factor, and a right. Hence the saying: consensus non concubitus facit matrimonium (Consent and not cohabitation constitutes nuptials or marriage, and persons cannot consent before marriageable years). The result was that the "one contract which ... should certainly be formal had become the most formless of contracts"[4] due to lack of capacity on the ground of age.

The consent of a minor's parents or guardians had to be obtained, and entries made in an official register. Failure to comply with these requirements completely invalidated the marriage.

Section 12(c) if the Nigeria Matrimonial Causes Act of 1990 provides that a marriage shall be voidable if either party did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise. Marriage is a contract, which creates rights and duties, and consequently absence of consent will invalidate the ceremony.

Lack of consent probably made the marriage void at Common Law. In which case a marriage affected by lack of consent will still be void if it was contracted before 1st August 1971. The reason for making such a marriage voidable is that the parties themselves may wish to ratify it when true consent can be given and consequently third parties should not be able to impeach it.[5]

5.1.1 CIRCUMSTANCES UNDER WHICH CONSENT AS A RIGHT TO MARRY MAY NOT BE VALID

The Law recognises instances under which consent given in anticipation of a marriage may not render the marriage valid as follows:

5.1.2 UNSOUNDNESS OF MIND

This will affect a marriage if, as a consequence, at the time of the ceremony either party was unable to understand the nature of the contract he or she was entering into. There is a presumption that he or she was capable of doing so and the burden of proof therefore lies upon the party impeaching the validity of the marriage. This test was formulated by Singleton L. J. in the Estate of Park[6] where he said:-

> And was the (person).... capable of understanding the nature of the contract into which he was entering or was his mental capacity such that he was incapable of understanding it.

The principle established in the above case proves the essence of consent before a marriage contract can be valid. Thus, the court in the case of ***Legey V O. Brien***[7] said in order to ascertain the nature of the contract of marriage, a man must be mentality capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.

5.1.3 DRUNKENNESS AND THE EFFECT OF DRUGS

In the absence of any binding English authority, it is submitted that the effect of drunkenness and drugs will be the same as that of unsoundness of mind. Consequently, the marriage will be viodable if, as a result of either one of the parties was incapable of understanding the nature of the contract into which he was entering.

5.1.4 MISTAKE

A mistake will affect the marriage in two instances only. First, a mistake as to the identity of the other contracting party will make the marriage voidable if this results in one party's failing to marry the individual whom he or she intends to marry. In the New Zealand case of *C.V.C.*[8] W married H in the erroneous belief that he was a well-known boxer called Miller. It was held that the marriage was not invalidated by the mistake because she married the very individual she meant to marry.

Secondly, the marriage will be voidable if one of the parties is mistaken as to the nature of the ceremony and does not appreciate that he is contracting a marriage. Such as in ***Valier V Valier*** [9], the husband, who was an Italian and whose knowledge of the English language was poor, was taken to a Registrar's office by the wife and they went through the usual form of marriage. He did not understand what was happening at the time,

the parties never cohabited and the marriage was never consummated. It was held that he was entitled to a decree of nullity.

The court in ***Moss V Moss***[10] said if each party appreciates that the is going through a form of marriage with the other, no other type of mistake apparent can affect the contract.

5.1.5 FRAUD AND MISREPRESENTATION

Unlike the case of a commercial contract neither a fraudulent nor an innocent misrepresentation will itself affect the validity of a marriage, even though she is pregnant. But if the misrepresentation induces an operative mistake (e.g. as to the nature of the ceremony), the marriage will be made voidable by the latter.[12]

5.1.6 FEAR AND DURESS

If owing to fear or threat, one of the parties is induced to enter into a marriage which, in the absence of compulsion, he would never have entered into the contract, the marriage will be voidable.

The fear may be due to a number of causes. In ***Buckland V Buckland***[13] for example, the petitioner, a youth aged 20 resident in Malta, was groundlessly charged with defiling the respondent, a girl of 15. Although he protested his innocence, he was twice advised that he stood no chance of an acquittal but would probably be sent to prison for a period of up to two years unless he married her.

He did so and it was held that he was entitled to a decree of nullity. Nor is it necessary that the fear should have been inspired by any acts on the other party's part. A number of recent cases, for example, that of ***Sign V Kaur Post***[14] have dealt with arranged marriages amongst members of immigrant communities. An example of duress imposed as external duress (from outside) is seen in the case of ***Szechter V Szechter***[15]. The petitioner was a Polish national who had been arrested by the security police in Warsaw. After 14 months interrogation and detention in appalling conditions she was sentenced to three years imprisonment for "anti-state activities". Her health, which had always been poor, deteriorated rapidly and she came to the conclusion that she would not survive the sentence, if she did come out of prison alive, she believed that she was likely to be re-arrested and in any case would be unable to get any job other than one of a menial nature. The respondent was a distinguished polish historian of Jewish origin whose presence in Poland was something of an embarrassment to the authorities and whom they were prepared to allow to emigrate. In order to effect the petitioner's release he divorced his wife and went through a ceremony of marriage with the petitioner in prison. The Scheme was successful, and eventually all the parties reached England, where the petitioner brought proceedings for nullity so that the respondent and his first wife could remarry, the decree was granted.

5.1.7 MENTAL DISORDER

A marriage is voidable if, at the time of the ceremony either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of

the Mental Health Act of 1983 of England to such an extent as to be "Unfitted for marriage"[16] Unfitted for marriage has been defined as "incapable of carrying out the ordinary duties and obligations of marriage in the case of ***Bennett V Bennett***[17]. In the case of mental disorder it is presumed that the general state of his or her mental health at the time of the ceremony was such that it is right that the marriage should be annulled. It will be observed that the petitioner does not have to rely on the respondents' mental disorder but may rely on his own. This is necessary to enable a party to withdraw from a marriage if he entered into it in ignorance of the existence or extent of illness or the effect, which it would have, upon his married life.

5.1.8 VENEREAL DISEASE

A marriage is voidable if at the time of the ceremony the respondent was suffering form venereal disease in a communicable form.[18] "Venereal disease" is not defined in the Act: an important question today is whether it includes HIV/AIDS.? Whilst this may be sexually transmitted it can also be transmitted in other ways. It is clearly and socially desirable to release a person from marriage to an infected spouse and it would be unreasonable to limit relief to a petitioner who could show that the respondent had acquired it as the result of sexual intercourse, a burden which many would be unable to discharge. It is submitted that with regards to HIV/AIDS as a venereal

disease for this purpose all courts would suppress the mischief and advance the remedy that parliament has provided[19] but it is by no means certain that a court would adopt this construction.

5.1.9 PREGNANCY PER ALIUM (PREGNANCY BY ANOTHER PERSON).

A marriage is voidable at the option of the husband on the ground that at the time of the marriage the wife was pregnant by some other person, by virtue of the provision of the Matrimonial Causes Act, Sec. 5(1) (d), 35 (c) and 36 (2).

A husband may petition for nullity, if at the time of the marriage the wife was pregnant by someone other than himself.[20]

5.2.0 CONSORTIUM

By the fact of marriage, the spouses owe each other a number of duties, which are collectively referred to as consortium: Scrutton, L. J said in ***Place V Searle***[21] that each Spouse has the right to the others consortium under the English Law. Consortium is not amenable to easy or precise definition but it has been described as "the living together as husband and wife with all the incidents that flow from that relationship.[22]

Lord Reid in the case of ***Belt V Samuel***[23] stated that consortium is a name for what a spouse enjoys by virtue of a bundle of rights some hardly capable of precise definition. The duties, which spouses owe each other in

their domestic life are not fixed. They vary according to the particular circumstances of each marriage and the parties thereto.

In general, these duties are mere matters of common knowledge than the subject of legal definition. For instance, it is generally accepted that the husband is the breadwinner, while the wife is primarily responsible for the running of the household. But the position may be reversed in particular cases. In spite of the variables, it is necessary to draw attention to a number of attributes of consortium below, which have at least been dealt with by the courts.

5 .2.1 CHANGE OF NAME:

The court said in the case of ***Fendall V Goldsmith***[24] that on marriage, a wife may use her husbands surname; she may retain the surname even after the marriage has been brought to an end either by divorce or death of the husband. It has been held that a husband has no right to stop his divorced wife by injunction from using his name unless she is doing so for the purpose of defrauding him as in the case of ***Cowley V Cowley.***[25] Sometimes a wife for professional or other reasons may not take her husband's name on their marriage. Although the change of name by a married woman is effected by custom and usage there is no legal obligation to change it.

5.2.2 DUTY TO COHABIT.

One of the primary incidents of consortium is the duty of the spouses to cohabit. But this duty is not absolute being subject to the circumstances of the parties: The court in ***Bradshaw V Bradshaw***[26] said that cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof[26], where for instances, the nature of their employment so demands, the spouses may live a part for most of the time. Obvious examples are where the husband is on military service abroad, as in ***R. V. Creamer***[27] or if his business takes him away from the matrimonial home for a major part of the year. In such cases, the living apart is by the mutual consent of the parties. Even then the spouses are regarded as cohabiting in the wider sense of the term.

Lord Merrivals in the case of ***Pulford V Pulford***[28] explained that withdrawal from cohabitation may constitute a matrimonial offence of desertion and that it may arise either from physical withdrawal from the matrimonial home or withdrawal from cohabitation in the wider context.

Where the spouses choose to live together in a matrimonial home, they may face the problem of where to locate the home. Each of the spouses may want the home to be as near as possible to his or her place of work.

Ordinary the claim of the husband may prevail he being the bread winner as stated by the court in the case of ***Dunn V Dunn***[29], where Per

Denning L J decided that where both parties contribute to the family budget, the location of the matrimonial home is a proper matter for mutual agreement.

5.2.3 SEXUAL INTERCOURSE.

The parties to a marriage owe each other the duty to consummate it. Failure to consummate the marriage that arises from the impotence of one spouse may constitute a ground for nullity. Their duty to have mutual sexual intercourse does not terminate the consummation of the marriage. It continues to be effective throughout the duration of the marriage. But an impotency which is subsequent to the consummation does not constitute a ground for nullity.[30] The right to sexual intercourse with each other must be exercised reasonably and with due regard for the health and disposition of either spouse. Consequently, while there is a duty to have sexual relations, a spouse is not bound to submit to excessive sexual demands of the other party, which may, for instance, be detrimental to that party's health. If such inordinate sexual demands or the willful refusal of one party to have intercourse at all, injures the health of the other, such conduct may fall within section 15(2) (c) of the Matrimonial Causes Act 1990 as evidence of the "irretrievable breakdown" of the marriage.

The case of ***R.V Miller***[31] established the principle that since marriage imports the consent of the spouses to sexual relations, a husband

cannot be guilty as principal in the first degree of rape on his wife. But he could be an accomplice or an accessory to the offence of rape committed on his wife by a third party. If, on the other hand the husband's exercise of his right of intercourse involves the use of force or violence he may be guilty of wounding or causing actual bodily harm.

5.2.4 MUTUAL DEFENCE

The law confers on every individual the right to use such reasonable force as is necessary to defend himself/herself against an assault. If the assault is such as to cause reasonable apprehension of death or grievous bodily harm and the person assaulted believes on reasonable grounds that he cannot otherwise defend himself from death, he may use such force as may cause the death of the assailant[32] Whenever it is lawful for a person to use force in self defense against an assault, any other person acting in good faith may lawfully use a commensurate force in aiding the person assaulted. Thus, a spouse may use such force as is necessary in aiding or defending the other spouse who is assaulted.

Moreover, a spouse may use force, if necessary, in order to resist actual unlawful violence threatening the other spouse in his/her presence.[33]

5.3.0 PROCREATION AND PRESERVATION OF HUMAN RACE

Procreation is the act or process of producing offspring, a sort of reproduction.. The study of the patterns of personal relationship in family life led directly to the conception of the family as a unit of interacting person. Procreation is a good to human beings worthy of man's pursuit and human acts suited to achieve this good should be done.[34]

A couple has the right to children and to determine how many children they will have. Openness to new life is inherent in marriage. If, on the wedding day, either party is intending to deny the other's right to have children or intends to solely legislate on this matter the marriage is invalid. However, a marriage is not invalid because a couple is unable to have children, unless there is impotency antecedent to the marriage and it is permanent.

People have children for a number of reasons - reasons of various levels of merit. In early America, as in many agricultural societies today children were a "free" labor force as well as a form of social security. Even today there are Americans who have children for tax or welfare advantages. We are taught that life involves growing up within a family enduring adolescence, getting married having children, and working hard to be a productive and accumulating member of the community all the while. It is unquestionable hard to break such cultural patterns.

There are other reasons for having children. Many people seem to have an innate affection for children, simply because they are children.

Others seem to reserve their love for these children who are members of their own race or socio-economic group although such people may think of any child as "cute".

It is often said that children contribute to feelings of fulfillment for the parents. The "fulfilling" nature of children is an interesting one. Let's consider it briefly from a biological point of view. We must remember that we are all the result of millions of generations of successful reproducers. If our forbearers had not reproduced we would not have been here. In fact we are likely to be the offspring of the most hard-driving reproducers of past generations. Those individuals of any generation who reproduced with less than maximum effort left fewer genes in the following generation; those more devoted to reproduction left a greater percentage. Hence, each generation would tend to consist increasingly of the offspring of the most successful reproducers, as the proportion of the genes of the less successful one's progressively diminished in the population through time.

Now, if the motivation to reproduce (or to do the things that result in reproduction) is an innate response to the influence of genes, we, as the offspring of the most successful reproducers, can be expected to feel rather strongly about having children ourselves and caring for them intensely. Such a feeling may take a variety of forms, from a peculiar longing to see one's "own" children and to interact with them to a general positive

response or protective feeling toward any body or child. Procreation therefore is one of the aims of statutory marriage.

5.4.0 CONTROL OF SEXUAL BEHAVIOUR.

A healthy sexual relationship is so important in marriage. When we respect nature we live in order and peace. Sexuality is part of the human nature, and as such, carries a moral responsibility in statutory marriage but with limits by diseases that are passed from one person to anther during a sexual act and which are called sexually transmitted Disease (STD). They are a serious and sometimes deadly group of infectious diseases which includes gonorrhea, syphilis and Aids, though Aids could be transmitted by other means (blood transfusions, contaminated instruments and at times from a mother to the child in the womb or at birth) is chiefly transmitted through sexual intercourse. Sexual intercourse is related to the reality that man and woman can inflict this deadly disease on one another. The life-giving functions of human sexuality, which epitomizes health and life itself, have outside marriage become a road to death. Adultery therefore is a ground for divorce under statutory marriage.

5.5.0 PROTECTION OF MORALS

Marriage produces a strong sense of responsibility for the family. Marriage would help to remedy many social evils such as prostitution, abortion, general diseases, the misery of illegitimate children, Aids, etc.

Morality entails good conduct, according to civilized standards of right and wrong, which extends to proper sexual relation. Sex has become a product of trade. Promiscuity causes mutual dislike and distrust, disease and destructive of efforts to the society which has now been controlled or regulated by the marriage institution under the statute.

5.6.0 MUTUAL PROTECTION

Spouses owe the other a duty of protection from danger to life according to their abilities, which means in practice that, as a rule, a man owes this duty to his wife. The court in the case of ***R V Rose***[35] said that one spouse is entitled to use reasonable force to protect the other from attack or other physical harm, and may kill an assailant if he or she believes that the act is absolutely necessary to preserve the other's life.

In the past, there was a right in one spouse to defend the other's honour or good character by physical force if necessary, provided this force was used against a person of his or her own sex. Thus, if a man, Y maligned Z's wife, Z had a right to defend his wife's good name with any weapon, which he considered reasonable in the circumstance. So might Z's

wife if her husband was defamed by a woman. Perhaps physical violence is permissible, however only in cases of protection from physical harm. For while it may be hard to expect a man to stand by and do nothing while his wife is being assaulted or otherwise subjected to physical harm, there is not the same compelling, argument in his favour if all what his wife suffers is mere injury to her name or reputation. A court action would be less dangerous to life and limb, and perhaps more rewarding. In any case tempers and passions are normally easier to keep in check where the only weapon of attack employed against one's spouse is words, than where physical violence is used.

5.7.0 THE RIGHTS OF THE WIFE.

As a result of a man marrying a woman validly, she traditionally acquires some rights as a wife which are well established by law. The rights are as follows:

5.7.1 MAINTENANCE.

Though primarily the husband's duty under English Law is to provide his wife with the necessities of life which includes food shelter, clothing and medical expenses, this duty is prima facie complied with if he provides a home for her and the wife has no right to separate maintenance in a separate home unless she can justify living apart from her husband.

This obligation remains if the spouses are obliged to live apart, for example, owing to the illness of one of them provided that there is no desertion on the part of the wife.

A wife who commits adultery - even on one occasion - Ipso facto loses her right to be maintained by her husband. Even if he remains unaware of the adultery for some considerable time, a husband has a right to refuse his wife further maintenance on subsequently discovering the offence. And the fact that the husband himself had committed adultery is immaterial, as decided in ***Govier V. Hancock***[37]. But a husband is not relieved of his duty of maintaining his wife if he had condoned or connived at her adultery. But he is still under an obligation to maintain her as long as he wants her for a wife.

A husband is also relieved of his duty to maintain his wife if she deserts him. The obligation is revived as soon as the desertion ends. A husband remains under the duty to maintain his wife where he deserts her. The combined effect of these last two rules is that if a wife deserts her husband but subsequently makes a genuine move to return to him and he refused her the right to be maintained, and provided that the request to return to the matrimonial home was genuine when made and remained so when proceedings were taken it is the husband who is now in constructive desertion.

5.7.2. ORDERING THE HUSBAND NOT TO MOLEST THE WIFE.

This is an Order, which does not order the husband to leave the matrimonial home but enjoins and restrains him from "assaulting, molesting, annoying or otherwise interfering with the wife[38]. Molestation is widely construed and the courts have been reluctant to define it but "pester" is perhaps the best single synonym.[39] Molestation may thus, take place without either the threat or use of violence.

In the case of ***Vaughan V. Vaughan***[40], for example, a husband was held to have molested his wife when he called at her house early in the morning and late at night, called at her place of work and made a perfect nuisance of himself to her the whole time.

5.8.0 RIGHTS OF THE HUSBAND:

The husband too by being validly married to his wife is entitled to certain rights from her as consequence to the marriage, which will be studied below:

5.8.1 MAINTENANCE.

The general rule under English Law is that a wife is under no obligation to maintain her husband. But there are, however a number of circumstances under which a court may order that she shall do so or that her property, business profits or earnings shall be settled for his benefit. Orders

of this kind may be for an interim period, for a specified term or on a permanent basis.

First, if a wife presents a petition for judicial separation on the ground of her husband's insanity, the High Court has power under section 15 of the Matrimonial Causes Act. 1965 (of England) to make an interim order that she shall pay alimony to her husband. On making the decree for judicial separation asked for, the court has power under the same subsection to order that the wife pay such permanent alimony to her husband as the court thinks fit.

In the second place, if a wife petitions for divorce on the ground of her husband's insanity the High Court may, by virtue of Section 16(3) of the same Act make an interim order against her for the payment of alimony to her husband. If the divorce asked for is granted, the wife may be ordered to secure to her husband "such gross sum of money or annual sum of money for any term not exceeding his life" as the court thinks fit. In addition to or in place of this secured sum, the wife may by order be directed to pay her husband a monthly or weekly sum of money for the rest of their joint lives under section 16(3).

In the third place, if a decree of divorce or of judicial separation is granted against a wife by reason of her adultery, cruelty or desertion, the High Court may order that any property to which she is entitled to in whole

or in part be settled for the benefit of her husband and/or children of the marriage or either or any of them under section 17 (1) (B) 17(2).

The first point to note in connection with Section 15-20 of the Act is that their provisions only apply where a decree for divorce or for judicial separation has been granted or is being sought. In other words, there is no power in the courts to make an order, by virtue of these sections, settle her property for his benefit while the spouses are still living together or while they both deserve so to live together. For instance, in ***Calderbank V. Calderbank.***[41] A family had during a 17-year marriage, enjoyed a high standard of living supported by the wife's capital resources. When the marriage broke down the husband (who had no capital of his own) was awarded a lump sum of £10,000 (i.e. about one-eighth of the wife's capital). This was to enable him to buy (with the aid of a mortgage) a home suitable to the standard of life the family had adopted, in which he could live and raise the three children of the marriage.

The wife appealed against the order on the basis that at Common Law, although a husband was obliged to maintain his wife[42], the wife was under no corresponding duty to maintain the husband. The Court of Appeal upheld the decision of the previous court. The provisions of the English Act apply to both parties on maintenance. Section 25 of the Nigerian Matrimonial Causes Act, 1990 admittedly empowers the court to make orders in favour of a husband but this could only be appropriate in

exceptional cases" as where the husband's earning capacity was impaired by illness. A wife has in general no financial obligations and responsibilities towards her husband. it followed that a former wife should not be expected to assume such obligations.

Alimony is a fixed sum of money paid regularly to a woman for her support by her husband, or former husband, under orders from a court.

By Section 73(1) (a) of the Nigerian Matrimonial Causes Act of 1990 the court can order the payment of lump sum or weekly, monthly, yearly or other periodic sum to a former wife.

In ***Okanlawon V. Okanlawon***[43] a case decided after the commencement of the Act where the court ordered a husband who earned £400 per annum (while the wife earned £12 per month) to pay a periodic sum of £6 per month for the maintenance of the petitioner (wife) and the three children of the marriage.

Section 73 (1) (k) of the Nigerian Matrimonial Causes Act 1990 permits the court to sanction a lump sum or periodic sum or other benefits in lieu of rights to an ancillary relief order already made or in lieu of or the right to seek such a relief.

In ***Ogunleye V. Ogunleye***[44], the Lagos High Court sanctioned an agreement whereby the husband would pay a monthly allowance of £3 to the wife for the maintenance of the only child of the marriage. The court

has a discretion whether or not to sanction such an agreement, even if the parties want the court to do so.

The line of difference between an order to secure maintenance on the one hand, and an order to pay maintenance and to give security for its payment is often a fine one, yet it has been drawn as in ***Glover V Glover***[45] where the husband covenanted to make periodic payments (as maintenance) by a deed which provided that all necessary orders shall be made to carry the deed into effect and the deed was expressed to be executed by way of security for the payment. The court sanctioned the deed into effect. The orders, which the court said should be made, were in fact made. Later the husband applied for the variation of the maintenance order so as to reduce it to nil. Section 73 (3) Nigerian Matrimonial Causes Act of 1990 provides that the court cannot vary the maintenance order in the absence of fraud. It was held that on a true construction of the deed and the orders, the order of the sanctioning court was not an order "to secure maintenance", on the contrary it was an order that maintenance already ordered should be secured, therefore the court could vary the order provided the applicant brought himself within the conditions imposed by Section 73 (2) of the MCA 1970.

5.8.2 ADULTERY AND DAMAGES THEREFORE

A husband has a right of action for damages against any man who commits adultery with his wife - this being in addition to his right to divorce her on grounds of her adultery.

A wife, on the other hand, has no right of action for damages, against a woman who commits adultery with her husband. This bias is in favour of the husbands in common to be general law. Bromley says with reference to English law that:

> .... Since Criminal Conversation was based upon the quasi-proprietary interest, which the husband had at common law in his wife, the anomaly survives that a wife may not petition for damages from a woman who has committed adultery with her husband.[46]

Criminal Conversation is defined as sexual intercourse of an outsider with husband or wife, or a breaking down of the covenant of fidelity. Tort action based on adultery, considered as an aspect of a civil injury to the husband or wife entitling him or her to damages; it is also the tort of debauching or seducing of a wife or husband.

One important effect of marriage is to create between husband and wife a certain obligation of fidelity and mutual trust. The nature of this duty is usually revealed through an examination of its possible invasions and remedies thereof.

Enticement and detention of wives are cases connected with invasion of marital rights but the two are different. Enticement, usually, though not always involves inducing or causing a woman to leave her husband with the intention of establishing marital or amorous relations with her.

Detention of a wife surely does not infer an intention to establish relations with her, but rather to give her away in marriage to another person. This usually occurs where the parents of the wife are dissatisfied with her husband and actively encourage her to leave him.

Under traditional law, it is considered an unlawful invasion of a husband's right to take his wife away from him with the view to marrying her off to another man. The husbands' remedy is to ask the parents either to return his wife or to refund the dowry.

The English law of adultery is fairly clear. A husband has a right of action whenever his wife commits adultery; his remedies may be against the wife or against the co-respondent.

5.8.3 THE RIGHT TO TESTAMENTARY CAPACITY

There are no statutory provisions, which disqualify unmarried women from making testamentary dispositions of their separate property by reason only of their sex. Neither is there any such incapacity on women to own property at common law. As far as the female sole (single woman) is

concerned, therefore, there is the same legal capacity to make a will as attaches to a man.

Section 8 of the Wills Act, 1837 deprived married women of any testamentary capacity; but Section 1 of the Married Women's Property Act later removed that defect, 1882 and 1893, and so, they too can make a valid will.

There has been in Nigeria since very ancient times a practice whereby property is disposed of by way of an oral will, usually made by a person as he approached the end of his days. He would call his family and inform them of his wishes as regards his property. If the family agreed to his or her disposition of the property, the recipient would then bring "Tukwici" (thank offering) in Hausa, which would then be accepted by those present acting as witnesses. This practice has diminished with the growing tendency amongst Nigerians to make wills according to the received English law requirement.

Testamentary dispositions under Islamic law in Nigeria provides that on the death of a Muslim whose marriage has been registered under the Ordinance, succession to his or her property is to be governed by Islamic law, which provides that "on the death of a Moslem whose marriage has been registered under this Ordinances the succession to his or her property shall be regulated by Islamic Law.

So far as the substantive rules of testate succession are concerned under Islamic Law, it is sufficient for our purposes to notice;

1) That the law of intestate succession limits the freedom of testamentary disposition i.e. the testator cannot dispose of more than one-third of his net estate. Dispositions in excess of this limit if executed by the heirs, would be regarded as a gift from the heirs rather than as bequest from the deceased.
2) That there can be no bequests to heirs. They have their portions already stipulated by the law of intestate succession and to allow the testator to bequeath to heirs would amount to allowing him to vary the portions decreed by Allah. However, a bequest to an heir is valid if their heirs consent to it.

5.9.0 THE MUTUAL RIGHTS AND OBLIGATION OF PARENTS IN RESPECT OF CHILDREN

Under the English Law a child has the right to maintenance and advancement from his parents on whom there is a correlative moral and legal duty.

The parent's duty of maintenance is primarily that of the father who is duty bound to house, clothe and maintain his wife and her children to best of his ability, having regard to his material resources and the children's age and needs. This duty can be enforced by court order at the instance of the child's mother or, presumably another member of the wider family of

which the father is a member - subject of course to the statutory limitations on representation in law suits. A father who has been in breach of his duty in this respect, with the result that a third party has had to carry the burden of maintenance of his children, may be ordered by a court of competent jurisdiction to re-imburse that other person.

At Common law the duty of parents to maintain their children is moral not a legal one.[47] This moral obligation is reinforced by a number of previsions which place a duty on parents in common with other persons in charge of children under fourteen years of age to supply them with the necessaries of life.[48]

A parent who fails to perform this duty without lawful cause is guilty of misdemeanor [49]. If he did so in circumstances which amounted to desertion or abandonment of the child and if any grievous harm (e.g. starvation or exposure to the elements) were likely to result to the child the offending parent would be guilty of felony. [50]

The guardianship of a child of a marriage is vested primarily in the father. He is the natural guardian and his rights as a parent are superior to those of the mother. In consequence, he has the custody, the care and control of the child's person and education during minority (normally until the child attains the age of 21 years or marries at an earlier age), as well as the sole administration and management to his property and business

affairs. This does not mean that the mother has no right over the child. She shares in the parental control of the child's person and education, but the father has the final authority.

Custody is one of the incidents of natural guardianship. Where custody is separated from guardianship as it frequently happened in Nigerian Law, the latter is not decreased but only displaced or suspended in the interests of the minor to the extent that the custodian parent should exercise certain incidents of the parent authority. The other incidents remain, as before, with the father.

5.10.0 CUSTODY

5.10.1 CUSTODY OF LEGITIMATE CHILDREN OF MONOGAMOUS MARRIAGE

Under the Common Law, a father had an absolute right to the custody of his legitimate children until they attained the age of majority. Even on his death any claim by their mother to custody could be defeated by the father's appointment of a testamentary guardian. Although equity followed the common law, it laid greater emphasis on the protection of the welfare of the child. In equity, the welfare of the child is of paramount consideration.

Statutes have now altered the Common Law rule. In discussing the statutory changes, a distinction will be made between the position in the Western and Mid-Western states on the one hand and the rest of Nigeria on the other. This is prompted by the fact that while the pre-1900 English Statutes of General Application have ceased to apply in the Western and Mid-Western states, they continue to have legal effect in the other parts of Nigeria.

Taking first the position in Nigeria, the pre-1900 English Statutes on custody are Statutes of General Application which are still in force,. In order to understand the changes effected by the successive English Statutes, it is necessary to examine their major provisions.

A marked change in the Common -Law rule was achieved by Talfourds Act of 1839, which empowers the Court of Chancery to give a mother the custody of her children until they attain the age of seven years, and access to them up to the age of majority. But the court can only make an order of custody in favor of a mother who is not guilty of adultery. The Custody of Infants Act, 1873, enlarged the provisions. This Act enables the Court of Chancery to grant a member access to, or custody of her child who is under the age of sixteen. Section 2 of the Act, which is still in force, makes valid the agreement made under a separation deed by which a father relinquishes the custody of his children to their mother provided the arrangements is for the benefit of the infants.

The Guardianship of Infants Act 1886 further extended the provisions of the earlier statutes. It conferred on the court where the mother of the child is then residing with its father[51].

Under Section. 12(3) of Custody of the Infant Act 1891, where the custody of the child is granted to its mother, the court may order that its father should pay to the mother such weekly or other periodic sums towards the maintenance of the child as the court considers reasonable in the light of the father' means. Nevertheless, no order for custody or maintenance made under Section 12 of the Custody of Infant Act 1891 is enforceable nor can any liability accrue thereunder while the mother of the child resides with its father.

In addition, such order for custody or maintenance will cease to have effect if after a period of three months from the making of the rider, the child's mother continues to reside with its father.[52] A parent cannot recover custody of a child from the other parent by a writ of habeas corpus. The basis of this is that as each parent has a right to the custody of the child, it can't be said that the possession of the child by either parent is unlawful.

5.10.2 AS BETWEEN PARENT AND THIRD PARTY

A writ of habeas corpus[53] will be granted if it is established that a third party unlawfully detains the child. Nevertheless, the court may refuse to grant the writ if it is satisfied that the parents have abandoned or deserted the child or has so conducted themselves as to be disentitled to the custody.[54] Moreover, a parent may be refused the custody of his child if he has allowed the child to be brought up by another person, that is, the parent was unmindful of his parental duties. But the court may in such a case still grant the parent custody if it is established that with regard to the child's welfare he or she is a fit person to have the custody.

In the Nigerian cases of ***Ahize V. Ahize, and in Ugoji V. Okeke*** where custody has been refused to a parent and the child is being brought up in a different religion to that of the parent. The parents have the legal right to require the child to be brought up in accordance with their desire.[55]

5.10.3 THE CUSTODY OF ILLEGITIMATE CHILDREN

At Common Law, an illegitimate child was a filius nullius. (Son of nobody), and neither of the parents was strictly entitled to its custody. But it is the mother's obligation to maintain it as a right to the child's custody.

In the Western and Mid-western States, the Infants Laws of 1886 applies to both legitimate and illegitimate children. Consequently, any dispute between the natural parents of a child and its custody is resolved on the basis that the child's welfare is of first and paramount consideration. The same rule applies to dispute between a natural parent of the illegitimate child and a third party. Subject to this rule, the custody of an illegitimate child may be claimed from the third party by its parent by habeas corpus proceedings. The same rule applies in Nigeria under the Guardianship of Infants Act 1886 and Custody of children Act 1891.

5.10.4 CUSTODY OF CHILDREN UNDER THE NIGERIAN MATRIMONIAL CAUSES ACT, 1990

The Matrimonial Causes Act 1990 makes prevision for the custody of children of a marriage that includes both legitimate and illegitimate children.[56] Under the Act, Proceedings for the custody of an infant must form part of a petition for matrimonial relief. Section 71 (1) of the Act provides that in custody proceedings:- the court shall regard the interest of (the) children as the paramount consideration. Subject to this verging principle, the court may make such order in respect of custody of a child, as it deems appropriate.

The order may place the child in the custody of either of its parents as the court thinks fit. The court on the other hand may, if it considers it in

the best interest of the child, place it in the custody of a third party. In the former case, access may be granted to the other parent, while in the latter both parents could be given access to the child.[57]

An order made under the Act could be varied or discharged on the application of either parent. Custody may be granted on such terms and conditions as the court considers appropriate in the particular case.

5.11.0 THE RIGHT OF PARENTS TO CONTROL AND CHASTISEMENT

Although the right of a parent to control and chastise his child is co-extensive with the right to custody, it deserves separate treatment. Its importance may be seen in determining whether a parent has defiance to criminal charges for corporal punishment imposed on the child in an attempt to correct him. Section 295 of the Nigerian Criminal Code provides that "a parent may correct his child, legitimate or illegitimate, who is under sixteen years of age, for misconduct or disobedience to any command. If a parent lawfully entrusts "the governance or custody " of his child to another person, he may also delegate to the latter his own "authority for correction" including the power to determine in what cases correction ought to be inflicted. No correction is justifiable which is unreasonable in kind or degree having regard to the recipient's age and condition - physical and

mental. Nor is condition justifiable if the child, by reason of his tender age or mental condition is incapable of understanding its purpose.

5.12.0 THE PARENT'S RIGHT TO DETERMINE RELIGIOUS UPBRINGING

The person with parental rights has at Common Law a right to determine the religion of the child. Often, the right of the parents to determine a child's religious upbringing goes hand-in-hand with custody. Nevertheless, there are occasions when the issue of religious upbringing arises independently.

Under the Common Law, the father has an absolute right to determine the religious upbringing. As in the case of custody this absolute right has been abrogated by Statute.[58] But the result is that both parents have equal rights to determine the religious upbringing of their child. Welfare of the child is the first and paramount consideration.

By Section 4 of the Custody of children Act 1891 of England, where a court refused to grant custody to a parent and the child is being brought up in a religion different from that of the parents, the parent have a legal right to bring them up in their way and the court may order that the child be brought up in the religion which the parent chose. But before making an order, the court may consult the wishes of the child.

5.13.0 THE RIGHT TO THE CHILD'S SERVICE

The parents of a child are entitled to his or her service while he resides with them. Usually, the services are of a domestic nature, but they may be contractual. Where the child is under 21 years of age, he or she is presumed to render services no matter how nominal to the parents.

It is an actionable wrong for any person to unlawfully deprive a parent his or her right to a child's services, domestic or contractual.

5.14.0 MAINTENANCE OF CHILDREN BY PARENTS UNDER THE STATUTE

5.14.1 THE PRE-1900 ENGLISH STATUTES.

The unsatisfactory position of the Common Law has been altered by statute, which provides the means for enforcing parental duty. The pre-1900 English Statutes applicable in Nigeria (except the Western and Mid-Western States), on custody also provide for the maintenance of children. In addition Section 5 or the Guardianship of Infants Act 1886, empowers the court to grant an order for the custody of a child to the father or mother. In that case, it may also make an order in respect of the maintenance of the child.

Again, if a parent claims the custody of his child by habeas corpus and the child is being brought up by another person at his own expense, the court may if it grants custody to the parent, order that he pays the whole costs incurred in bringing up the child.[59] The parent is compelled in this way to perform the obligation which for sometime they had relinquished to a third party.

5.14.2 INFANTS LAW OF 1958

By section 12 of the law, where the court grants the custody of a child to the mother, it may also order the father to pay towards the maintenance of the child such weekly or periodic sum as it considers reasonable. No such order for maintenance is enforceable while the mother resides with the father. The order will expire if for a period of three months after it was made the mother of the child continues to reside with the father. The Court also has discretion to order a parent to repay the cost of the upbringing of this child by a third party. In both cases the payment ordered may be enforced by an order for the attachment of the parent's income.[60] If, owing to the neglect of a parent to exercise proper care, an infant under the age of seventeen is committed to an approved institution or to the care of an individual, the parent may be ordered to contribute towards the maintenance of the infant. The maximum maintenance which can be ordered under this provision is eight Naira per month.[61] The sum

ordered to be paid may, on the application of either parent, be increased, reduced or rescinded. The Matrimonial Causes Act 1990 provides under Section 70 (1), that a court may order a parent to maintain the children of the marriage, including legitimate and illegitimate children, under the age of twenty-one years. Payment of maintenance in respect of children may be enforced by an attachment order against the income of the recalcitrant parent.

5.15.0 ILLEGITIMATE CHILDREN UNDER THE ACT

5.15.1 The Pre-1900 Bastardy Acts

A number of Pre-1900 English Bastardy Acts provide for the maintenance of an illegitimate child by its natural father. It is uncertain whether these Statutes can properly be regarded as Statutes of General Application in Nigeria. It is, therefore, surprising that as far as it is known, no Nigerian court has considered the applicability of these Statutes.

The Pre-1990 English Statutes on affiliation began with the enactment of the Poor Law Amendment Act of 1844. This Statute was subsequently amended and consolidated in the Bastardy Laws Amendment Act of 1872. The Act enables the mother of an illegitimate child to apply to the Magistrates for an affiliation order in respect of the child. If the application is made before the birth of the child the woman is to make a

sworn disposition stating whom the father of her child is. At the hearing of the application, if the evidence of the mother was to the identity of the child's father is corroborated in some material particular, the justice may if satisfied, adjudge the man to be the "putative father" of the bastard child. In addition, the justice may make an order for the payment of weekly maintenance by the putative father to the mother of the child, or to any other person to whom its custody is granted. Besides the maintenance, the putative father may also be ordered to pay the expenses incidental to the birth of the child.[62] Failure to make the prescribed payments will be punishable by the attachment of the goods of the putative father. An order for maintenance remains in force until the child attains the age of thirteen years or dies, whichever is the earlier.[63]

5.15.2 MAINTENANCE OF CHILDREN AND YOUNG PERSONS ACTS

Owing to the failure to apply the Bastardy laws Amendment Act, 1872 in Nigeria, affiliation complaints by mothers of bastard children are, in practice, directed to the Social Welfare Department. Usually, the welfare officers of the department first attempt to mediate between the parties by persuading the putative father of the child to pay reasonable maintenance for its upkeep. If this fails to produce the desired result, the department shall apply to juvenile court under sections 26 & 28 Children & Young Persons Act for a maintenance order. Under t\hese sections, it will be

recalled, a court may order the maintenance of children in need of care and protection. If the court is satisfied of the paternity of the child, it may make the required order. The major defect in this procedure is that the mother of an illegitimate child cannot on her own apply direct to the court for an affiliation order. She can only obtain relief through the social welfare department. It is submitted that the law on affiliation is far from being satisfactory.

5.15.3 MATRIMONIAL CAUSES ACT 1990

It has been pointed out that a parent may be ordered under Section 70 (1) of the Matrimonial Causes Act to maintain an illegitimate child who has been accepted" as a member of the household.

5.16.0 THE PARENT'S POWER TO CONTROL EDUCATION

At Common Law, the person with parental rights could determine what education (if any) the child shall receive.

There are Books containing striking cases where this right was enforced. For instance in Tremain's Case [64] the child

> Being an infant.... went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford, there went another team to carry him to Cambridge, qualm to keep him there.

The exercise of this right has now been very much affected by legislation. A parent is, by laws obliged to ensure that his child, being of school age, receives efficient full-time education regular attendance at school or otherwise.[65] The legislation requires authorities to have regard to parental wishes.[66] If a parent does not like what the local authority offers he may send the child to a private School or make efficient arrangements for him to receive education at home; if he fails to do so, not only may he be guilty of a criminal offence but the local authority can also apply to the court for a care order transferring to it all the parental rights and duties. A parent is thus effectively deprived of his right not to educate his child. The common law right remains of some importance, however in that it is the person in whom the parental rights are vested who can exercise such choice as his economic circumstance permit about the appropriate school for his child.

5.17.0 PARENTAL RIGHT OVER THE ADMINISTRATION OF PROPERTY OWNED BY CHILDREN

Parental rights include certain powers of administration over a child's property notably the right to receive and recover in his own name for the benefit of the child's property to which the child is entitled.

5.18.0 THE RIGHT TO REPRESENT THE CHILD IN LEGAL PROCEEDING

A child can only bring legal proceedings by his "next friend"; if his interests are involved in litigation he is represented by a guardian ad litem under the provision of order 11, Rule 10 & 12 of the High Court (Civil Procedure) 1987. A parent is prima facie entitled to act in the capacities (unless he has an interest adverse to the child), but the court may remove him if a proper case is made out as in the case of ***Davis V Johnson*** [67].

5.19.0 KIND AND IMPARTIAL TREATMENT

A strong affection or deep concern for another person is love. Love can be communicated in many different ways. It is expressed through words, for example, or through touch or other actions that show admiration and concern. The ability to love a child is one of the most pleasurable parts of living. Couples have the ability to give love and to their child for each to receive it from him or her. Husband and wife are expected to love each other, have respect for their values and opportunities, and children, which the marriage institution offers. This love may contribute to the well being of the marriage, which gives rise to a family.

Affection for children leads to a desire to bind the family. The facial expressions of emotions are the same in all cultures. Even children who are

born blind smile and frown and are endowed with these universal expressions.

Both the husband and the wife owe each other some rights and each of them are expected to discharge these rights towards their children honourably. Above all couples should be geared towards enhancing matrimonial harmony which in turn it will enhance the well being of the children.

5.20.0 REMEDIES UNDER THE ENGLISH DOMESTIC VIOLENCE AND MATRIMONIAL PROCEEDINGS ACT 1976

There has in recent years been a widely expressed feeling voiced by the selected Committee on Violence in Marriage[68] that, although no laws, however well enforced, can prevent marital assaults, "Improvement of the law can be of material assistance to the problem."

The English Domestic Violence and Matrimonial Proceedings Act of 1976 (a private member's measure) was "hurried" through parliament to provide the urgently needed first aid for the 'battered'....[69] women." It seeks to carryout such improvement in four respects, listed below:

(i) by increasing the effectiveness of injunctions by enabling the court to attach a power of arrest[70].

(ii) by giving the courts power to grant exclusion injunction and injunctions against molestation, without the need for other proceedings (e.g. for divorce) to be started.[71]

(iii) by giving an effective remedy not only to spouses but to those who are "living with each other" in the same household as husband and wife;

(iv) by remedying certain defects in the Matrimonial Homes Act of 1967.

5.21.0 THE MUTUAL RIGHTS TO DIVORCE FOR SPOUSES

For the courts to grant divorce certain conditions must be fulfilled as follows:

5.20.1 THE TWO-YEAR SEPARATION RULE (SECTIONS 15 AND 16 MCA 1990)

Except where divorce proceedings are based on "willful and persistent refusal to consummate" adultery, or the commission of rape, sodomy or bestiality, a proceedings for divorce may be instituted within two years of a marriage without the leave of the court. A court may grant leave to institute proceedings within the prohibited period under section..... 16(b).

> On the ground that to refuse to grant the leave would impose exceptional hardship or exceptional depravity on the part of the other party to the marriage.

To be "exceptional" the conduct or hardship must be of a grave nature. It is important to note that the operative part of the provision is that to refuse to grant leave would impose exceptional hardship on the applicant, or that the case is one involving exceptional depravity on the part of the other spouse. The words of the provision refer to present hardship or that which may be imposed in the future by the failure to grant leave to petition. It does not seem to cover hardship suffered in the past in the case of exceptional depravity, the act or conduct must by necessary implication be in the past that is already committed by the respondent.

In dealing with an application for leave to petition, the court is required to have regard to the interests of any children of the marriage. It should also take into account the question of whether there is any reasonable probability of reconciliation between the parties before the expiration of the two-year period.[72]

If at the hearing of the divorce proceedings, after leave has been granted the court is satisfied that such leave was obtained by misrepresentation or concealment of material facts, it may do one of two things. The court may adjourn the hearing for such a period as the court thinks fit or it may dismiss the petition on the ground of the misrepresentation or concealment of material facts[73].

If in such a case there is a cross - petition the court may dismiss the cross-petition along with the main one or adjourn both. But where the court decides to hear and determine the cross- petition, it is bound to hear and determine the petition also[74]. However, the dismissal of a petition or cross-petition as stated above does not preclude the spouse from initiating subsequent proceedings on the same or substantially similar facts as those that constituted the grounds of the dismissed petition or cross-petition[75]. Moreover proceedings may be instituted after the expiration of the two years period, based on matters, which occurred during that period.

5.22.0 THE GROUNDS FOR DIVORCE UNDER THE M.C.A. CAP 220 LFN

Section 15 (1) Matrimonial Causes Act 1990 declares that either party to a marriage may petition for its dissolution on the ground that the marriage has "broken down Irretrievably". This Act stipulates eight situations, each of which constitutes such irretrievable break down.

5.22.1 The Eight Facts Situations are as follows:

Willful and persistent refusal of a spouse to consummate the marriage is a fact for the grant of a decree of divorce as a right. "Willful and persistent refusal to consummate" means "a settled and definite decision arrived at without just cause" and in determining whether there

has been such a refusal the judge should have regard to the whole history of the marriage. The word 'persistent' implies that the refusal is a continuous act rather than an isolated case of refusal. Consequently, for a court to find that there is willful and persistent refusal to consummate, it must be satisfied that the marriage had not been consummated up to the commencement of the hearing of the petition.

What constitutes willful and persistent refusal to consummate will depend on the facts of each case. But it must be shown that the refusal was a conscious and free act of the respondent. Mere neglect to comply with a request is not necessarily the same as refusal. Moreover, before there can be a refusal there must be a request, direct or implied, and an opportunity to comply with such a request must exist. The fact that a husband habitually uses contraceptive in spite of his wife's protest does not constitute a refusal to consummate. In fact, a marriage is consummated where the husband can have full intercourse but is incapable of making his wife conceive a child. The same may be true where coitus interrupts is practiced.

5.22.2 ADULTERY

By Section 15(2) (b) of the 1990 Act. There is an "irretrievable breakdown" where, "since the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent."

Adultery is the voluntary act of sexual intercourse committed by a spouse with a person of the opposite sex, not being the husband or wife, during the subsistence of the marriage. The element of free will is fundamental to the commission of adultery, so, where a spouse has extra-marital sexual intercourse without his or her real consent there will be no adultery. Where, for instance, a wife is raped this does not constitute adultery. Moreover, it has been held that where an insane spouse engages in sexual intercourse with a third party, the adultery cannot be established against the insane party if he does not know the nature of his or her act is wrong. The court decided in the case of ***Hanbury V. Hanbury***[77] that where a spouse has extra-marital intercourse while under the influence of alcohol or drugs so that he or she does not understand the nature and consequence of his or her act, the position is akin to insanity, and adultery will be negated.

Once a husband establishes an act of intercourse between his wife and a third party, the burden of proof is then on the wife to show that the intercourse was without her consent. But if at the close of evidence, the court is uncertain whether the case is one of adultery or rape, it must dismiss the petition. In a case involving adultery it is immaterial that the marriage has not been consummated.

For adultery to be found, the intercourse need not be completed, as would constitute the consummation of marriage. But there must be some penetration of the female organ by the male. So, when the parties indulge in sexual gratification which does not involve some penetration, adultery will not be found as in the case of the President of United States of America and Monica Lewinsky in 1998, where it was said he used cigar to play with her private part, while she played with his organ.

5.22.3 THE CONDUCT WHICH THE PETITIONER CANNOT REASONABLY BE EXPECTED TO BEAR

The conduct of the respondent, which is in issue, must have occurred since the celebration of the marriage. The term `behaviour' in the context of Section 15(2) (c) means something more than a state of affairs or a state of mind. It has been construed to import: "action" or "conduct" by one spouse, which affects the other. Such conduct may either take the form of acts or omissions or may be a course of conduct and it must have some reference to the meaning.

The phrase 'cannot be reasonably expected to live with the respondent' in sub-section 15(2) (c) poses an objective test in contradistinction of subsection 15(2) (b). But the word "the petitioner" in the clause means the particular petitioner in the case under consideration and not an ordinary reasonable petitioner. Thus, a violent petitioner can reasonably be expected to live with a violent respondent.

Situation envisaged in the clause is enumerated in Section 16 of the Act. But this enumeration is not exhaustive, for Section 16 makes it clear that they are 'without prejudice to the generality of Section 15 (2) (c)'. These situations are: Rape Sodomy, or bestiality; habitual drunkenness or intoxication, frequent convictions and habitual leaving the spouse without support; imprisonment; attempt to murder and assaults; and insanity.

5.22.4 CRUELTY

Cruelty is another ground for divorce

Where there is injury to the petitioner or a reasonable apprehension thereof, he may not be reasonably expected to live with the respondent, may take a variety of forms, including those which may constitute cruelty under the law. Such conduct may include physical assaults, humiliating treatment, nagging, and the use of juju.

In ***Johnson V. Johnson***[78] "It was held that unreasonable refusal of sexual intercourse, nagging habitual intemperate, drinking of alcohol and, inordinate sexual indulgences of the respondent with all sorts of women, particularly with housemaids, were weighty and unreasonable acts to call the petitioner to endure.

As a general rule, the courts do not consider a single act of cruelty as sufficient to evoke the application of Section 15 (2) (c).

In the case of ***Okafor V. Okafor***[79], Oputa, J, explained the relevance of cruelty to the section thus; "This implies not just one solitary act of cruelty but a behavioural pattern based, be it on cruelty or other grounds which lead the court to infer that cohabitation can no longer subsist between the parties'. It was held in that case that where on the same occasion the respondent beat the petitioner pushed her down and locked her up, the acts did not amount to that sustained behaviour envisaged by Section 15 (2) (c).

5.22.5 DESERTION FOR 1 YEAR

Under Section 15 (2) of the 1990 Act, a marriage will be regarded as having "broken down irretrievably" where the respondent has deserted the petitioner for a continuos period of at least one year immediately preceding the presentation of the petition.

Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation

permanently to an end without reasonable cause and without the consent of the other spouse[80]. To constitute desertion, therefore, four elements must be present at the same time; the defacto separation of the parties, animus deserendi, lack of just cause for the withdrawal from cohabitation, and the absence of the consent of the deserted spouse.

5.22.6 DE FACTO SEPARATION OF THE SPOUSES

De facto separation implies the bringing to an end of cohabitation by severing all marital obligations ever shed, M. R. in ***Perry V. Perry***[81a] established that obvious case of desertion occurs when one spouse physically departs from the matrimonial home. But there are other instances of separation. A spouse who is desirous of leaving the matrimonial home does not always have an alternative place to go to. Rather than leave, he may continue to live there, but repudiates all marital obligations. In such a case there will be desertion just as in the case of physical departure. Consequently, there may be desertion where the parties continue to live under the same roof[81b].

As in ***Walker V Walker***[82] the parties lived in the same house but the wife withdrew to a separate bedroom, which she kept herself locked. She refused to perform any domestic duties for her husband, who therefore did the household jobs for himself. He had most of his meals outside, but on a

sunday the parties were compelled to use the same kitchen, though at different times. They communicated with each other by the exchange of notes. It was held that the parties were not living together in the same household and that the wife was therefore guilty of desertion.

There may be defacto separation but no desertion where the parties are living apart against their will, for instance, by imprisonment or internment as in the case of ***Beeken V Beeken***[83].

5.22.7 ANIMUS DESERENDI

Intention to withdraw from cohabitation permanently: There is no intention to withdraw from cohabitation permanently where a spouse is temporarily absent from the other as in the case of ***G.V.G.***[84] from e.g. on holidays or business[84]. The same is true where the separation is due to mutual consent.

Where a spouse voluntarily abandons the matrimonial home there is a presumption, that he intended to desert (animus deserendi.) The case of ***Sowande V Sowande***[85] decided that desertion, starts at the moment of his departure. But if in the course of separation due to mutual consent one of the parties forms the intention to withdraw permanently from the other, desertion starts from the moment the intention was formed.

In ***Agu V Agu***[86] The parties, a Nigerian and a German lady were married in England in July 1952. The husband petitioner returned to Nigeria in August 1958 on the mutual agreement that he would first settle down and later send for his wife and children. In 1960 the petitioner booked passages for the respondent and their children to join him in Nigeria. The respondent canceled the booking on the ground that she was nervous to make the journey, and later made it clear that she would not make the journey. In May 1963 the petitioner made an unsuccessful journey to Germany to persuade her to return. It was held that the respondent was in desertion from 1960, when the animus deserendi supervened.

Similarly, if separation is involuntary e.g. owing to imprisonment it may be turned into desertion by the subsequent animus deserendi of a spouse as in ***Beeken V Beeken's*** case [87].

5.22.8 LACK OF JUST CAUSE TO DESERT

There will be no desertion if the spouse who has withdrawn from cohabitation has a good reason for doing so. It is clear that where one

spouse is guilty of adultery or other matrimonial misconduct the other spouse will have a reasonable cause for living apart.

The court in ***Jackson V Jackson***[88] stated that the general principle is that any conduct, which makes the continuance of matrimonial cohabitation virtually impossible, will provide a good excuse for a spouse to desert.

5.22.9 ABSENCE OF CONSENT TO LEAVE THE MATRIMONIAL HOME

A spouse who leaves the matrimonial home without the consent of the other spouse may be in desertion. If there has been a separation by agreement, desertion will supervene once one party withdraws his consent to that state of affairs.

In ***Ikpi V Ikpi***[89] the parties were married in 1944 and lived at Ibadan. In November 1950 the husband was transferred to Zaria. There was an agreement between the spouses that the wife should remain at Ibadan as she was expecting a baby and maternity facilities were not assured at Zaria. The wife was to join him in Zaria in February 1951 if maternity facilities in Zaria were guaranteed. Later the husband wrote assuring the wife of maternity facilities in Zaria. The wife refused to join him on the ground that she would not get a teaching appointment in Zaria. It was held that as

the husband had put an end to the agreed separation the wife was in desertion when she refused to join him in Zaria.

5.22.10 SEPARATION AND RESPONDENT'S CONSENT TO DISSOLUTION

A marriage will be regarded as having "broken down irretrievably" where the parties have "lived apart" for a continuous period of at least two years immediately preceding the proceedings and the respondent does not object to a decree being granted[90].

Mere physical separation for two years or more is not sufficient to constitute living apart under the Act. The marriage relationship does not end as long as the spouses *bona fide* recognise it as subsisting. Consequently, a petitioner has to prove not only the fact of separation for two years but also that he or she had ceased to recognise the marriage as subsisting and intended never to return to the other spouse. However, the court has ruled that in ***Santos V Santos***[91] the petitioner's state of mind need not be communicated to the other spouse.

The court laid down the principle in ***Sharp V Sharp***[92] that 'living apart' involves physical separation accompanied by the severance of consortium. And in the case of ***Agunta V Agunta***[93] the court said that there must be a clear intention on the part of one or both spouses not to

return to the other and the treatment of the marriage as having come to an end.

5.22.11 (v) THREE YEARS' SEPARATION AS A GROUND FOR DIVORCE.

Acceptable evidence of the "irretrievable breakdown of marriage" is that the parties have lived apart for a continuos period of "at least three years[94] immediately preceding the presentation of the petition."

The distinction between this provision and sub-section 15 (2) (e) considered above is the difference in the length of the period of separation and the requirement in the former that the respondent should not object to a decree being granted. Besides these points of departure, the same interpretation is given in both sections to the facts of living apart and the continuity of separation.

It will be sufficient for the dissolution of a marriage under this head to show that the parties have been living apart for three years immediately before the presentation of the petition.

It will be sufficient for the dissolution of a marriage under this head to show that the parties have been living apart for three years immediately before the presentation of the petition.

5.22.12 FAILURE TO COMPLY WITH A DECREE OF RESTITUTION OF CONJUGAL RIGHTS.

A marriage may be dissolved on the fact of "irretrievable breakdown" where the respondent has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights[95].

This provision will come into effect where the respondent in defiance of a court order, has refused to resume cohabitation with the petitioner for the statutory period. It is submitted that the period of one year or over must of necessity immediately preceded the presentation of the petition.

5.22.13 (vi) PRESUMPTION OF DEATH. (SECTION 15 (2) (h) CAP. 220 LFN)

A marriage may be dissolved on the fact that one party to it has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.[96]

This fact may be established by proof of the respondent's seven years' continuos absence immediately before the petition, and of the fact that the petitioner has no reason to believe that the other party was alive at anytime within that period. But proof of seven years absence will not suffice if it is shown that the other party to the marriage was alive at anytime within that period[97]. The burden is, therefore, on the petitioner to

satisfy the court that nothing has happened within the seven years to give him or her cause to believe, as a reasonable man or woman, that the respondent is alive.

What is the position if there is no positive proof that death has occurred? Since 1937[98] it has been possible to obtain a decree of presumption of death and dissolution of marriage. A decree absolute, if it is found, after the decree **nisi** but before the decree absolute, that the other party is still alive, the decree will be rescinded. This procedure effectively terminates the marriage even if the other party is in fact still alive. The petitioner can thus remarry, and be sure that the marriage will not be void.

The Act now provides[99] in section 16 (2) (b) that:

> Any married person who alleges that reasonable grounds exists for supposing that the other party to the marriage is dead may ..... present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable ground exists grant a decree of presumption of death and dissolution of the marriage.

With this ends the grounds for divorce.

5.23 INHERITANCE AND MUTUAL RIGHT

When a man who was married under the Act dies intestate leaving no widow, his children are entitled to the net estate to share alike. If the

deceased was survived by a widow as well as children, the latter will take two-thirds of the net estate - the other one-third going to the widow.

On the other hand all the disposable property of a woman who married under the Act and dying intestate will, if she is not survived by a husband be distributed equally among her children irrespective of sex; If she left a husband, the said property will go to him absolutely and to the exclusion of the children.

5.24 CONCLUSION

The rights of spouses under the English Law shows that it is heavily patrichially based particularly under the Common Law, which placed the men on a higher pedestal of rights than their wives'. The women had to seek for their rights through the Courts of Law and Parliament. Thus, the rights of the husbands and wives were granted as a result of court battles. The Statutory rights are more favourable to the wives by giving them the right to sue and be sued and to deal with their properties as they wish. The rights of spouses listed and discussed in this chapter is not exhaustible such that any right that may be claimed by either spouses before the court will be decided according to its circumstance. In Nigeria, the rights of the spouses that married under the Statute are guaranteed, and enforceable by the

courts. The rights in most respect are provided on mutual basis without discrimination.

NOTES AND REFERENCES.

1. The text relied on was in the Holy Bible, Genesis 2:24. "Therefore shall a man leave his father and his mother and shall cleave unto his wife: and they shall be one flesh".

2. Hall, J. C. Sources of Family Law, (Sweet & Maxwell,) 1966, Pp. 305-313.

3. Thomas Poynter Ecclesiastical Courts (2nd ed. 1824)

4. Pollock, F and Maitland, F. W.; The History of English Law Before The Time of Edward 1, (Cambridge University Press, 1895,) Vol. 2 . P. 369

5. See Law Com. No. 33, Paras 11-15

6. (1953) 2 All E.R. 1411, 1430 C.A.

7. (1834) M. W. 325;

8. (1942) N.Z.L.R. 356.

9. (1925) 133 L.T. 830

10. (1897) P. 263, 271-273.

11. Ibid.

12. Ibid

13. (1968) P. 296, (1967) 2 All E. R. 300

14. See Sign V. Kaur Post, P. 94.

15. (1971) P. 286 (1970) 3 All. ER 905

16. Matrimonial Causes Act 1983 S. 12 (d)

17. (1969) 1 Al ER 539.

18. Matrimonial Causes Act 1983 S. 12 (e)

19. See **Heydon's** Case (1584) 3 Co. Rep. 7

20. Ibid S. 12 (f)

21. (1932) 2 KB 497

22. Bromley, P.M. Family Law, 3rd Edn. (Butterworth London, 1966) P.157

23. (1952) AC 716 736 (1952) 2 All ER 394, 401.

24. (1877) 2 PD 263 264

25. (1901) AC 450

26. (1897) P. 24.

27. (1919) 1 KB 564 CA.

28. (1923) P. 18-21

29. (1949) P. 98 - 103

30. Matrimonial Causes Act 1990 See 5 (1) (a)

31. (1954) 2 A ER 4529.

32. See: Criminal Code Act, Sec. 286, 287; Okonkwo, C. and Naish M. Criminal Law in Nig. (Sweet & Maxwell, London, 1964) 219-226.

33. Criminal Code Act, Sec. 32(3)

34. Biology, The Word of Life Page 242, 3rd Edition.

35. (1854) 15 Cox, CC. 540.

36. (1796) 6 Term Rep. 603.

37. (1952) P. 202

38. Re Taylor Application (1972) 2 QB. 369

39. Atkins Court Divorce forms 138

40. (1973) 3 All ER 449 CA.

41. (1975) 3 WLR 586

42. (1976) Fam. P. 271

43. Suit WD/31/70 of 19th Feb 1971

44. Suit WD/31/70 of 2nd July 1971

45. (1964) F.L.R. 262

46. Bromley, Op. Cit. P. 166 "Crimcon" is short for Criminal Conversation.

47. Halsbury's Law of England (3rd ed.) Vol. 21 Para. 419 P. 189.

48. Sections 300 and 301 of the Criminal Code Act.

49. Ibid, S. 339.

50. Sec. 341 Ibid.

51. Sec. 5 Custody of the Infant Act, 1891

52. Sec. 2 Ibid.

53. Sec. 12 (1) and (2)

54. Sec. 12 (4).

55. Suit No. HOW/11M/67 (unreported), Nkemma J, High Court, Owerri, 25 August 12) 67; (19644) 2 All NLR 148.

56. Custody of Children Act 1891, Sec. 1.

57. Sec. 4 Ibid.

58. Sec. 71 Ibid.

59. Sec. 71(3) and (4)

60. Sec. 4 Custody of Infants Act 1891, Sec. 19 f Infants Law 1958

61. Custody of Children Act 1891 Sections 2 and 3

62. Sec. 22.

63. Children and Young Persons Act, Sec. 28.

64. (1719) 1 Strange 167.

65. Education Act 1944 S. 36

66. Ibid Sec. 76.

67. (1978) 2 W.L.R. 553, 567 Per Dilhorne

68. Per-Devies L.J. (1973) 1 W.L.R. 1159.

69. Vol. 1, Para 42.

70. Per Lord Salmon Davis V. Johnson (1978) 2 W.L.R. 553.

71. Sec. 2.

72. Matrimonial Causes Act 1990 Sec. 30 (4) Cap. 220 LFN

73. Section 30 (5)

74. Section 30 (6)

75. Section 30 (7)

76. Section 30 (8)

77. Halsbury (1892) P. 222.

78. CCHCJ/11/72, 94

79. Suit No. 0/60/71 (Unreported) HCL Onitsha 13 Nov. 1972.

80. Raydens Practice and Law of Divorce (ed. Jackon V. and Turner, C.F.)19th ed.

81a. 1 ALL ER

81b. Rosanwo V. Rosanwo (1961) WNLR 297; Shyngle V. Shyngle (1923) 4 NLR 94.

82. Naylor V. Naylor (1962) 2 ALL ER 138 (CA)

83. (19448) P. 302 (CA)

84. (1964) P. 133.

85. FSC. 130/1962 (Unreported)

86. Suit N. E/ID/1966 (Unreported) Oputa J.

87. (1948) P. 302 CA.

88. (1932) 146 LT 406

89. (1957) WNLR 59.

90. Section 15(2) (e) of Matrimonial Causes Act 1990.

91. (1972) 2 WLR 889 (CA)

92. (1961) 2 FLR 434;

93. (1972) 2 ECSLR 20

94. Section 15(2) (4) MCD 1990

95. Section 15(2) (9) Ibid for the relief of restitution of conjugal rights.

96. Section 15(2) (h) MCA 1990 LFN, CAP, 220

97. Section 16(2) (a) Ibid.

98. Matrimonial Causes Act 1937. S. 8.

99. Section 16 (2) (b) M.C.D. 1990, LFN, CAP, 220

CHAPTER 6

6.0 THE RIGHTS AND DUTIES OF SPOUSES UNDER ISLAMIC LAW

6.1 INTRODUCTION

The study of rights of the spouses in marriage under Islamic Law could be approached in many ways according to what the writer intends it to be. It could be approached from the right of Almighty God and mutual rights, etc. But in this work, I intend to approach it from the angle of monetary and non-financial ways and of-course in the light of the rights of Almighty God as falling simply either as those of the husband, the wife or mutual. Therefore, the study is basically to show the rights and obligations of the spouses. Hence, the rights e.g. to maintenance, divorce, inheritances, etc. as rights of the Almighty God would be categorized according to whom it is be due to.

Marriage in Arabic is called Nikah[1] while the Holy Quran described (Male and Female) Marriage as Azwaj in Quran 16:72 which reads;

> And God has made for you mates (and companions or Azwaj;) of your own nature, and made for you, out of them, sons and daughters and ground-children, and provided for you sustenance of the best will they then believe in vain things and be ungrateful for God's favours.

Also the Holy Quran described marriage as Nikah. In Quran 4:3 when it says:

"Marry (Fankihu) women of your choice" Marriage in Islam is both contractual and sacramental. Thus, it is described by the Holy Quran as a solemn covenant between Allah and the human parties as well as between these parties themselves[2] It is the legitimate means by which male and female could cohabit as married persons. This formed the basis upon which it is seen as a contract, a covenant and divine institution.[3] Therefore, marriage in Islam is a means to emotional and sexual gratification, as a mechanism of tension reduction, legitimate procreation, social placement, as an approach to inter-family alliance and group solidarity[4]. Marriage also is an institution where by its rules and regulation provided lawful facilities for sexual intercourse, peace, tranquility and procreation of children [5].

A marriage contract is validly concluded between a man and woman in Islam according to Maliki School when five essential elements are satisfied. These are: Formulas, witnesses, dower (Mahr) or sadaq, marriage guardian and the spouses i.e. subject matter. Where a man and woman are lawfully joined by way of marriage as husband and wife they are bound by some legal and religious consequences. In other words, once couples become husband and wife, in a lawful way under Islamic Law, some social, legal and contractual consequences are to be fulfilled. These are known as

the rights and duties of the married persons or spouses under Islamic Law[7]. These rights and duties may be divided into three for simplicity of explanation and understanding as follows:

a) The rights of the husband, which signifies the obligations of the wife and

b) The rights of the husband, which signifies the obligations of the wife and

c) The mutual rights and duties of both husband and wife.

However before discussing each of the above kind of rights, a brief introduction of the entire relationship between married persons under Islamic Law may be relevant.

It is important to understand that family relations as a result of marriage contract under Islamic Law are regulated both on specific legal rules and general religious moral (or ethical) principles. Thus, the Holy Quran and the sunnah of the Holy prophet provided relatively minimal details regarding the legal specifics of family life thereby leaving the jurists to work out the detailed rules even-though quite intricate and difficult.

The moral and legal basis of the relationship between a husband and a wife can be seen in several chapters and verses of the Holy Quran in the preceeding chapters. Hence, spouses are bound and committed to each

other legally, morally, contractually, religiously and socially based on the divine designation of peace tranquility and sovereignty, a link of mutual love and compassion – being God's signs for those who reflect.[8] The nature of the relationship that should exist between married spouses in Islam has been precisely stated by the learned author of the Family Structure in Islam as follows:

> The role of the husband normatively evolves around the principles that it is his solemn duty to God to treat his wife with kindness, honour and patience, to keep her honourable or free her from marital bound honourable and to cause her no harm or grief. The role of the wife is summarized in the Quranic statement that women have rights even as they have duties according to what is equitable, but men have a degree over them.[9a]

This is usually interpreted by Muslims in conjunction with passage of the Quran: 4:34, which states, among other things, that:

> Men are protectors of women and managers of their affairs because God has made some excel over others and because men expend of their means. The righteous women are therefore devoutly obedient and consequently guard what God would have them guard.

This may be likened to what sociological parlance call instrumental leadership or authority in the household due to role differentiation on the basis of sex[9b].

The above quotation aptly provides us with the general principles of Islamic Law relating to marital relations of married spouses. The details of which shall now be considered.

6.2 THE RIGHTS OF THE WIFE, AN OBLIGATIONS OF THE HUSBAND

A wife under Islamic Law is entitled to various rights from her husband by virtue of the marriage contract between them. These rights may conveniently be divided into financial/material and non financial/non-material rights. The former involves the question of rights that demands the husband to expend for the wife from his wealth while the latter is asking the husband to discharge his social, religious and moral obligations for the wife.

6.2.1 FINANCIAL/MATERIAL RIGHTS OF THE WIFE

The financial/material rights of a wife from her husband are mainly two, namely the right to dower (sadaq or mahr) and right to maintenance.

a) The right to receive dower is one of the most important legal incidences of marriage under Islamic Law. Thus a husband must give his wife as of right her dower (Sadaq or Mahr) on the occasion of their marriage. The provisions of the Quran requiring a husband to marry his wife with his property is contained in Quran 4:4 and 4:24.

Quran 4:4 provides:

> And give unto Women (who ye marry) free gift of their marriage portions; but if they of their own accord remit unto you a part thereof, then ye are welcome to absord it (in your wealth).

While Quran further provides in chapter 4:24.

> Except for those prohibited all Women are lawful for you provided, you seek their hands with your property and given them their dower as appointed.

Sadaq has no direct equivalent word in English even though dowry is today commonly used to describe it. In an attempt to define it, various definitions have been proffered and all of them are focused towards one end.

Dower according to BALLIE in his book is:

> The property, which is incumbent on a husband (to give to the wife) either by reason of it being named in the contract itself as opposed to the usufruct of the wife's person. [10]

It has also be defined as that thing given by a man to his proposed wife in form of money or its equivalent as consideration for conclusion of the marriage.[11]

In his own contribution to the description of dower a learned Islamic Law author, Abdal Ati, considers it as follows:

> Dower is used to designate what a Muslim groom gives to his prospective bride. It is her personal property which she is empowered to waive reduce, return to her husband or dispense with as she pleases... It may consist of money, property movable objects or services rendered to the bride herself.[12]

From the above definitions, it is evidently true that dower is not a price or cost for the purchase of the wife or marital benefits which is the only reason why it is given exclusively to the wife and not to her guardians or parents. For all intent and purposes, dower is given by the bride-groom for various reasons, which among others are the following:

Dower is seen as an expression of love and the bridegroom's demonstration of his willingness, readiness and capability of supporting and holding on to the wife for good; it is seen as manifest assurance on his part that the brides economic security and rights will be maintained; to the bride, dower is a token of the bridegroom's desire to enter into a union with her; to her family, it is a gesture of mutual friendship and solidarity, an assurance that their daughter will be secured and in good hand."[13] Even-though dower is exclusively for the bride this does not preclude her from surrendering it to her parents as custom may require for spending for the marriage of the parties, similarly, payment of dower per se does not remove the bride-groom from performing his other obligations due to the bride.

6.2.4 UNSPECIFIED DOWER (MARHR AL-MITHLI)

This arises where the dower has not been fixed either before or at the time of the contract or after the contract. It is fixed with reference to the social position of the wives' father's family and her own personal qualifications. The social position of the husband and his means are of little account. This should be done by taking into consideration the amount of dower paid to her sister and paternal aunts.

The author of Hedaya says;

> In regulating the proper dower of a woman, attention must be paid to her quality with the woman from whose dower the value is to be taken in point of age, beauty, fortune, understanding and virtue because it varies according to any differences in all these circumstances; and in like manner differ according to place of residence or time.[14]

Islam therefore safeguards the rights of a wife and attempts to ensure her economic status consonant with her own social standing.

The following case expresses the exclusive rights of a wife to her dower; ***Fatsuma Bako Rafa V Bako Rara Sharihuru***[15] in which the court ordered dissolution of the marriage on the ground that dower was not paid. This was an appeal case against the decision of Area Court between the parties. The court of first instance heard all the statement's of the parties and their witnesses, and subsequently ordered the dissolution of the marriage on the evidence of the appellant's witnesses. On a further appeal

by the respondent at the Upper Area Court, the order was reversed but the wife failed to comply with it, where upon she went back to the court of first instance and instituted another suit. The Area court accepted the suit and dissolved the marriage again vide its Judgment of 31/12/91 relying on a tradition of the prophet but it neither quoted the tradition nor mentioned the name of the reporter. In its judgement the Upper Area Court, of Alkaleri set aside the decision of the Area Court, and allowed the appeal of Bako Rafa. It relied on what the author of one "Inkamul Ahkam" says in page 92 but without actually quoting it.

In one tradition, it was narrated that the prophet (PBH) paid dower on all his wives and also all those who married his daughters were made to pay dower to them. From the above provision it is very clear that marriage is unlawful save with the payment of dower[16]

As to the amount payable as dower, no definite or specific amount is fixed. However, there are various traditions of the prophet (PBUH) on this subject. In one of the traditions, it has been narrated by Amir bin Rabiah that a woman belonging to Banu Fazarah was married on a pair of shoes as her dower. The prophet (PBUH) asked her:

> Are you happy with yourself with a pair of shoes? She said yes. The Prophet (PBUH) permitted her to marry.

Similarly, Sahal b. Sā,idi reported that:

> A woman came to the Apostle of Allah (PBUH) and said: Apostle of Allah verily I give away myself to thee and stood waiting for a long-time. A man then stood up and said: Apostle of Allah marry this woman to me if you have no need of her. The Apostle of Allah (may peace be upon him) said: Have you anything to give as Sadaq. The man said that except for his loincloth he had nothing. The Apostle of Allah (peace be upon him) said: You will be without a loin if you give it away to her; seek for something else. He said that he could find nothing. The Apostle of Allah (May peace be upon him) asked him to find out something still, even if it were an iron fingering. He said he could get nothing. Then the Apostle of Allah (May peace be upon him) asked him. Do you remember something from the Quran? He said: Yes I know such and such Surahs. The Apostle of Allah (May peace be upon him) said: I marry thee to this woman in exchange of the Quran that you remember.[17]

6.2.5 RIGHTS TO MAINTENANCE (NAFAQAH) OF THE WIFE

Maintenance (Al-Nafaqah) is another important right a wife has to claim from her husband. This includes the right to feeding, shelter, clothing, and medical care in times of need in addition to all other essential services irrespective of whether the wife is rich. This right conferred on the wife must be provided for by the husband.

Maintenance of a wife in law has a status and special position and peculiar to it, it should not be confused with or considered the same as what is now being witnessed in some Muslim families in Nigeria where the

maintenance of a wife is not seen as a responsibility as a result of which they (wives) support themselves and children.

This duty of maintenance has been fully acknowledge by Quran 2:286 and 65:7. In Quran 2: 286 it provides that:

> The husband shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear...

While Quran 65:7 further provides that:

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

A specific consequence of this divine command is that a wife is entitled to this right by virtue of the fact that she is devoted to the husband and confined to his house hold by the very reason of marriage, that is, being his wife and trustful. This duty of maintenance is enjoyed to be discharged by the husband cheerfully without "reproach" or injury.[18]

This right of maintenance given to a woman is not qualified. Thus, it is a right given to a wife irrespective of her faith or religion, age, riches or poverty, healthy or sick. A wife under the law is relieved from the responsibility of maintaining herself no matter how wealthy she may be.

Hence, even where a husband has less resource than his wife, it remains compulsory upon him to bear the family financial expenses in a generous and charitable way. Right to maintenance for a wife is inalienable and in case of failure by the husband to discharge that duty, she is entitled to take legal action in a court of law against him for the recovery of that maintenance.[19] Thus, it can be seen that maintenance is complex and covers the condition of both spouses and the custom and traditions prevailing in their community.[20]

However as regards residence, there seems to be no prescribed pattern for it. What is prescribed is, the husband's responsibility for the wife's shelter. The wife's lodge must be adequate so as to ensure her privacy, comfort and independence. The main concern here seems to be the welfare of the wife and the stability of the marriage. The wife's right to maintenance even extends to cases after her divorce and particularly where she happens to be pregnant. This was the issue for determination in the case of ***Karimatu Idi Inusawa V Idrisu Dausara***[21]. In this case the ex-wife sued her former husband for maintenance and paternity of her child born after divorced and won because she was pregnant before the divorce. In the instant case the appellant sued the respondent. She told the court that the respondent divorce her 7 months ago and stated that she was pregnant within the period and later delivered the child. She further alleged that she

observed her Iddah before re-marrying. That she never knew she was pregnant because she was small and could not therefore inform her husband.

The respondent denied what the appellant stated and maintained that the pregnancy was not his own because for 5 month the appellant stayed in her father's house. The respondent sought for settlement out of court with the appellant's parents but it proved abortive. The respondent further alleged that it was 12 months since they separated and not 7 months as alleged by the appellant. The parties then separated after the appellant's father gave back the dower to the respondent (ex-husband).

On a further appeal the Court asked the parties for their witnesses to testify as well as the evidence based on the medical doctor's report to find out the real paternity for the purpose of and maintenance. The court therefore reached the following conclusions:

1) That since the appellant and respondent were married for 15 days before she left for her father's house (as she was divorced) she started observing Iddah.
2) That after that the appellant married the 2nd husband, Lawan who was brought before the court to testify, it was proved that she indeed

married the 2nd husband within 5 – 15 months of her divorce from the first husband and by which time she was pregnant.

3) In addition, they went to the hospital where it was verified that the appellant was 32 weeks pregnant.

4) That no doubt the appellant married the 2nd husband while she was pregnant and still serving her Iddah period.

5) As such the marriage between the appellant and the 2nd husband is null and void and are barred from marrying each other forever.

6) The respondent is to take care of the child as he is the rightful father and that all those who negotiated the immoral and illegal marriage should pray for Allah's forgiveness never to repeat such mistake again: The wife won the appeal for maintenance.

Like the above authority, traditions also abound in respect of maintenance. In one of those traditions, the Prophet (PBUH) was reported to have declared that:

"The best Muslim is one who is the best to his family."[22]

The Prophet (SAW) in his farewell address on month Arafat on his last pilgrimage said:

> O men you are entitled to certain duties from your wives. They too are entitled to certain rights from you... if they yield to correction they are to be provided as a matter of right their maintenance and clothing as due.[23]

The cumulative understanding of the above textual authorities forms the basis upon which a wife is held to be entitled or vested with an inalienable right to maintenance. The jurists unanimously agreed on this even-though they differed on the details. This view of the jurists is clearly expressed by the view of Khalil, an Islamic Scholar who said:

> It is a duty of the husband who has attained the age of puberty to provide food stuff, soup, clothes and accommodation in accordance with the prevailing custom for his wife who is not indisposed and who possesses the capacity to discharge her conjugal responsibility...[24]

6.2.6 THE EXTENT OF MAINTENANCE (NAFAQAH)

Both the Quran and Sunnah of the Prophet (PBUH) has affirmed beyond doubt the inalienable right of a wife to maintenance by her husband with its various components namely feeding, clothing, shelter and medical and general care in times of needs. The question, however, is how can the quantum of the maintenance be assessed and determined. In other words what shall be the quantity and quality of maintenance given by husband to his wife. The most important considerations are:

i) the financial ability or means of the husband.

ii) the standard of living of the wife prior to the marriage and

iii) the prevailing custom and practices of the people of the community of the spouses.[25] Thus a husband must provide a shelter or

accommodation, food, clothing and other general care to his wife adequately, customarily and equitably so as to ensure the privacy and independence of the wife. The wife is to be clothed, lodged, fed and cared for by the husband according to his means and her style of life. The husband has been warned against discarding these duties to his wife by the provisions in Quran 7: 31 as follows:

> Men are taught to maintain their adornment at every place of worship and to eat and drink without being prodigal for God loves not the prodigal.

In another passage, the Holy Quran 65: 6 – 7 reads:

> Lodge them where you are lodging, according to your means and do not press them so as to straighten their circumstances.... let the man of plenty expend out of his plenty. As for him whose provision is tinted for him, let him; expend of what God has given him God charges no one beyond his means...

In the light of the above, an Islamic Law writer and judge, in his book made an attempt to explain the standard of maintenance to a wife as follows:

> ... The quality of the maintenance must be based on a scale commensurate with his purse, her status, and the level of urbanization and cost of living in the community where both parties live. It amounts to misfortune if she is of voracious appetite but he either puts up with it or repudiates her. He should provide extra food for the nursing mother to enable her cope with the demands of the child. But he owes no duty to provide more than the actual need of food for the sickly woman or a woman whose appetite is low. It is not binding on him to provide her with Harir (Silk Materials). While some Scholars apply this principle to all places, others confine its

> application to Medinah. He should provide her water for her domestic and religious needs, oil, for ordinary purposes, burning, and for making ointment, firewood, salt, and meat from time to time, mat, bed and mattresses... essential cosmetics that are recognised by customs such as eye brow, grease, etc. He should provide maid (s) if her status calls for it otherwise she will do the domestic duties.[26]

The above quotation is a general view of Islamic Jurists on the rights and extent of some in favour of a wife. However, on the details of such rights as it relates to minor are items like sweet, refreshments, etc, though opinions defer. Some said they are not obligatory for they are luxuries.[27]

6.2.7 CONDITIONS FOR THE ENTITLEMENT OF MAINTENANCE

The issue of whether and when a wife is entitled to maintenance is a complex one. It has been held that a wife is only entitled to the maintenance when, in addition to the existence of a valid marriage, some conditions are fulfilled.

According to Maliki School, these conditions are:

a) she should be ready to be under the husband's general dispositions and control;

b) the marriage is valid and duly consummated or

c) if the bride has been invited for consummation, the husband is an adult or of matured age and the bride is capable and fit for conjugal relations.[28]

According to Hanafi School on the other hand, it is agreed that where the wife is a minor, she must be maintained by her father or guardian, however where she has submitted herself to the husband even if she has not reach the age of puberty she will invariably be maintained by the husband. An example of the above instance can be seen in the matrimonial relations between the Prophet (PBUH) and Aisha whom he married two years before she reached the age of puberty.

Some cases relating to the question of maintenance has already been highlighted with reference to various provisions of the Quran and traditions of the prophet (PBUH). It is however, important to state here categorically that a wife's right to maintenance is not absolute. Thus, she may be denied all the above rights where any of the following happens:

1) If she packed out of her matrimonial home to some other places without her husbands permission or consent and without any religious cause.
2) If she travelled without her husband's permission.

3) If she puts on Ihram for Hajj without his permission. But if he went with her or she travelled with his permission, the maintenance will be given.

4) If she refuse sexual intercourse with her husband.

5) If she is imprisoned after committing a crime

6) If the husband dies and she becomes a widow, in that case her right of inheritance supervenes. This is the very reason why the widow is not entitled to maintenance during the iddah of death.

As regards maintenance of a wife, the schools advance different views. However, the most favoured views are that of the Hanafi School which is that a wife is entitled to be maintained so long as she is under her husbands disposal and power however young or ill she may be once there is a valid mariage.[29]

Maliki and Shafi School hold the view that if the husband failed to provide maintenance for a period of two years, the wife will be entitled to dissolution of marriage.

The wife's lodge must be adequate to ensure her privacy, comfort and independence. Thus, it should be a lodging quarters befitting the life style

and means of the spouses. The residence is the exclusive right of the wife to the extent that she may not allow relatives of the husband to stay in.[30]

As regards clothing it is expected that at-least a wife should be given clothes twice in a year for the winter and summer,[31] and especially during Sallah festivals. A wife may however be given clothes more than twice a year according to the means of the husband. That feeding or food, is a matter of daily affairs and to be provided sufficiently too.[32]

A wife is entitled to demand from her husband when he is about to set out on a journey to either give her for the whole duration of his absence an anticipatory allowance or to give a power of attorney to another for her maintenance. The allowance will fall due at the same interval at which the husband was in the habit of paying it whenever he returns.

6.2.8 OTHER CIRCUMSTANCES OF MAINTENANCE

As earlier stated in the preceding topics, maintenance is an inalienable right of a wife and a corresponding duty or obligations, which is incumbent on the husband to discharge. This notwithstanding, the question of maintenance is not found on a hard and fast rule nor is it a pure mathematical equation or a calculated business transaction under which she is provided comfort, affection and compassion.

Whether a wife is entitle to maintenance in other circumstances, such as during sickness, working, waiting period (iddah) such as during arrest and recalcitrants are considered with reference to the provisions of law as follows:

6.2.9 MAINTENANCE DURING SICKNESS

It is generally acknowledged that maintenance is the exclusive right of a wife and a responsibility on the husband, which he must discharge. However, unlike the various components of maintenance namely; food, clothing, shelter the issue of medical and general care at all times, gave rise to differing juristic opinions during sickness. One group among the majority (Maliki inclusive) hold the view that a wife will not be entitled to maintenance once she is sick as she cannot effectively discharge her marital roles and responsibilities as a wife and which is the only reason that entitles her to be maintained by the husband.

Another group (Hanafi inclusive) hold a different view, that the wife's sickness not withstanding, she is entitle to maintenance. They based their view on the principles of Istihsan i.e. moral and practical consideration and hold that it is still the duty of the husband to provide for the wife because she is still his mate whose companionship and trust he enjoys even-though

illness may impede her performances in certain respects e.g. domestic responsibilities and sexual intercourse.[33]

This view is supported by Ibn Taymiyya who pointed out that a sick wife is unquestionably entitled to full maintenance.[34] One will be left with no choice but to be inclined to the jurists who approves wife's maintenance notwithstanding her sickness because to take a contrary position may amount to total negation of the general aims and spirit of Islam which requires kindness and love to one another.

On the maintenance of a sick wife, opinions still differs as to the question of medical care and expenses. While one group holds that the husband is not responsible legally, other group holds the view that if the charges are moderate and the husband is financially comfortable, he is responsible for it. Yet others argue that even if he is not legally responsible for the cost, it is still his religious duty to bear the responsibility out of compassion, courtesy, or in conformity with social norms.[35] This second group, with a moderate view is in accord with the spirit of Islam because medical care by the husband is like saving and preserving the health of the wife and that is also the aim of food, shelter and clothing. Similarly if procreation and child bearing which are the exclusive responsibilities of the wife is anything to consider in a marital relationship, then maintenance of a

wife in all ramifications must be accorded a very special attention and recognition in the schemes of family roles. This second view is found by scholars like Hon. Justice Ambali M. A. and the learned author, Hammu dah Abdul Ati as very convincing as it enhance the textual instructions that a husband should be kind, compassionate and considerate to his wife.[36]

6.2.10 MAINTENANCE OF RECALCITRANT WIFE

All the jurists of Islamic law have agreed that a recalcitrant (Nashir) wife is not entitled to maintenance from her husband provided such recalcitrance has been proved and is found to be unjustified in law.

Generally a recalcitrant wife is that wife who behaves with hatred and disinterest to the husband. She is always disobedient, defiant and refractory to the husband. According to some jurists, a wife who without lawful reason refused to answer the sexual demand of her husband is also rebellious and recalcitrant; hence she shall not be given maintenance.[37]

A wife may therefore be regarded as recalcitrant (Nashir) and will loss her right to maintenance in the following circumstances.[38]

i) If she refused the husband sexual intercourse save due to menses, or serious illness, fasting during Ramadan. The Hanafi Jurists, however, did not see this to be a sole reason for denying her

maintenance. For maintenance is not because of sex only, but the fact that there is marriage and she remained confined to the husband and does other domestic work like care of their children.

ii) Where they have agreed to stay in her house, if she refused him entry into the house without prior knowledge of her decision for him to look for alternative accommodation.

iii) If she leaves her husband's residence without his permission or lawful cause.

iv) In case of his travelling to earn a living or in the modern days he is a public servant transferred from one state or town to another, if she refused to follow him without valid reasons. However, a wife can still disobey her husband but not to be taken as a recalcitrant which can deter her from receiving her maintenance. Hence, disobedience in the following circumstances will not be inferred;[39]

1) Refusal of consummation of marriage due to non-payment of prompt dower.

2) When accommodation is not legally sufficient and adequate under the law.

3) Where she is imprisoned for a reason not caused by the husband but her fault.

4) Travelling to Hajj for the first time with her Muhram even without the consent of her husband.

It is allowed for a husband on transfer to move with his wife and she has no right to refuse to follow him provided that:

1. The husband is trust-worthy;
2. The town to which the husband is transferring to is not far as to severe her relations from her parents and
3. The way to the town is safe.

The Hanafi and Malikis agreed that once the transfer is genuine, and the above conditions are fulfilled, the wife is bound to follow the husband and if she refuses, she loses her right to maintenance. However Ibn Hazan's view differs from that of Hanafi and Maliki. He holds that the husband is responsible for the wife's maintenance from the moment the contract is concluded, whether she submits herself for consummation or not, even if she is recalcitrant or a minor with whom consummation is not possible.

6.2.11 MAINTENANCE DURING ARREST

Where the wife is arrested, detained, or imprisoned for committing an offence or for a debt, which is not caused by the husband, she forfeits her right to maintenance. Where the arrest is caused or initiated by the husband for debt she owes to him, then in this case he waives his reciprocal

rights on her by causing her arrest (as agreed by both Maliki and Shafi Schools.)

Conversely, where the wife is arrested without any legal justification, she cannot be deprived of her right to maintenance because of the arrest, detention and or imprisonment is not caused by her. The rule applies even where the husband is arrested, detained or imprisoned unjustifiably or for a debt he owes the wife.[40] The wife in certain circumstances as where the husband is poor provides the maintenance as a debt due on the husband or that she should just bear the expenses without charging it as a debt due on the husband.

6.2.12 MAINTENANCE OF A WORKING CLASS WIFE

Under Islamic Law maintenance is the exclusive responsibility of the husband and a right on the wife not-withstanding that she is working with the husband's consent and having separate account of her own. This is also in consonance with the provisions of Quran 4:32 which granted women like men the independence to acquire and own property.

The verse reads thus: (4:32)

> And in no wise covet those things in which God Hath bestowed His gifts more freely on some of you than others. To men is allotted what they earn and to women what they earn; but ask God of His bounty: for God hath full knowledge of all things.

However, notwithstanding the right, which the above verses conferred on women, the husbands have the exclusive right to either allow or disallow his wife from working. According to some jurists, the wife's rights to work are purely founded on an agreement (stipulation) entered with the husband prior to the conclusion of the marriage contract. Thus, where the husband agreed for the wife to work, then all her earnings are her exclusively right and not for the husband. Similarly, the jurists further hold that irrespective of whether there was a stipulation in marriage to allow the wife to work, nothing precludes the husband from subsequently refusing her to work and if she worked, she forfeits her right of maintenance. Another jurists however hold that if there was an agreement prior to marriage that she can work, the husband cannot stop her from working and if she disobeys him she is not to be seen as recalcitrant.[41]

Where a wife is to work out side her matrimonial home, she must guard her chastity, behaviour, and looks and properly cover herself decently.

Where the husband's means or income cannot adequately cater for the up-keep of the family and the wife is willing to work the husband may allow her to work for gain provided that:

1) The husband has the right to terminate the wife's working right whenever he deems it necessary;

2) He has the right to object to any job if he feels that it would expose her to any harm, seduction or humiliation.

3) The wife has the right to discontinue working whenever she pleases.

4) Any gain from work realized by the wife belongs to the family and cannot be considered as her own personal property. When the wife is employed, the household becomes her jurist occupation. By house hold, it means the rearing of children and all domestic services required for maintaining a clear and comfortable habitation.[42]

In the tradition of the prophet (PBUH) he was reported to have said:

> Cleanliness is a part of faith, motherhood is highly commended and it is the greatest value second to the worship of Allah (Ibadah).[43]

In a nutshell, the husband has no right to prevent his wife from doing some work, which does not relate to the marital house.

6.2.12 MAINTENANCE OF WIFE DUE TO POVERTY OF HUSBAND

A husband may due to sudden financial disabilities fail to fully provide maintenance to his wife. The question is how does such poverty affect the wife's rights to maintenance?

According to the Hanafi School even if the husband is financially incapable of discharging his responsibility of maintenance, the duty remains his own and the wife is entitled to such maintenance. She may source for the maintenance herself according to her needs, which shall remain a debt to be paid by the husband whenever his financial status improves.

From Hanafi's stand the following suggestions can be inferred:

1. That where the wife is wealthy, she should feed herself and her husband without refund;
2. To pledge his credit for her maintenance. The question that follows is what if the husband is too poor to pay?

   Then obviously the marriage must be dissolved.

Exceptionally in Islam poverty is not a ground for a wife to seek divorce from the husband. While the Zahiris have agreed that poverty is not a ground for divorce, they differed from the Hanafis in that they did not see it as a debt payable by the husband, any maintenance sourced by the wife at the time of his financial incapacities.[44]

The majority of Jurists with the exception of Hanafi, however, opined that where a husband is so poor that he cannot discharge his obligation of maintenance to the wife, she has the choice of either enduring

with that, to stay with him awaiting relief or she can go to the court and ask for separation or divorce due to lack of maintenance.

This is supported by the hadith of the Holy prophet (PBUH), which says:

> ... Let charity begin at home because the woman will maintain her stand saying you either feed me or let me go[45]

On this issue of maintenance during poverty Ibn Dayyin has intellectually observed as follows:

> The spirit of Islamic Law demands the following; if the man deceives his wife by misrepresenting his financial status or deliberately refuses to support her, leaving her helpless, then she has right to seek separation from him. But if she marries him without any prior knowledge of his financial problem or if his position hardened after ease then she has no right to seek separation on account of his poverty.[46]

6.2.13 MAINTENANCE DURING WAITING PERIOD (AFTER DIVORCE OR DEATH) (IDDAH)

A wife is entitled to maintenance even after the separation of the marriage by way of divorce or death. Also where she is not a muslim but pregnant. The wife is required by law to wait for certain period of time (i.e. Iddah) before going into another marriage. The Holy Quran therefore guarantees her right of maintenance during that period.

Quran 65:1 reads:

> O Prophet, when you divorce women, divorce them at their prescribed period and calculate the period and keep your duties to Allah your Lord. Turn them not out of their houses nor should they themselves go forth unless they commit an open indecency.

Again the Quran in 65:6 says:

> Lodge the divorced women during the prescribed period in the houses where you dwell according to your means and harass them not that you may create hardships for them and force them not to leave and if they be with pregnancy, spend on them until they be delivered of their burden.

Another verse supporting the earlier quoted verses of the Quran on a wife's right to maintenance during Iddah is Quran 2:236. It provides that:

> It is no sin for you if ye divorce women while ye have not touched them nor appointed unto them a portion provided for them the rich according to his means a fair provision (This is) a burden duty for those who do good.

From the above Quranic verses it is clear that where a woman is observing Iddah following divorce of a consummated marriage, she becomes entitled to maintenance if by consummation of the marriage she becomes pregnant. It is immaterial whether the divorce is pronounced once or thrice.

There are divergent views among the schools as regards conditions for entitlement to maintenance during Iddah. They differ regarding the nature and circumstances of the known methods of dissolution or it's merits. Where a husband dies, wife relict(s) is required to observe a waiting period of four months and ten days as laid down by Holy Quran 2:234 which reads as follows:

> And if any of you died leaving wives behind they shall undergo a waiting period of four months and ten days...

This applies to all subsisting and consummated marriages of the deceased. As to the condition of the right to maintenance where the husband dies the muslim wife, whether revocably divorced or not and whether pregnant or not loses her right to feeding and clothing. All the Imams are agreed upon this. This is because they have all taken the view that the whole property now passes on to the heirs and the spouse relict being one of them shall and should not be conferred with additional right.

As to accommodation, the Maliki School of Law holds that from the time of death up to the expiry of Iddah period (i.e. four months and ten days,) the wife shall be allowed to continue to reside in the matrimonial residence. This is irrespective of whether the residence belongs to either of the spouses or even if it is rented.

Where dissolution occurs as a result of divorce (i.e. where divorce is a unilateral type or at the instance of the husband) which could either be a revocable or irrevocable divorce, she enjoys the right to accommodation for the purpose of observing her waiting period. She cannot be asked to vacate the matrimonial residence by the husband and neither can she or on her own accord opt to vacate it. This is of course a right of the Al-mighty Allah. It cannot be brushed aside. In respect of right of feeding, she could only enjoy this right if she is pregnant otherwise it is lost.

This is in line with the provision of Quran 6:5 it reads:

> And if they happen to be with child spend freely on them until they deliver their burden, and if they nurse your off-spring after the divorce has become final, give them their due recompense.

As regards the right to clothing while pregnant, the divorcee is entitled to a complete dress if repudiated at the commencement of her pregnancy. This is however not obligatory on the husband if he has provided her with such a set at the beginning of her pregnancy.

A triple divorced woman enjoys feeding, accommodation and set of dress if pregnant. The pregnancy however has to be established by expert.

Where the divorce is through a judicial process the rules applicable to a marriage, which has been irrevocably divorced, apply here and that is to say, the wife unless pregnant is not entitled to any form of maintenance.[47] However where a wife is separated from her husband through Khul'u (self redemption) she shall not be entitled to maintenance except when she happened to be pregnant. Similarly where the woman is separated from her husband through Li`an (oath by implication) she cannot claim maintenance from her husband even if she is pregnant.

The purpose of the verses quoted above as well as juristic views is to the effect that after the expiration of Iddah, in cases of either divorce or death with or without pregnancy, she becomes eligible for re-marriage.[48]

Waiting period is ordained by God to serve some purposes. Most important among the purposes are:

i) To establish the presence or absence of pregnancy

ii) To serve as a term of probation to make room for reconcilliation.[49]

In conclusion there is no doubt that Islamic Law have made far-reaching provisions for the right of wife to have a peaceful and comfortable family life and a loving society. It provides the duty of maintenance squarely on the husband and an exclusive right of the wife especially the right of residence.

6.3.0 NON-FINANCIAL/MATERIAL RIGHTS OF A WIFE

A part from maintenance and right of dower which are inalienable rights of a wife by virtue of her marriage, the wife is also entitled to other non-financial rights which are of a social and moral kind. All non-financial rights conferred on the wife have basis in the provision of the Quran in which husband's are commanded by Allah to treat their wives with respect, equity and kindness with regards to all aspects of matrimonial and domestic affairs.

In fact, the Holy Quran and tradition of the prophet (PBUH) have requested a duty on the husband to be kind to his wife, to consort with the wife equitably. The husband is also saddled with the duty of being a source of companionship and security for his wife. In support of this, the Holy Quran in 4:19 and 21 provides that:

> And treat them kindly. If you hate them it may be that you dislike a thing, which Allah has placed abundant good in it.

As part of his kind treatment and equal consideration of wives, a husband should not beat his wife, isolate her from the matrimonial home, ensure he makes sexual intercourse with her at least once in four days, share equal days for each of the co-wives, permits her to condole or visit sick and near relatives and seek for education in such a manner that it will not cause the dissolution of the marriage.[50] Prophet Muhammad said:

> Beware about your treatment of women, you have taken them with the words of Allah and have made lawful sexual relationship with them with the words of Allah. And you have a duty to provide them the reasonable maintenance and clothing.[51]

In another tradition narrated by Aisha, One Hurdah Bint Utbah said to the prophet (PBUH).

> O messenger of Allah Abu Sufyan is a misery person. He does not provide for me and my son except whatever I take away myself secretly which he does not know. The Prophet (PBUH) replied: Take whatever is sufficient for you and your son in a reasonable way[52].

It is clear from the above that a husband's refusal to maintain his wife as required by law empowered the wife to claim her right through various means stated above. This, notwithstanding, the determining factors of what create responsibility on the husband in providing for his wife/wives and children of the marriage is his means and earning capacity.

6.4.0 MATRIMONIAL HOME

The matrimonial home is expected to be a place where both spouses are to live to have peace and tranquility throughout the subsistence of their marital life. Traditionally, it is very important for the wife as the mother in the house to always be at home. While the man is charged with the responsibility of going out to struggle for food, the woman is to prepare

food at home for the up-keep of the home and to make the matrimonial home habitable for spouses and children of the marriage. The traditional role is fast fading away as women too are becoming very educated, husbands are retrenched, laid off from work on or their earning capacity is load.

The question of maintenance at the matrimonial home depends on the subsistence of the marriage contract and the way and manner of its dissolution (that is, whether the dissolution was effected through divorce, death or through Khul'u by the woman and Li`an by the husband. Regarding fixing the sum for maintenance at the matrimonial home, all the jurists agreed for the Qadi (Judge) in exercising his discretion to consider the rank and circumstances of both spouses. In either case, the following conditions must be fulfilled:

1) There must be a valid marriage contract between the spouses;
2) The wife must submit herself to her husband and be obedient to him.
3) She must give the husband free access t sexual intercourse at all lawful times.
4) She must not refuse to accompany her husband when he travels unless she strongly feels that during the trip her person and property are not safe.
5) When both parties can derive benefits from each other.

Even though the wife stays at the matrimonial home, she will not be entitled to maintenance until the above conditions are present. Similarly the husband's duty to maintain his wife starts only when the wife attains the age of puberty and not before.

6.5.0 KHUL'U (SELF-REDEMPTION)

Though this right is the right of Almighty God, but for the purpose of this work it is treated as the right of the wife emanating from the Quran.

Khul'u (Self-redemption) is another right, which a wife has over her husband to bring to an end her matrimonial ties with her husband. Khul'u is the right which Islamic Law has conferred on a wife and which enables her upon payment of a ransom to seek and obtain a release from matrimonial bonds from her husband. Khul'u takes two forms. The first is a request initiated by the wife and eventually consented to by the husband. The second is a bilateral agreement to terminate the marriage thereby severing matrimonial relationship between the spouses. The former is called Khul'u while the latter is called Mudara'ah. The basis of Khul'u is founded on the rights, which God accords both spouses not withstanding role differentiation between the Spouses.

The nature and scope of Khul'u is based on the words of God as contained in the Quran and further supported by hadiths and judicial authorities.

In Quran 2:229 it provides that:

> "…. And if ye fear that they may not be able to keep the limits of Allah in that case, it is no sin for either of them if the woman ransoms herself. These are limits (impose by) Allah. Transgress them not for who transgress Allah's limits, such are wrong doers."

In Quran 4:128 it further provides:

> If a woman fareth ill treatment from her husband, or desertion it is no sin for them twain if they make terms of peace between themselves. Peace is better.

In one tradition, in the famous case of Jemila wife of Thabit Bint Qays bin Shamms who approached the Prophet (PBUH) and said:

> I found no fault in Thabits religion or personality but I fear my religion. The Prophet asked her: Are you willing to refund his Orchard to him to whom she answered yes. The Prophet asked Thabit to take back his Orchard and release her by one talaq.

Khul'u under the law becomes effective only on the payment of a ransom or the return of the husband's dower by the wife. The provisions of the shariah regarding what is to be returned to the husband have been clearly stated by the court. In the case of ***Alh. Karami Tudun Wada V Aishatu Bappa,***[53] the wife, Aishatu instituted an action for the dissolution of her marriage against her husband at an Area Court in Gombe on the ground that she did not love him. Alh. Karami asked the court to give them time for reconciliation, which proved abortive after two opportunities were given the parties. At the resumed hearing the husband asked Aishatu to pay him

all the expenses on clothes and cosmetics and his dower of ₦800.00, which she denied. The court ordered her to give him all the remaining dresses – 3 wrappers and N800.00 dower. The court based its decision on the authority of Fikhu Sunnah that Karami has the right to demand for redemption since he has no fault. It is provided in Vol. 2 page 253 that:

> If a wife needs a divorce from her husband the issue of redemption fee and properties of the husband lies with her.

Aishatu was dissatisfied, she appealed to Upper Area Court No. 2 on the ground that she could not afford to pay what the court directed her to pay. The appeal court asked Karami the duration of the marriage and whether he consummated it to which he answered yes. Aishatu further told the court that they were married for 8 months and she had spent 5 months with him. The court asked Karami whether there are non-perishable properties like Kwalla to which he replied that all they have taken are Kwalla but the other one and the remaining properties were with him. The court then held that all the property bought by the husband to his wife are non-refundable if she has stayed for up to 3 months in his house. In this regard the Appeal Court reversed the decision of the Area Court from refunding every property to only the refund of the dower of ₦800.00, a box, watch, jar and the remaining properties that have not perished.

Dissatisfied with this decision Alh. Karami appealed to Sharia Court of Appeal. The court invited all the parties and after going through the

copies of proceeding of both Area Court Gombe and Upper Area Court No.2 and the address made to both parties, observed as follows:

> On the dissolution of marriage by way of Khul'u since the husband was not at fault he has the right to demand from his wife refunds.

But that the manner the court arrived at the Khul'u is contrary to the provisions of Islamic law (i.e to say that the husband should list all that he expended on his wife for her to repay him.

The court said that the law provides in a situation where a wife wants dissolution of her marriage on no fault of the husband, the demand for khul'u, either with the equivalent amount of dower he paid on her, or more or less than it. The spouses can agree on this privately or with the help of their guardians. It is provided under Islamic law in Adawi's Commentary in Risala Vol. 1 page 102, that she will not be required to pay for all properties since she has spent more than 3 months in his house as also stated in Bahja's Commentary to Tuhfa Vol.1, page 373 which provides that:

> The law prohibits a husband from collecting back the dresses he bought for his wife if they have reached 3 months together.

About the issue, which Karami raised before us, the court said he did not request for stay of execution of the decision of the Upper Area Court. Moreover, in the Area Court it was Karami himself that requested for Khul'u demanding for his properties from the wife; and the court ordered her to

give back some of the properties. From that view point of the issue for determination of the marriage has been completed since there is no application for stay of execution and from the moment the husband collected those things from the wife as Khul'u the marriage terminates. On the Khul'u decided by Upper Area Court Gombe after the refund of the dower of N800.00, a Box, a jar watch, as affirmed by the decision of the Upper Area Court with modification is upheld. The Shariah Court of Appeal accordingly ordered Aishatu Bappa to pay Alh. Karami ₦2000.00, which is more than the dower he paid on her.

In the case of ***Alh Danladi Abubakar V Uwani Danladi,***[54] a case involving Khul'u, where a wife alleged divorce by her husband but had no proof. The husband demanded ₦6,500.00 as Khul'u. The issue before the court was whether the court could interfere on the amount for khul'u, the court clearly shows that the question of what should be paid, as Khul'u is entirely a matter to be left for the parties to decide and not for the court of law. All the court is required to do is to enforce the agreement of the husband on the amount he has asked from his wife and not for the court to fix or decide which amount is to be taken by the husband. Once the amount fixed by the husband is agreed through a consensus with the wife the court is bound to enforce it and it is immaterial whether the amount is far less than the amount paid as dower or far more than it. Therefore the courts are expected to ensure that parties reached a consensus on what should be paid

by the wife as khul'u for securing her release from the husband. Another case decided in line with the above one is the case of ***Jummai Yusuf V Yusuf Nayawo***[55] which centers on divorce by letter confirmed by the husband as an effect of an alleged Khul'u. The husband demanded ₦3, 500.00 but the wife agreed to pay ₦1, 000.00 after which he admitted granting the divorce.

From the case cited above it is clear that notwithstanding the right given the wife to seek for her release from her husband through Khul'u, the Holy Quran admonish a wife to resort to reconciliation instead of outright demand for release from her husband. This is because in most cases of matrimonial discords, it is believed that women are always at the receiving end by virtue of their emotional nature and weak-mindedness especially when they are menstruating, pregnant and nursing a baby. At these periods, their temperaments are very high hence Khul'u is discouraged because if allowed without restraint women will turn it in to a commercial venture thereby undermining the all-embracing institution of marriage. It is important to note that before Khul'u becomes valid and operative under Islamic Law it must satisfy the following conditions.

i) The husband must be sane and adult.

ii) The consideration must be a valid property under sharia.

iii) Where either party/spouse is a minor, his/her guardian must represent him.

iv) The consideration can be more than the Sadaq paid or it's equivalent or less than the sadaq.

Consideration is very essential in determining the validity of Khul'u. It is unanimously agreed by the Jurists that validity of Khul'u depends on consideration. However nothing precludes the husband from accepting Khul'u without receiving anything as consideration from the wife. Where consideration is agreed upon by the spouses the law requires that it must be signified. For example, if the husband says to the wife. "I released you on Khul'u and the wife keeps quiet there is no khul'u.

As regards whether the wife can give the husband more or less than she receives from him, the majority of the jurists said it could be either way. Their authority being verse 2: 229 there is no blame on either of them (if she give something for her freedom)..., which seem to imply any amount. Those who hold this view also rely on a hadith (which is weak) narrated by Baihaqi from Sa'id al Khudri who said:

> My sister was married to a man among the Ansars, on a conflict they came to the Prophet (PBUH) who asked her; to which she replied 'yes and even add more on it' she returned the dower to him plus additional sum.

Another group of jurists is of the strong view that the husband is only entitled to an equivalent amount of his dower. They based their authority on a very strong hadith with a sound Isnad reported by Doral

Qutni that the father of Zubair said: "her Sadaq was an Orchard (form) the prophet (PBUH) asked her" Will you return to him the Orchard he gave you? She said 'yes' Infact the author of Bidayat al-Mujtahid sees accepting more than what the husband gave her as an instance of receiving something without any justification whatsoever[56]. We feel accepting more than the Sadaq (dower) earlier paid by the husband and insisting on it is defeating the entire purpose behind this important method of securing a release by the wife. The actions of some unscrupulous men who fix an amount by themselves which they know is beyond the means of wife just to make things difficult for her and to make her miserable has been frowned at by the court. An instance of such act was resolved in the case of ***Fatume & Abu Sarkin V. M. Jidda.***[57] The husband insisted on getting a certain sum which he himself fixed as the amount of Khul'u. The court rightly rejected his claim and gave him what there is evidence to show he has really spent on the wife before he married her.

What is payable as 'Consideration for Khul'u could be real property, usefruct and as such it must be ascertainable. It is where the consideration is not agreed upon that the court intervenes and the principle of law relied upon by the court is the unanimous agreement of the jurists that where there is uncertainty as regards what is given as consideration for Khul'u the dower of her equal (Sadaq Mirth) should be given as consideration. The

mode of acceptance of Khul'u is important showing whether it is a promise or not. And whatever is the man's response is what is to be construed by the court. Khul'u is an irrevocable talaq of an imperfect type and irrevocability is founded on the consideration, which passed between the spouses.

Where there is no consideration the talaq is a revocable talaq of perfect type. The Iddah (waiting period) for Khul'u is one month and the rationale is to ascertain whether or not the woman is pregnant.

6.6.0 RIGHTS OF INHERITANCE

This is also one of the Rights of Al-mighty God but for the purpose of this work it will be treated as the right of the wife emanating from the Quran.

The earlier practice before the advent of Islam was that a woman had no right to inherit from the property of her deceased husband. The norm then was for the uncle or orphans to take possession of the estate of their late father in addition to taking the entire estate. The uncle also had the right to inherit the wife of the deceased. This practice of the pre-Islamic era was considered injurious to the women in their dual capacity as wife and daughters and this forms the basis for the revelation of the ordinance relating to inheritance by women. The entire injustices on women relating

to inheritance is found on a tradition reported by Jaban (May Allah be pleased with him) that the wife of Sa'd bin-Rabia came to the Apostle (PBUH) with her daughters and said:

> Oh Apostle of God. Here are the two daughters of Sa'd bin-Rabia. Their father became a martyr while fighting on your side in the battle of Uhud. Their uncle seized their property and left nothing for them. They cannot be married without property. The prophet (PBUH) replied that God will decide it as he has no immediate answer.

It was on this ground that God revealed all the provisions of the Quran regarding inheritance generally and this is contained in Quran 4:11, 12 and 176 respectively. However, on the earlier complaint lodged before the Prophet (PBUH) by the wife of bin-Rabia. He sent for the brothers of the deceased husband of the woman and distributed his estate to the beneficiaries as follows: He allotted two-thirds of the estate to the two female orphans and one-eighth of the estate went to the widow and the balance was given to the surviving brothers of the deceased. The courageous act of the wife of late Sa'd bin-Rabi resulted in Islam granting the women the rights of inheritance in triple capacity as a daughter, sisters and mothers.

The rights of the women to inherit are as follows.

6.6.1 THE WOMAN AS A WIFE/MOTHER

The wife's right to inheritance is provided for in Quran 4:12, it provides that:

> ... And unto them belongeth the fourth of that which ye leave if ye have no child but if ye have a child then the eight of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted hath been paid).

Where the wife is not a muslim she can benefit from a device in her favour for any amount up to one-third of the net estate. She may also take from gift by her husband made to her during the husband's lifetime.

6.6.2 THE WOMAN AS A DAUGHTER

The woman as a daughter of her deceased father has a right to inheritance in her deceased's fathers estate in Quran 4:176. Her right of inheritance is as follows:

1. She takes half where she is the only surviving daughter of her deceased father.
2. They take two-thirds where there are two or more daughters without a male issue (her brothers).
3. Where she is with a brother she looses the above position and it is drawn by organization to the brother and in this instance, she takes half of what he takes.

It is clear from the above analysis to that women have an inalienable right to succession.

Further more, Islam protects not only the daughter but also all other heirs by regarding the marriage the husband contracted during a death sickness as void[58]. Similarly a wife divorced by her husband during a death sickness will be entitled to her share of inheritance even if she re-married.

The above provisions further shows that with their Quranic shares over rights of inheritance, women have been uplifted from the status of mere chattels to a proper status as their male counterparts.

In conclusion, it is important to state here categorically that the right of inheritance of a woman is conditional, and that all the expenses and debts reasonable or incidental must be settled and the residue is what is subject to distribution to all those entitled to benefit thereof.

6.6.3 THE WOMAN AS A SISTER

In distinction to other indigenous custom a woman whether as a wife or single could inherit from other relations and they too could inherit from her. She could inherit in many capacities.

The woman's right of inheritance as a sister of the deceased is contained also in Quran 4:12. It provides; that:

> And if a man or a woman has a distant heir (having left neither parent or child) and he (or she) has a brother or a sister (only on the mothers side) then to each of them twain more than two, then they shall have shares in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid: A commandment from Allah. Allah is knower indulgent.

There are also unreported decisions of the courts, which were taken from the records of the court not yet prepared as a report during my visit to the courts. These cases support the woman's rights to inheritance of her deceased husband properties. In one of such cases in the Upper Area Court, **Kalgo, Muawa Yar Yaroga** demanded that 19 cows, 2 farms and 2 copies of Holy Quran, which constituted the estate of her husband, be distributed. Mamman Sambo Almajiri contested the claim and made a counter-claim that the cows were given as gifts. She proved her case against Almajiri. The Sharia Court of Appeal, Sokoto confirmed the judgment and ordered for distribution of the part of the estate, a farm, and copies of Holy Quran, which were left out in the distribution. Al-majiri appealed on the distribution of the farm and copies of the Holy Quran but re-opened the issue of gift of the cow. It was dismissed. In another case in the Area Court II, No. 1, Ilorin, ***Mallam Anyila Yoyinsoye V Madam Sara***, Mallam Anyila sued the wife of his late brother for collecting the key to the

house in which she was living before the death of her husband. She locked the house and held on to the key of the house refusing to release it until the estate of her husband was distributed. The trial Area Court held that her husband no longer owed her the responsibility of providing her accommodation because the Iddah had expired. It therefore ruled in favour of her husband's brother. But the Sharia Court of Appeal Ilorin set aside the decision and held that she held on to the key to the house to demand her own share of the estate of her husband. It ordered the trial court to collect the key and carry out the distribution of the estate to all the heirs.

A contrary decision from the earlier two cases was entered in the Area Court II, No. 2, Ilorin. In the case of **Alhaja Asabi Ile-Ewi V Alhaja Ayinke** Alhaja Asabi sought to recover the house of her father. The late father of Asabi gave the late husband of Ayinke the parcel of land on which he built a house. The wife (Ayinke) had observed the Iddah and the trial court granted the prayers because Ayinke had ceased to be the wife of her late husband legally and that the deceased built other houses on one of which he was buried. The Sharia Court of Appeal Ilorin allowed the appeal because the gift had been perfected and cannot be rescinded by the actual donor talk-less of any of his descendants.

At the City Area Court, Kano, in the case of ***Talle Musugal V Bakari.*** The sued the husband of her late sister for her share in the estate of her late sister who was survived by her as sister and Bakari as husband. She listed the moveable and immovable items that constituted the estate. Bakari acknowledged her as the surviving sister of his late wife but denied that the two houses named by Talle belonged to his late wife. Talle called a witness and declined to take an Oath to perfect her claim. Bakari did and had the judgment in his favour both at the trial court and the Sharia Court of Appeal, Kano. She appealed to the Court of Appeal, which considered the letter of Kano Land Office, plus the testimony of one witness to conclude that she had satisfied the requirements of sharia. It allowed her appeal.

6.7.0 THE RIGHTS OF THE HUSBAND

6.7.1 OBLIGATIONS AND DUTIES OF THE WIFE

Under Islamic Law, the rights which the husband has against his wife out-weighed that of the wife and this is by virtue of the position in which it was said God has placed man over a woman from creation. Various provisions of the Quran already quoted in the preceding chapters support this. Similarly, various traditions of the Prophet (PBUH) reveal that the rights of the husband have been held to be greater than that of the wife. In one of such traditions, it was narrated by Alhakim that Aisha was reported to have asked the Prophet (PBUH):

> Whose right is greater than womans'?
>
> He replied (the rights of) her husband.

And then she asked, "Then whose right is greater than man's? To this he replied (The right of his) mother.[59]

Notwithstanding this inequality the rights of both spouses are reciprocal and complimentary even-though the greater nature of a man's right have fully been recognised. This reciprocal and complimentary nature of the rights of both spouses have been stated in the Quran 2:228 which reads:

> Women shall have rights similar to the rights against them according to what is equitable even though men have a degree (of advantage) over them (i.e. wife).

Another verse supporting the above quoted verse is Quran 25:74. It reads;

> Our Lord! Grant unto us wives and offspring who will be the apple of our eyes and guide us to be models for the righteous.

The other provisions of the Quran in line with the already quoted ones are Quran 4:34 and 2:187, among others. From the above Quranic injunctions women are expected to contribute at all times to the success of their marriage by ensuring that they perform all their duties and obligations to the husband honourably with the fear of God.

The rights, which the husband has over his wife/wives, are numerous but the most important ones are as follows:

6.7.2 DUTY OF OBEDIENCE

This is the utmost of all rights which husband has from his wife within the limits of the law. That is, not to disobey God or the rules of law[60]. It means that the wife must at all times be loyal, obedient and submissive to the husband within the limits of law. There is however no obedience in Islam if it is to disobey the Creator. This right of the husband ranks first to the extent that it is mentioned in the Quran 4:34. It reads:

> So virtuous women are those who are obedient guarding the intimacy, which Allah has ordained to be guarded.

The extent of husbands right over his wife is mentioned together with the prescribed prayers in one tradition narrated by Ahmad and A-Tabarani in which the Prophet was reported to have said:

> If woman performs her five daily prayers, observes her fasting during the month (of Ramadan), safeguards her chastity and obeys her husbands, it will be said to her, "enter the paradise through any of its gates you want.[61]

Islam considers wife's obedience to her husband as performing a jihad in the cause of Allah. In a tradition, Ummu Salamah reported that the Prophet (PBUH) said:

> Any woman that dies while her husband is happy with her will enter paradise.

That what will make most women enter the fire of Hell is their disobedience and ingratitude to their husbands. This has been indicated in a tradition where the Prophet (P B U H) was reported to have said:

> ....I saw the (Hell) Fire.... And I saw that the majority of its ...dwellers were women ..... because of their ungratefulness ... they are not thankful to their husband 's and are ungrateful for the favors done to them. Even when she sees something (she does not like) from you, she will say I have never seen anything good from you.

It is part of obedience that the wife should answer the husband whenever he calls upon her for sexual intercourse unless she has a justifiable reason for refusing to answer the call otherwise she will incur Allah's Wrath. On this Abu Huraira reported that the Prophet (P B U H) said:

> If a man invites his wife to sleep with him and she refuses to come to him then Allah and his Angels send their curses on her till morning.[62]

These are the general duties, which a wife owes her husband among other rights. In his own contribution Abdal Ati holds the view that the specific details of obedience may be unexhausted and thus stated the following as relevant:

i. She must not receive male strangers or accept gifts from them without his permission. Nor must she lend or dispose of any of his possession without his approval.

ii. She must restrict her movement and not leave her home without the permission of the husband as he has every legal right to curtail and restrict her freedom of movement.

iii. She must submit herself to the disciplinary powers and measures of the husband in case she is found refractory or disobedient (i.e Nushur).

iv. She must not object to the husband taking another wife unless at the time of the marriage agreement they agreed to the condition that where he decides to marry another wife she has the right to seek divorce.

v. If the husband insist on part-locality or patrilocality. The wife must comply.

vi. She should undertake a journey with the husband to anywhere unless it is otherwise stipulated as a condition to the marriage contract.[63]

In all ramifications the wife is bound to observe the duty of obedience strictly unless there is a necessity or legitimate advantage or justification for her to do otherwise. In conclusion, this duty of obedience of a wife to her husband is not absolute; rather it is subject to the obedience of Allah and his Apostle. This condition is by virtue of a tradition in which the Prophet (P.B.U.H) was reported to have said:

> There is no obedience to a created (being), which will lead to disobedience to the Creator (i.e. Allah) [64]

The primary and most important duty of a wife has been explained in various provisions of the Quran, but the major one is in respect of the wife's basis of the duty of staying at home in Quran 30:21 which reads:

> And one of His signs (of Wonders) is that: He created for you mates out of your own kind, so that you may dwell in tranquility with them and He has put love and mercy between you. Verily in this are signs for those who know

This verse further highlights the duty of wife towards her husband, which is providing tranquility and consolation for the husband through mutual love, and mercy, the duty, which is said to be better, performed at the matrimonial home requires the wife to always be at home. This duty of the wife is also clearly required in Quran 16:782.

> Allah has provided for you mates of your own kind and has provided for you through your mates' children and grandchildren.

This indicates that procreation and child bearing is the exclusive duty of the wife and it requires staying at home. Bringing up of children, inculcating good moral and religious virtues in their minds at the early age in life is the duty of the woman as a mother and because the children depends mostly on her at infancy though the efforts of the wife need to be complimented by the husband too. This duty of a wife, it is argued cannot be adequately and effectively discharged unless the wife stays at the matrimonial home. It is

for this and many other reasons earlier mentioned that it is important for the wife to always be at the matrimonial home and to go out only with the husband's approval. Whenever there is a conflict between the husband's right of confining the wife to the matrimonial home and her right to visit her parents or relatives, the husband's right shall prevail. It is however necessary for the husband to exercise his rights reasonably so as to safeguard and not destroy the matrimonial relations between the spouses' inter-se and the parents or other relations of both spouses.

Staying at the matrimonial home is another aspect of obedience, which a wife owes her husband. The sum total of the wife's duty to stay at matrimonial home is a kin to the wife's duty to take care of the husband's wealth, The whole duty was summed up by the Prophet (P B U H) when he said:

> A good wife is the one who pleases you when you look at her; obeys you if you command her; takes care of her self and your property when you are absent.

6.7.3 GOING OUT TO SEEK FOR KNOWLEDGE

Islamic Law encourages every-one to go out and seek for knowledge and this includes married women. The knowledge the woman is seeking may be obligatory on her.[65] If it is so then the husband must teach the wife if he is able to do so by himself, otherwise she must be allowed to go to where she can get it in order to know the rules and practices governing her religion, even without the husband's permission.

KASU LIBRARY

When the knowledge the wife is seeking is not obligatory on her or it is obligatory on her but the husband is knowledgeable about it and did actually under-takes to teach her then she has no right whatsoever to go out seeking it outside unless the husband gives her permission.

6.7.4 GOING OUT TO WORK

There are divergent views among the jurists regarding the husband's right in allowing or disallowing his wife to work an which may lead her to the curtailment of her husband's right or to infliction of harm on him or in the performances of her matrimonial duties as a wife. In this respect, the jurists made a distinction between the wives work, which may cause harm to the husband matrimonially, and that which may not cause harm to the husband and which view the majority supports. As Sayyid Sadiq, quoting from Ibn Abidin one of the eminent Hanafi jurist said:

> What ought to be explained is that she (the wife) can be prevented form any work that may lead to the curtailment of husband's right or inflicting harm on him or (may lead) to her going out (of the matrimonial home). On the other hand, if there is no harm in her work, there is no way to prevent her. Like wise, she cannot be prevented from going out if she adopts a profession which is (Fold Kifayah) suitable only to women such as Midwifery.[66]

6.7.5 LIVING ACCORDING TO THE HUSBAND'S SOCIO-ECONOMIC STANDARD

Like other rights earlier mentioned, another right of the husband upon his wife is that the wife has a duty not to create a burden, problem or hardship for the husband by requesting him to provide her with what she knew the husband cannot afford. This right is based on a tradition of the Prophet (P B U H) in which he was reported to have said:

> Any woman who puts a burden on her husband regarding the nafaqah (maintenance) which he cannot bear, then Allah will not accept from her any good deeds unless she repents and comes back to the right path and accepts from the husband what he can afford.[67]

It has already been clearly stated while discussing maintenance in the proceeding chapters that maintenance is the exclusive responsibilities of the husband and a right on the wife, it is however important to bear in mind that maintenance is qualified with respect to the means and earning capacity of the husband which is in line with the provision of Quran 65:7 which reads thus:

> Let him who hath abundance wealth spend according to his abundance, and he whose provision is measured let him spend of that which Allah hath given him: Allah asketh naught of any soul save that which He hath given it. Allah will vouchsafe after hardship, ease.

The provision of this verse shows that where the husband has enough wealth then it becomes imperative on him to provide adequately for his wife,

children and other relatives. Conversely, where his means is meager, it will be wrong for the woman to press him to provide more than he can afford.

6.7.6 RIGHT TO MARRY MORE THAN ONE WIFE (POLYGYNY)

Unlike marriages under the Act and Christians marriages which are monogamous in nature Islam allows a man to marry up to four wives and his first wife has no right to deny his right to marry a second, third or even the fourth wife unless there was an earlier agreement to that effect. The provision of law allowing a man to marry more than one wife is contained in Quran 4:3. It provides that:

> And if you fear that you will not act justly towards the orphans, marry such woman as seems good to you two, three, four; but if you fear that you will not be equitable, then marry only one, or what your right hands owes so it is likelier that you will not be partial or become destitute.

The above quoted verse is usually read or interpreted in conjunction with this passage of the Quran 4:129, it reads:

> You will not be able to be equitable between your wives even so you are eager. Yet do not be altogether partial so that you leave her (i.e. the wife discriminated against) as it were suspended. If you set things right and are God-minded (or God-fearing), God is All – forgiving, All compassionate.

There are many views and literature, which supports the right of the husband to marry more than one wife. One view holds that men's sexual

needs are greater than and more demanding than women's. That man have natural predisposition towards polygyny based on their higher capacity for physical dominance and aggressive sexual arousal. This capacity is reinforced by the presence of more marriageable female than male in most societies.

Another reason supporting polygyny is the view that on the individual level, a man may be attracted to more than one woman and seriously wish to marry them. Such attraction may be the result of a desire on his part for sexual variety, offsprings wealth and authority. In some cases, polygyny may serve as a status symbol not only for the man but also for the women. To the man it is a mark of prestige and wealth, whereas to the woman it is a matter of distinction to be married to such a man and to mention the fact that with two or more woman the household burden becomes lighter for each one of them.[68] Apart from the established authority as contained in the earlier quoted verses, many scholars agreed in addition to the above provisions that for polygyny to become permissible as a right of man under Islamic Law, certain conditions must be fulfilled, these are:

1. The permissibility of polygyny must be in line with the provisions of Quran 4:3 already quoted, the Sunnah of the prophet (P B U H) and by the consensus of the Muslim jurists through the ages.

2. Polygyny was initially permitted to prevent injustice to women particularly female orphans and to promote continuance
3. It is lawful to those who have reasons for it who can treat their wives equitably and provide for them sufficiently. However, it is not easy to give equal justice to all the wives as required by Quran 4:129 in their treatment but the husband is expected and required to control fully his emotional inclinations so that his sentimental sympathy will not be greater for one wife than for the other. Even though Islam permits polygyny, certain moral exhortations and legal rulings are interpreted as checks against the abuse of Polygyny. In a tradition, the Prophet (PBUH) was reported to have proclaimed God's condemnation for the sensual men and women.

Considering the actual and specific circumstances of polygyny in Islam, in the early schools of various persuasions have identified the following as necessitating polygyny...

1. The muslims had a greater need for progeny to build up and reinforce the nascent community.
2. There were an increasing number of helpless widows and orphans who had lost their supporters for one reason or another and who

urgently needed providers, fosters and guardians to take proper care of their moral and material welfare.

3. The lack of public funds or "state budgets" to meet the urgent needs of such helpless dependant was obvious.
4. The marriage bonds were generally laxed at the time and in need of reforms. Polygamy was a measure of regularization and stability.[69]

6.7.7 RIGHT TO PRONOUNCE TALAQ (i. e. DIVORCE)

Unlike what applies under Statutory and Christian law marriages where the enabling law is "For better or for worse till death do us apart" Marriages under Islamic law is purely a social contract and not a "sacrament". By this, it means parties to a marriage contract under Islam has a right at any-time to pull out of the matrimonial bond once the reason for which the marriage was entered no longer exist. This social contract principle of Islamic law marriages does not however remove it completely from being a sacrament because in many verses of the Quran and traditions of the Prophet (PBUH) spouses had been admonished to always resort to reconciliation rather than resorting to outright separation. Thus, Islam permits dissolution of marriage whenever it be-comes absolutely impossible for the parties to continue with the relationship, thereby emphasizing the social contract concept.[70] In line with human nature, Islam permits dissolution of marriage as a natural process. Islam took up a position which is said to be between liberalized

proscription and out-right accommodation because it gives this right to both parties even-though the modes differ. For instance, while the wife can terminate her marriage through the process of khul'u (self-redemption) the husband on the other hand has been given the right through talaq, which are of various types. In essence, the husband unlike the wife has been afforded latitude of opportunity in the course of dissolution of marriage. In addition to the above channels open to both spouses there is another mode of dissolution by judicial intervention.

The right to pronounce talaq is exclusively rested on the husband and it is purely founded on the belief that it is not an excuse in Islam for a man to allow a marriage, which is essentially a social contract to frustrate him or her. However, the Prophet (PBUH) has frowned at divorce and this has been confirmed in various traditions of the Prophet (PBUH). In one tradition, the Prophet (PBUH) said:

> Divorce is the most distasteful thing in the sight of God among lawful things.

He further said:

> Divorce shakes the throne of God[71]

Having out-lined the background analysis regarding the husband's right to pronounce talaq, emphasis will now be focused on the rules and procedures

as well as authorities of the courts in respect of the husband's right to pronounce talaq.

Generally, there are two types of talaq, which the husband can resort to namely...

1) Sunnah talaq; and
2) Contra-Sunnah talaq

"Sunnah talaq" is the talaq pronounced in accordance with the Sunnah of the Prophet (PBUH) Sunnah talaq becomes effective upon the fulfillment of three conditions namely....

1) The pronouncement must be said or made at once
2) The woman must be in a state of fresh purity
3) There must not have been any sexual intercourse within that state of fresh purity. "Contra-Sunnah talaq" however is the one pronounced in disregard to the Sunnah talaq. For a talaq whether sunnah or contra-sunnah to be valid and operative under the law, the husband must possess the following capacity....

1) The husband must be adult and sane
2) He must pronounce the talaq out of his own free will and not under coercion, duress and or undue influence.

Even-though the husband has a right to divorce his wife, it has been held in the case of ***Saidu Emigi & Patiko Ndako V Aliyu Kusolukpa & Teni Saidu***[72] that an instigator of divorce between a married couple cannot be allowed to marry the woman he encouraged to divorce her husband.

In the above case, the appellants appealed against the decision of Upper Area Court for allowing a man who procured and encouraged the appellant's wife to divorce him to marry her.

The Shariah Court observed that the initial suit started at the Area Court Edozhigi where it was established by the appellant witnesses that indeed the respondent instigated and encouraged the appellant's wife to divorce her husband so that she could marry him. Likewise, in the Upper Area Court it was verified that no doubt the respondent had instigated the appellant's wife to divorce her husband. The appellant witness also testified that even before and after the suit filed by the appellant against the respondent in the two lower courts on the respondents intrigues, he had seen the respondent and the appellants wife on two different occasions. The respondent did not deny this testimony. The Shariah Court held after critically examining the record of proceedings of the two lower courts that according to Islamic law on the subject in the book of Fadraz Zaujnini at page 254, any person who is found to have encouraged a married couple to divorce her husband so that he could

marry the wife, would not be allowed to marry such a wife. The court further held that the Upper Area Court Bida therefore erred in law in allowing the marriage between the appellant's wife to the respondent. Hence, the marriage was declared illegal, null and void and of no effect. The wife was accordingly ordered to go back to her father's house to observe "Istibral' before marrying another man but not the respondent, Aliyu (which is three months period).

Similarly, the court also decided the issue of whether a divorced husband has the right to detain the personal effects of his divorced wife for failure of the wife's parent to pay back the sadaq he paid (i.e. dower), was the case in ***Katamba Muhammed V Habiba Tsado Oonna***.[73] In this case the appellants appealed against the judgment of the two lower courts which dissolved his marriage with his wife despite the fact that he sued for re-payment of the dower he paid during his marriage to her.

The Shariah Court after looking at the record of proceedings of the two lower courts at Bida and Badegi found that:

1) The area court Bida dissolved the marriage between the couple after finding that they could not settle their marital problems.
2) The Upper Area Court Badegi also upheld the decision of the lower court for the reason that the appellant did not appeal against the decision

of the Area Court Bida within the required time. In addition, he refused to give back to the divorced wife her personal effects despite completing her "Iddah" period because the Sadaki he paid was not repaid by her father who was always absent whenever he demanded for it.

The Shariah Court in its judgment dissolved the marriage between the appellant and the respondent, and that the appellant should give back the respondent's personal effects. The respondent is declared free to marry another man after her completion of Iddah period.

Thus the judgments of the two lower courts were accordingly upheld.

On the husband's rights to pronounce talaq, it has been held in the case of ***Goigoid Fall V Hauwa Karama***[74] that a wife cannot be divorced on the orders of the husband's father. In the above case the respondent petitioner sued the appellant defendant at the lower court for divorce since her husband's father said she is useless to the family and that as soon as her parents paid back the dower (Sadaki) she was to leave immediately because he had found a suitable wife for his son. The Dambo'a Area Court ruled that since the petitioner (wife) had no credible witness and that there is evidence of settlement, with her husband by giving her ₦600 to calm her mind, the marriage should subsist. The respondent petitioner was dissatisfied with the decision of the lower court and appealed to the Upper

Area Court Dambo'a. The Upper Area Court overturned the decision of the Dambo'a Area Court and held that the respondent's evidence and that of her witness Ma'aji, that the appellant's father insulted her, as being useless and her being asked to leave the house is credible enough before the court. The Upper Area Court thereby dissolved the marriage.

The appellant appealed to the Shariah Court of Appeal against this decision. The Appeal Court after reading through the record of proceedings of the two lower courts held that:

1) The evidence of respondent witness (Ma'aji) is hearsay evidence as both the lower courts records of proceeding showed that the witness was told what to say in the court.
2) That the swearing to an Oath by the respondent and the person that swore is not credible because they are related. They all belong to the same father and furthermore she was a spinster.
3) That Ma'aji was also of the same father with the respondent hence he was a tainted witness. It was wrong according to law to accept his testimony
4) As a result, the Appeal Court quashed the decision of the Dambo'a Upper Area Court and upheld the judgment of the Area Court.
5) The father of the appellant was seriously advised to leave the couples to live peacefully with their marriage since the court observed that he was the cause of the couples marital troubles.

In terms of the procedure and to the effectiveness of talaq, there are two methods:

1) The revocable talaq which consist of the first and second pronouncement of talaq, and
2) The irrevocable talaq, which consist of the first and second pronouncement of talaq which is not revoked until the expiration of the Iddah period. Others are talaq pronounced on monetary and material consideration and lastly the third pronouncement of talaq which is final until the woman marries another husband who later divorced her on his free will without any pre-arrangement before she can be re-married by her former husband.

The irrevocable talaq is further divided into two namely:

1) The imperfect irrevocable (Bain Bainuna Suqhra) talaq.
2) The perfect irrevocable (Bain Bainuna Kubra) talaq.

The talaq listed above falls under the imperfect irrevocable, meaning that the distance between the parties is "short" in the sense that re-marriage for the patron is possible immediately after the Iddah period. The perfect irrevocable type signifies that the distance between the parties is "long" because re-marriage between them is only possible after a valid Thalami

after which the woman must have married another man who later divorces her on his free will without any pre-arrangement.

As to the mode of pronouncement of talaq, it can be oral, express or in writing and it can also be implied or by denture or signs. Where the express method is used there is no need for ascertaining the intention of the husband. However, the jurist differs on the need for intention wherever the implied method is used because such a method is open to various interpretations unlike the express type. Talaq can also be delivered through a messenger or where it is delegated to the wife, she can pronounce it herself. This is called delegated talaq (Talaq Al-taquid). All the jurists agreed in this regard and they further held that once the talaq al-taquid is pronounced, it amounts to a valid talaq and whether it is pronounced once, twice or thrice, it is interpreted as single talaq.

Talaq becomes effective only when it is pronounced or delivered with full intention, thus any talaq pronounced or delivered under coercion is ineffective because it is devoid of intention. On this the Prophet (PBUH) was reported to have said:

> There are three things, which Allah has forgiven my Community: Things done under mistake; things done under coercion; and things done under forgetfulness.[75]

As to the number of pronouncements of talaq all the jurists agreed that it is three times. The first two are the revocable type while the third one is the irrevocable type. As regards whether the three can be pronounced once and at the same time. All the schools agree that it can be said once and the same time and that it has the same effect as the one pronounced at three different times or intervals. Talaq is irrevocable and it is said to be in consonance with the provisions of Quran 2:229 and 2:230 respectively.

Quran 2:229 it reads:

> Divorce must be pronounced twice and then (a Woman) must be retained in honour or released in kindness.

Similarly Quran 2:230 reads:

> ...and if he hath divorced her (the third time), then she is not lawful unto him thereafter, until she hath wedded another husband. Then if he (the other husband) divorced her, it is no sin for both of them that they are able to observe the limits of Allah. These are the limits of Allah. He manifesteth them for people who have knowledge.

All the jurists however agreed that the pronouncement of talaq thrice at once and the same time is contrary to the Sunnah of the prophet (PBUH.) other Jurists hold that talaq must be pronounced thrice at once and the same time, otherwise it must be pronounced one after the other.

6.8.0 RIGHT OF INHERITANCE OF THE HUSBAND

Like the wife, the husband is also vested with the corresponding rights of inheritance from the property of his deceased wife. This right of the husband to inherit his wife's property is not absolute. It is subject to certain conditions. The guiding authority is Quran 4: 12. It reads:

> In what your wives leave, your share is a half, if they leave no child: but if they leave a child, you get a forth; after payments of all legacies and debts.

It is important to state here categorically that a man cannot inherit his wife's estate/property if he caused her death; if they are of different religious belief as reported in a tradition where the Prophet was reported to have said:

> A muslim cannot inherit an unbeliever and an unbeliever will not inherit a muslim.

Other instances in which a man will not inherit his deceased wife is where he apostates (Ridda); differences of domicile i.e. where the husband leaves in a hostile country to which the muslim community was committed to wage war in order to establish and promote Islamic rule. This applies only to unbelievers.

Other rights of the husband, which is an obligation and a duty for the wife are:

6.8.1 RIGHTS TO SEXUAL INTERCOURSE

Islamic jurists have recognised that it is the duty of the wife to provide legitimate sex to her husband. She must be sexually responsive and make herself attractive, available and co-operative to the husband. The sexual accessibility of a wife is an inalienable right of the husband, hence she is seen as a comfort or garment to him as he is a comfort and garment to her too. However, the sexual right of the husband is subject to the wife's health and some other legitimate justification for her to deprive him sex such as monthly menses, while fasting in the month of Ramadan in the day time or while on Ihram during holy pilgrimage to Mecca and Medina,[76] in recent times what about diseases such as STDS/HIV/AIDS.

6.8.2 DUTY TO BREAST FEED CHILDREN

A wife is under obligation and as part of her marital role to breast-feed the children of the marriage if she is still married to the father of the child. This is in compliance with the provisions of Quran 2:223. It reads:

> And mothers shall suckle their children for two whole years for him who desires to complete the time of suckling. And their (mother's) maintenance and their clothing must be borne by the father according to usage. No soul shall be burdened beyond its capacity.

The duty to breast-feeding however may not be completely binding. It all depends upon certain factors of the wife such as her ability, status, sickness or shortage of milk in her breast. In case of any of the above factors, a wife

may not breast -feed the child and the husband must employ the services of professional breast-feeder as may be approved by the wife. Thus it is said:

> It is the duty of a woman who remains under the matrimony of the father of the child to breast feed the child except if she belongs to the class of people who do not breast-feed.[77]

Similarly, it is further stated that:

> It is not binding on the mother to maintain her child, even if the child is an orphan. She however owes it a duty to breast-feed the child as long as she is a wife to him (the father of the child). If she does not breast feed because of her high status, sickness or scarcity of milk from her breast then the duty falls on the father except if he is too poor to employ a breast feeder or that the child will not breast feed from other women.[78]

6.8.3 MUTUAL RIGHTS OF THE SPOUSES TOWARDS THEMSELVES

Islamic law grants some rights and imposes some obligations on the spouses to a marriage contract. This ethical principles of mutual rights of the spouses is in line with the provisions of Quran 2:184 and 30:21 already quoted in the preceding chapters and which is to lead a conscientious commitment by both sides to the divine designation of marital union as an abode of peace and serenity, a link of mutual love and compassion, all being God's signs for those who reflect.

Among these mutual rights of the spouses are... Rights to maintenance; right to sexual intercourse; custody, paternity and or

legitimacy of children; right to consortium of spouses; right to kind, impartial equitable and benevolent treatment; right of inheritance; and right to the dissolution of marriage.[79]

6.8.4 THE RIGHT TO MAINTENANCE

Earlier in the preceding chapter it has been stated clearly that maintenance is one of the most important right of a wife and a duty incumbent on the husband to fulfill. A specific consequence of this divine right of the wife is contained in various verses of the Quran and in particular Quran 2:233 provides that the wife is said to be entitled to this right by virtue of the fact that she is devoted to the husband's companionship and confined to his household by the very reason of marriage that is being his wife trust. This right is inalienable and it is inconsequential whether the wife is a muslim or non-muslim, rich or poor and according to many authorities minor or adult, healthy or sick. The wife's maintenance entails her incontestable right to lodging, clothing, food, medical and general care. This right of maintenance extends even to the period of divorce, as there are many verses of the Quran on this as well as decided authorities already quoted in the preceding chapters. However the wife's inalienable right is determined by the means and earning capacity of the husband. This therefore presupposes that as a mutual right, nothing precludes a wife from assisting her husband's if his means is meager or where she earn far more

than the man or in a situation where the husband is poor and cannot discharge effectively and adequately his main responsibility of maintaining his wife, the wife can assist-even-though according to Hanafi jurists hold that it is not obligatory on the wife. The jurists further hold that where the husband is poor and cannot maintain his wife or due to other circumstances the wife may look for the means of maintaining herself according to her needs which shall remain a debt to be paid by the husband whenever his financial status improves. The Zahiris hold a contrary view that any cost of maintenance borne by the wife while the husband is in financial difficulties is not a debt payable by the husband.

The majority of the jurist however opined that where a husband is so poor that he cannot discharge his obligation of maintenance to the wife, she has the choice of either enduring with that, stay with him awaiting relief or she can go to the court and ask for separation or divorce due to lack of maintenance.

This is supported by a tradition of the Prophet (PBUH), which reads:

> ...Let charity begin at home because the woman will maintain her stand saying you either feed me or let me go.

6.8.5 THE RIGHT TO SEXUAL INTER-COURSE

Sexual inter-course is one of the mutual rights between the husband and wife. The wife is always commended to submit herself to the sexual call of her husband. The husband too is always expected to satisfy the sexual demand of the wife. In fact, in law, the only legitimate way a man and woman can have sexual intercourse without inhibition is through valid and subsisting marriage or with a captive. This is supported by Quran 23:1-6 which provides:

> The believers must (eventually win through); those who humble themselves in their prayers: who avoid vain talk who are active in deeds or charity who abstain from sex, except with those joined to them in marriage bond or (the captives) whom their right hands possess for (in their case) they are free from blame.

It is therefore clear that the Holy Quran has not permitted indiscriminate sex. It must be sex between married couples or female captives that is owned by a freeman. Either of the spouses must try as much as practicable and within the ambit of the law to satisfy the sexual demands of the other. In fact, in some cases if any of the spouses is found to be sexually unsatisfactory or weak, the marriage maybe dissolved, so as to avoid transgressing Allah's limits by the unsatisfied party.

In all, each spouse owes a duty to satisfy the others reasonable demands for sexual intercourse. The word "reasonable demands" is to be determined

with reference to the health, temperament and biological needs of the parties' as well as such extraneous factors like extreme temperature and other factors taken into consideration. On the other hand, excessive and in ordinate demand for sex could amount to cruelty especially if the other party is thereby affected adversely as well as inability to satisfy the other. Similarly, refusing reasonable demands like practicing coitus- interrupts (sexual – interruption) in spite of protest from the other party could be injurious to health. In all, parties are expected to strike a balance in satisfying each other's sexual demand in order to enhance a harmonious matrimonial relationship.

6.8.6 CUSTODY, PATERNITY AND LEGITIMACY OF (CHILDREN OF THE MARRIAGE)

Custody, paternity and legitimacy of children are a joint responsibility of both spouses. In cases of custody the wife is given priority because of her closeness to the children than the father. Following divorce the mother is to have custody of her female child till she is married and the marriage is consummated. For the male child, until he reaches puberty. Both parents enjoy this right whether or not they are muslims. The basis of this right is to ensure the moral, social and religious uprightness of the children and also to inculcate on them good virtues and general education. Like the right of custody, which is conferred on the wife after divorce the

right of guardianship of the children is vested on the father. In this regard, the father's responsibility as the head of family still continues, as he bears all the expenses involved in the maintenance of the children and the entire household. Where for any circumstances the parties divorce or separate, this right of custody will still remains with the mother and maintenance is vested on the father."[80]

There are various decided authorities of the court expressing the position of the law on custody. One of such cases is the case of ***Zulai Mohammed V Abubakar Ibn Abubakar*** [81]. The question was who should be given priority on the right of custody.

This case is an appeal against the decision of the Upper Area Court No.1 Gombe, it originated from an Area Court.

Zulai instituted a suit against Abubakar Ibn Abubakar seeking for the restoration of her right to the custody of her 3 years old daughter. Abubakar said that he did not seize the girl from her but alleged that it was Zulai's father that took the girl to him. Zulai denied this and replied that the girl was taken to him for the purpose of census, to be counted among the Abubakar's family and to be taken back afterwards. The Court asked Zulai to bring witnesses to establish her claim. She brought witnesses who confirmed that her father took the girl to Abubakar not for custody.

Abubakar then complained that if he returned the girl, she would not be given proper upbringing as he desires.

Having consulted authorities the court found that Zulai was entitled to custody but since she had remarried, this right fall on to her mother or her sister. Except where there is no such close relation or where they waived their right, it will revert to the father.

Abubakar was dissatisfied with this decision and appealed to Upper Area Court No. 1 Gombe. In his grounds of appeal he submitted that if he accept the judgment of the lower court his daughter would not get proper upbringing. The court heard from both parties and put some questions to them. In his answer Abubakar maintained that his mother whose name was Aishatu was still alive.

In her reply, Zulai stated that her mother was dead but she had a sister named Ladi who was alive. In its assessment of this case the Upper Area Court realized that Ladi was married and was some other children in her custody. On this ground the court reversed the decision of the lower court, which awarded the custody to the mother because investigations revealed that her right had lapsed. For this reason the Upper Area Court ordered that Zulai should send her daughter with all her belongings to the house of her father, Abubakar.

Zulai being dissatisfied with the decision, appealed to this court. On the ground that the Upper Area Court No.1 Gombe did not avert its mind to the Islamic rule where there is a maternal relation of a girl that is not up to 12 years she should ideally stay in the custody of her maternal relations: and consequently erred by granting custody to the father of the girl.

Having gone through the record of proceedings in both the Area court and Upper Area Court and having heard from both parties and analysed their contention the following observations were made by the Shariah' Court of Appeal said:

"That in Islamic law preference is given to mother in the custody of children, were it lapsed it goes to the mothers mother, then mother's sister if she is not married. It then falls to the father's mother." The court cited Bahja Vol. I page 407 where it provides that:

> In the rank of women entitled to custody it is a condition that the woman should not have a husband that had intercourse with her except if she is a grand mother, meaning mother's mother who is marrying the mother's father.

Our observation and the decision of the Upper Area Court are in line with the above tradition.

The Appeal was accordingly dismissed. Another case is that of ***Muhammed Jatau Waziri V Mammu Hajira***[82]. The issue for determination was who has the right of custody of 4 years old daughter, between the mother and father.

This is an appeal against the decision of Upper Area Court No.2 Gombe, which originated from Civil Area Court Gombe between the plaintiff Mammu and the defendant Muhammadu Jatua where the plaintiff claimed that Muhammadu Jatau divorced her and took away their year old daughter who was in her custody: she wants the court to restore the custody of the daughter to her.

In his defense, Jatau admitted that he took her with a view of taking her to a tailor to measure her for a dress from there he took her away, he added that the age of the girl was 5 years and not 4 as alleged by her mother.

The Area Court held that the mother of the girl had the right to have the custody of the girl even though she had re-married which Jatau himself was aware of but did not take any step to assert his right for a long time, consequently he had waived his right to that effect.

The court based its decision on the authority of what is contained in Jawahirul Iklil Vol. 1 Page 409. The court observed that even the woman whom Jatua gave the custody of the girl to was also married and had no right of custody of the girl. Moreover, Jatau had said, he would not give his wife the custody of the girl. For this reason the court said the mother of the girl was the most entitled and ideal for the daughter's custody even-though she was married.

Jatau was dissatisfied with this decision he appealed to Upper Area Court No.2 Gombe. His ground of appeal was that: he was not satisfied with the decision of the Area Court, because the court ordered the custody of the girl to Hajiya Mammu.

The Upper Area Court affirmed the decision of the civil Area Court. Jatau was still dissatisfied. The Shariah Court of Appeal having gone through the copies of proceedings of both the Civil Area Court and Upper Area Court and heard the address of both parties, It was observed that Jatau did not mention any one who is more entitle to the custody of the girl than her mother. For the first person to be entitled to the custody is the mother, then the mother's mother then followed by the father's mother as contained in Tuhfa – The Commentary of Mayyara Vol. 1 Page 270 where it is provided that;

> Mother of a child is the first to be entitled to the custody of her child, and then followed by the mother's mother then the mother's sister and then the father's mother.

Having observed that out of all those mentioned above none is more entitled to the custody than the mother of the girl in this circumstance. We agree with the conclusion arrived at by the lower courts that the mother of the girl should continue to keep (custody) the girl.

The court dismisses the appeal of Jatau and affirmed the decisions of the Upper Area Court and that of the lower court.

From the two reported cases it is clear that in cases of custody preference is given to the mother and where there is no mother, the next person to take charge of the custody is maternal or paternal grand – mother, the child's maternal aunt, the mother's maternal or paternal aunt, the child's grand paternal grand-mother, then the father.

The above categorization is further supported by the traditions of the Prophet (P.B.U.H.) where an early muslim woman activist was reported by Abdullahi Ibn Umm Amr to have protested to the Prophet (PBUH) when she said.

> This my child, my stomach was his abode, my thighs were his playing centre my breast was the reservour to quench his thirst. His father wants to take him from me. The Prophet (PBUH) replied (uttering the law). You have better claim to guardianship than his father, as long you have not remarried.[83]

Another classical case on the above topic was reported in respect of the companion of the Prophet and his mother-in-law:

> On the authority of Yahaya Ibn Sa'd he said that he heard Al-Qasim Ibn Mohammed saying; Umar Ibn Khattab was married to a woman from the Ansar. She had a child for him called Asim. Later Umar divorced her. Umar came to Qinba and found his child Asim playing at the corridor of the mosque. He took him by the arm and put him in his front on the animal he rode; the grand mother of the child pursued him and challenged him. They both appeared before Abubakar Sadiq. Umar said my son "and she said " my son" Abubakar ordered Umar to let her have him. Umar did not contest it further.

In another version, it was reported that Abubakar told him the mother is more sympathetic than the man and therefore she has a better claim to the custody of her young child than the husband as long as she has not re-married.

6.8.7 PATERNITY AND LEGITIMACY

As regards paternity and legitimacy of children both the husband and wife must ensure that the child if born during a valid marriage has inalienable right to life and equal life chances as their biological child and both of them must bear the responsibility of the paternity of the children of the marriage except if the child is disclaimed by the husband through the process of Li`an.[84]

The principle of legitimacy was intended to avoid the ugly pre-Islamic practices under which children were given to men based on their higher status than that of women.

With the coming of Islam this practice was completely abolished and the principle of legitimacy requires that every child is to have a biological father and not a social father, a real father whose fatherhood once established 'cannot be revoked and accordingly, every child born will be reasonably assured of placement. Much of this security rests upon the individual's conscience and his religious sensitivity. However, these moral instructions may be designed to supplement the specific legal procedures and to generate an active sense of moral responsibility.

In one of his strong declarations, the Prophet (PBUH) said:

> Any woman who misplaces a child's legitimacy by relegating its descent to some one who is not responsible for its conception has committed a grave offence, alienated herself from God, and will be denied the bliss of eternity. Likewise a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted upon himself universal disgrace. This seems so institutionalized in Islam that stigma of illegitimacy seldom clings to a child in the Islamic family even the children of slave concubine are legitimate members of the family with family right.

6.8.8 THE RIGHT TO CONSORTIUM

Consortium connotes as far as possible the sharing of a Common home and a common domestic life. In another instance, it is described as

the fact of the spouses accepting and treating each other as husband and wife or at-least the intention of so doing as soon as circumstances permits.

In Islamic law, there is no clear provision relating to consortium but by analogy consortium applies to Islamic law because consortium is meant to ensure matrimonial harmony between the spouses as well as any thing that will bring about an enhanced matrimonial stability and prosperity between spouses.

6.8.9 THE RIGHT TO KIND, IMPARTIAL, EQUITABLE AND BENEVOLENT TREATMENT

The husband and the wife are all expected to be kind, impartial, equitable and are expected to show love to one another, Islam grants this rights to all the spouses by virture of various provisions of the Quran. In Quran 2:187 it reads:

> ...They (your wives) are garment for you and you (husbands) are garments to them.

Similarly Quran 2:228 provide that;

> ...The women have rights similar to that of men according to what is equitable and just.

Again the Quran in 30:21 made marriage to be a source of happiness and harmony between spouses, it reads:

> And among His signs is that He created for you mates from among yourselves that you may dwell in tranquility with them and He put love and mercy between your hearts. Verily in that are signs for those who reflect.

6.8.10 THE RIGHT TO DISSOLUTION OF MARRIAGE

After the marriage contract has been concluded and the parties began marital life and roles, there are instances of quarrels and disputes between the parties. Where the disagreement has gone beyond the capacity of either party to tolerate, although law recommends tolerance but if all efforts towards reconciliation fails or the reason for the marriage no longer exist the last resort is for the marriage to be dissolved.

As a general rule under Islamic Law, the husband is vested with the power to pronounce divorce to his wife whether or not there are reasons. This power is provided for in Quran 65:1 it provides.

> O prophet when you divorce women, divorce them at their prescribed periods and fear God your lord and turn them not out.

Like the husband, the wife is also vested with the right to bring her marriage to an end with the husband upon the fulfillment of certain conditions. She can pronounce divorce herself or that she can seek the husband's consent by payment of a ransom for her freedom or by going to court with or without his consent for the divorce.

In law, a wife can pronounce divorce if she has been empowered to or where the husband has delegated such powers to her. Both means of dissolution of marriage is known as khul'u (self-redemption) Dissolution through khul'u takes two forms. The first is payment of a ransom by the

wife as agreed with the husband and wife relinquishing some of her rights i.e. (munbarah). The second mode of dissolution of marriage is for the wife to go the court and apply for divorce on lawful exercise or grounds.

The basis of khul'u is contained in Quran 2:229. It reads:

> It is not lawful for you men to take of what you have given them (Women) unless the couples fear that they may not maintain God's bound, it is no fault in them for her to redeem herself.

According to a tradition of the Prophet (PBUH) a wife by name Habibah Bint Sahl got separated from her husband Thabit Bint Quays through redemption herself by giving him all that he i.e. the husband gave her. It is however observed that quantum of ransom may be more or less than the sadaq.

Finally, it is now evident that one of the most important consequences of marriage contract is the responsibility that follows. The spouses shall bear certain duties and obligations as well as enjoy certain rights. Some of these rights are mutual to both. There are religious textual provisions and Sunnah establishing these rights and obligations of the spouses.

REFERENCES.

1. Ibn Rushd: Bidayatul Mujtahid wa Niheyatul Muqtasid Vol. 2. (Darfiler Beirut 1966) P.2.

2. 'Abd al'Ati, H. The Family Structure in Islam Islamic, (American Trust Publications, 1982) P. 81. See also Quran 4:25.

3. Ibid at P. 59

4. Ibid at P. 53

5. It is observed that the term marriage has not been clearly and unanimously defined by the writers so far this research has come across. This shows that the meaning of marriage in Islam is relative and subject to various definitions. It is however believed that it is religion, social and contractual relations between male and female for a lawful cohabitation.

6. Dasuq, M. Hashiyatut Dasuqi, Darul-Fikra, Vol. 2 (ND) P. 220, Al-qirawani A. Z., Risala. Darul-Fikra, (ND) P. 32 and Ibn Rushd (1966) Op. Cit. P. 6.

7. Ibid at P. 40

8. 'Abd al'Ati, H. (1982) Op. Cit. 147. See also Quran 30.21 and 2:184.

9. (a &b) 'Abd al'Ati, H. (1982) Op. Cit. 147-148. See also Quran 2:229-234 and 4:19; 2:228 and 4:34.

10. Baillie, N.B., A Digest of Muhummadan Law, (Premier Book House, Lahore, 1974) Pp. 441-442.

11. Mahmud, A. B. The Supremacy of Islamic Law, (Hudadahuwa Publication Zaria (ND))P. 26-27.

12. 'Abd al'Ati, H. (1982) Op Cit. P. 64

13. Ibid. P. 70

14. Hamilton, C. The Hedaya, Kitab Bhavan. (1979) p. 60

15. Case No. BAS/SCA/CVA/90/AR 92.

16. Daura, B.M. (Trans) Tuhfat Al-Hukkam, (Centre for Islamic Legal Studies, 1989) Pp 32-36. See also Quran 5:6.

17. Abdal A, H. Op. Cit. (1982) P.148, See also Ambali M. A. Op. Cit. (1998) P. 170.

18. The term "Reproach and injury seems the closet translation of the Arabic term Mann and Adha, Meaning in this context that men should not feel that by providing for women they are doing them favour Nor should men cause the independent women injury or grief by way of boasting or arrogance.

19. Dasuqi, M. Op. cit. Vol. 2. (ND) P. 509.

20. Murtada, M. Op cit. (1981) P. 244. See also Ambali M.A. Op. Cit. (1998) P. 170.

21. Suit No SCA/KN/18/01

22. Khan, M. M., (Trans) Sahin Al-Bukhari., Vol. 8, (Hila'l Yayinlari, Ankara, Turkey, 1976) P. 151.

23. Ambali, M.A. Op. Cit. (1998) P.171, who cited Rida M: Darul Kutubil Amalliyya Lebanon (1975) P. 384.

24. Al-Azheri S. Jawahirul Iklil: Kutubul Arabiyya, Kano. Vol. 1. (N.D.) P.402. See also Ambali M.A. Op. Cit. (1998) P. 172.

25. Ambali, M.A. Op. Cit (1998) P. 174, See also Abdal A. H. Op. Cit (1982) P.150.

26. Ambali, M. A. Op. Cit (1998) P. 172 who quoted Al-Azheri Zawahiral Ikhil Vol..2 (ND) P. 402.

27. Ambali, M.A. Op. Cit (1998) P. 172

28. Dasuqi, M. Op. Cit Vol. 2. (ND) P.507

29. Ibid. P.524

30. 'Abd al'Ati H. Op. Cit. (1982) P. 150

31. Dasuqi, M. Op. Cit Op. cit. (ND) P.513

32. Ibid.

33. 'Abd al'Ati H. Op. Cit. (1982) P. 151

34. Ibid at P. 153.

35. Ambali, M.A. Op. Cit (1998) P. 172 who quoted Al-Fawakihid Dawari 3rd edition Vol. 2 (1955) P.104.

36. 'Abd al Ati H. Op. Cit. (1982) P. 153

37. 'Abd al'Ati H. Op. Cit. (1982) P. 158, See also Ambali M.A. Op. Cit (1998) P.173.

38. El-Imari, M.T. unpublished Muslim Personal Law: According to Maliki Law Center for Islamic Legal Studies, A.B.U., Zaria (1978) P. 113-114.

39. Ibid P. 144. See also al-Qirshi Vol. 3. P. 331-55

40. Qutb, M. Shabuhat Hawlal-Islam, (Malba'atul Istiqlal al-Kubra, Bagdad, 1964) Pp. 264-266.

41. El-Imari, M.T. Op. Cit. (1978) P. 119-121.

42. Shukuri, A. Muhammadan Law of Marriage and Divorce, (A.M.S. Press. Inc. New York, 1966) P.80

43. Ibid. P. 97.

44. 'Abd al'Ati H. Op. Cit. (1982) P 159-160

45. Ibid at P. 160. See also Ambali M.A. Op. Cit. (1998) P. 167

46. Ibn Qayyim, A. A Zadul-Ma'ad Fi Hadyi Khairi-Ibad, Vol. 4, (Al-Maktabatul Misriyyah, 1973) P. 297.

47. Gurin, A. M.: Introduction to Islamic Family Law (Centre for Islamic Legal Studies, ABU., Zaria) P. 179-182.

48. Ambali, M.A. Op. Cit. (1998) P. 246.

49. Ambali, M.A. Op. Cit (1998) P. 246, See also El-Imari M.T. Unpublished Op. Cit. (1978) P. 198.

50. Mahmud, A. B. (N.D.) Op. Cit. 28.

51. Prophet Muhammad's (PBUH) last Pilgrimage address at mount Arafat.

52. Khan, M. M., Op. cit. P.

53. Case No. BAS/SCA/CVA/125/GM/92

54. Case No. BAS/SCA/CVA/39/BH. 11/94.

55. Case No. BAS/SCA/CVA/69/TR/92

56. Sabiq, S., Fiqh Al-Sunna Vol. II (Darul-Fikr, Beirut 1977) P. 255-6

57. Case No. SCA/IN/6/BO/76

58. Death sickness is that sickness in which the sufferer is apprehensive of death of the sufferer.

59. This hadith is transmitted by Abu Hurairah, as quoted in Khan, M.S. Op. cit. (1976) P. 142.

60. Al-Jassas Vol. 1. P. 443, See also Bukhari Sahih Bukhari, See also Holy Qur'an Chapter 28:8, 19:41-48, and 17-28.

61. Khan, M.S. Op. cit. (1976) P. 149

62. Ibid. P. 152.

63. 'Abd al'Ati, H. Op. Cit. (1982) P 169.

64. Abdul Maliki, B.M. Op. Cit. P. 29

65. Narrated by Muslims and others.

66. Obligatory knowledge (al-Ilmum-Fard) is one thing, which Allah has made obligatory because whatever is made obligatory, knowledge about it is also obligatory.

67. Sabiq S., Op. cit. Vol. 2. (1977) P. 179

68. Tabari, Makarimil-Akłaq Darul-Fikr, Beirut, (ND) P. 157.

69. 'Abd al'Ati, H. Op. Cit. (1982) P 110-111.

70. Ibid at P. 118-121.

71. Narrated by Al-Bukhari, as quoted in Khan M.S. Op. cit (1979) P. 91

72. Suit No. SCA/NS/CU/63/91.

73. Suit No. SCA/NS/V/4/90.

74. Suit No. BOS/SCA/CV/104/93.

75. Siddiqi, A. H. Sahih Muslim (Trans) Vol. 11, Dar Al-Arabia, (1971) P. 719.

76. Ibn Qudama (ND), Al-Mugni, Vol. 6, Maktabatul-Jumhuriyyatul Arabiyyan, Cairo, Pp. 223-5.

77. Ambali, M.A. Op. Cit. (1998) P.181.

78. Abubakar, Hassan Al-Katsnawi, Ashulul Madariki, Op. Cit Vol. 11. P. 203.

79. Abdul Maliki, B.M. Op. Cit. P. 181.

80. 'Abd al'Ati, H. (1982) Op. Cit. P 187.

81. Case No. BAS/SCA/CVA/50/GMT/92

82. Case No. BAS/SCA/CVA/211/GM/92

83. Narrated by Al-Bukhari, Muslims and others

84. Ambali, M. A. (1998) Op. Cit. P. 187. 187, See also Quran 24:5-9

CHAPTER 7

7.0 CONCLUSION

Both Islamic and Statutory system of families recognizes that to have some rights, as a spouse there must be a legal union. E.g. for there to be the wives right to maintenance there must be a valid marriage subsisting between the spouses and that the wife must be in good standing in terms of sex and consortium. The concepts of the rights generally are the same except in terms of divorce and its modes. The English system does not recognize the husband's pronouncement of divorce except through the court of law.

It is seen that the concept of the rights of spouses under both systems are diverse in nature, particularly in respect of the rights of women in general and the recognition of the need to accord them more protection in the schemes of human affairs. And the recent need for expanding the rights of women through declarations at International Forum that are deemed crucial due to their disadvantaged positions.

The dividing lines between such marriages are very interesting to note. Under Islamic Law, marriage is purely a contract, which can be concluded with or without the mutual consent of the parties involved as seen in the case of minors. The marriage has to comply with certain conditions and its terms

are within bounds. Marriage under Islamic Law has no elements of sacrament, thus it is not conditional on being officiated by a priest because strictly speaking, there is no such office for the purpose of marriage.

Whereas, under statute law, marriage initially was regarded as a sacrament having its root from the Bible. The sacramental marriage implies, among other things, indissolubility of the marital bound, officiated by a priest, and benediction of the wedding ceremony. On the other hand, the idea of sacrament implies that marital partners are bond together by a sacred bond to which Supreme Being is also a party. Consequently, it was institutionalized as monogamous in nature with the elements of indissolubility. That is, one man one wife to the exclusion of all others. Unfortunately, the reality of marriage negates this idea. The institution is basic to civilization and family life is its principal product and the popular device by which the human race reproduces itself. It is for this reason that the law developed an elaborate and comprehensive regulatory mechanism on the formation and dissolution of such marriage. This aspect of indissolubility and the time taking to dissolve the marriage may well lead to promiscuity.

Since marriage is a contract under shariah, it can be dissolved by the parties to the contract through the process of (talaq) divorce by the husband or through a (khul) self - redemption by the wife on the payment of a ransom

to secure her release from the husband or by the court itself. By this, both parties are free to live their lives as single persons.

Islamic Law as a system recognises multiple marriages, that is, a man is permitted to marry up to four wives and the provisions of the Holy Quran already cited in the preceeding chapters, which is aimed at preventing adultery, etc, support this.

The procedures in contracting a statutory law marriage are very elaborate. For example, the couples are to proceed to the Marriage Registry in the district in which they desire to get married, to fill a form, give their notice of intention to get married; thereafter, notice is given (caveat) by the court in case there is any objection to the proposed marriage from the public. In the absence of any objection, a marriage certificate will be issued out. Neither of the parties should be below the age of 21, and now 18 years, the requisite consent shall be obtained in writing. The requisite consent is usually that of the father, but if the father is dead or is of unsound mind or absent from Nigeria, then the mother is competent to give consent and if such consent cannot be obtained for the same reasons as in the case of the father, then the guardian is competent to give his consent.

Where the Registrar is satisfied that all the necessary conditions have been fulfilled, and the certificate issued, then solemnization of the marriage

proceeds and this can take place either in the marriage registry, or in a place of worship. If it is in the registry, it must take place before the registrar and in the presence of two witnesses; between the hours of ten in the morning and four in the afternoon. If it is in a place of worship, a recognized minister of the religious organization concerned must conduct it. The place of worship must be specifically licensed to celebrate marriage under the Act, and as in the case of marriage in the Registrar's office, the marriage ceremony must be witnessed by at-least two people. Before celebrating the marriage, the officiating minister must first be satisfied that a registrar's certificate has been obtained by the parties and the marriage must take place between the hours of eight in the morning and six in the evening.

The officiating minister must send a copy of the marriage certificate to the Registrar of Marriages for the districts within 7 days of the marriage, prior to the ceremony.

The procedure for marriage under Islamic Law is not elaborate as such since it is a simple ceremony. The conditions required are as follows; there must be a direct, unequivocal proposal to be followed by a corresponding acceptance thereof; there must be at least two competent witnesses; there must be dower and sometimes marriage gift by the husband as consideration

for the marriage; the marriage must be given publicity; the woman must be of sound mind and full age; there must be marriage guardian for the women etc.

Whereas marriages under Islamic Law are not registered and written information about it can not be found in any official register like those under, the Statutory law marriages where records are kept in the Marriage Registry or Church where the marriage is solemnized.

The Christian marriage was vehemently criticized on the ground of indissolubility. Following this, it was modified and codified into statute thereby making allowances for divorce though some christian marriages still continues as simply a church blessing. The grounds of divorce are laid down in the statute and they have to be proved in the court to show that the marriage has "broken down irretrievably". Lord Westbury in the English case of ***Shaw V Gould***[1] criticized the initial position of the law on statutory law marriage where the English Judge gravely stated:

> Marriage is the very foundation of civil society and no part of laws and institutions of a country can be of more vital importance to its subjects than those which regulates the manner and conditions of forming, and if necessary of dissolving, the marriage contract.

The dissolution of marriage under Islamic Law on the other hand is easier as parties can effect it through "Talaq" by the husband and khul'u by the wife

without necessarily going to court or by court itself. However this does not mean that Islamic Law marriages are dissolved only through talaq or khul'u. The court also has the power to determine such cases whenever parties disagree especially on khul'u cases as regards to what amount the wife should give to redeem her self from the matrimonial relations.

Under Islamic Law, the wives and husbands have well defined rights spelt out in the Quran. A specific consequence of this divine Command is that the husband is responsible for the maintenance of the wife, a duty, which he is enjoined to discharge cheerfully without "reproach" or "injury". The wife is entitled to this right, by virtue of the fact that she is devoted to the husband's companionship and is confined to his household or by the very reason of marriage i.e. being his wife and "trust". Similarly, the main obligation of the wife as a partner in a marital relationship is to contribute to the success and blissfulness of the marriage as much as possible. While the husband must maintain, feed and clothe the wife, she must in turn obey her husband within the limits of Islamic Law. Muslim women had these rights before other women under any system of laws, since the time of the Prophet (PBUH), in the 7th century.

The rights of women under the Statute law are in the main won through court struggles and others are creation of legislations. The locus classique is the case of ***R. V Jackson***[2] where it was held in 1891 that a husband has no right to restrain his wife and that by an application for a writ of habeas corpus, it was no defense that the husband was merely confining his wife in order to enforce his rights to consortium. Like the case law, the Married Women's Property Act of 1882 and the Married Women's Property law of 1958 protected the wives right to own and dispose property. Also in Islamic Law, children like their parents have well defined rights in the Quran. For example, they have the right to proper upbringing, feeding, clothing, shelter, religiosity, inheritance and custody etc. These and many other rights are derived by virtue of the provisions of Quran. While those under the English law are basically common law won through the courts, which is later extended by statute. Women and children in Islam are given unique position regarding their rights than in any system of law because they are religiously defined and passed down or inspired through Prophet Muhammed (PUBH), since the advent of Islam as a religious and way of life. Whereas, the practice by some muslim where some rights are denied is another thing. This is attitudinal and customary practices.

The Statute, emphasis that in divorce proceedings between the spouses the paramount consideration should the child's welfare. That is, the court will decide the custody of the children taking into consideration the circumstances of the case. Whereas, in Islamic Law, the mother and mothers relations are given priority for the purpose of custody as of right over that of husband and his relations, unless they loose such right as a result of re-marriage or insanity, etc.

The differences in the nature of both laws (discussed in the proceeding chapters) made it mandatory to also have different systems to adjudication on any issue/matter arising from either marriage. Thus, in Islamic Law marriages, issues/matters arising for adjudication are first determined by the Area Courts in the Northern part of Nigeria and in Customary Courts in the Southern part. From these courts the Appeal goes to Upper Area Court; Shariah Court of Appeal, then to Court of Appeal and finally to Supreme Court and in the Southern part of Nigeria from Customary Courts, appeal lies to the High Courts, then to the Court of Appeal and finally to the Supreme Court.

Regarding Statutory marriages the issues/matters arising from the marriage are first determine by the High Court as the court of first instance. Then it goes to Court of Appeal and finally to the Supreme Court, by virtue of the Marriage Act, Cap 220 of the 1990 Laws of the Federation of Nigeria,

which has been discussed, in the preceding chapters as the enabling law governing statutory marriages.

The fundamental commonality is that both systems are marriages aimed at strengthening them as the basic foundation of the society namely, the family.

Both systems consider marriage as an institution, a divine institution and therefore frowns at any factor that will weaken it. For example, Islam frowns at divorce and Allah even described it as one of the distasteful thing in His sight, whilst under the Statute the procedure for its dissolution are tight.

Most Parties under both systems do not know the relevant laws regulating marriages before going into it and issues rising from marriages because most couples are not educated in Islamic Law but in respect of their five daily prayers. Regarding statutory marriages too, parties do not know the laws that govern their marriage because they are not lawyers and the law itself is elaborate, in both cases the spouses may not be educated.

Though under Islamic Law the rights of the spouses are well stated but due to ignorance and some times intentionally, the wives and children's rights are denied. For example, a child could be confiscated even at breast from its

mother. The child may later be entrusted into the custody of relations. This factor and my others such as illiteracy negative cultural practices, social inhibition leading to, gender discrimination in education, employment and in the family gave rise to the proliferation of women groups for their empowerment.

Even though Statute law protected some rights of the wives and children, these rights are breached in practice as in the case of those under Islamic Law. These breaches or denial of women's right gave rise to women groups for empowerment to ensure the application of the law as well as to extend these rights to public life.

The problem regarding the rights of women and children generally is articulated within the ideology or movement known as "Feminism". Feminism is the general perception of the present day women's unequal and inequitable status in the family and the society as well as their oppression and subordination by their male counter-parts due to their disadvantaged positions and the attempts being made by them to rectify this status quo. Feminism centres on reforms in all basic family and societal institutions. It is in this light that the concluding aspect of this project focused on the various plat forms and net-work of action mandate revolving around women's rights and

their progress world-wide, in order to ensure the application of laws positive to women and children, as well as to extend further the rights of women as wives or single to public life.

The following therefore are the various plat forms and network of action mandate on which the conclusion is anchored.

7.1.0 UNIVERSAL WOMEN ISSUES: BREAKING NEW GROUNDS AND CREATING NEW HOPES FOR THE FUTURE

Having examined the rights and responsibilities of spouses in the family on how they were achieved and their extent, it will be necessary to also focus on what women groups are doing to advance their rights further. Hence, with the recent reawakening and realization by women all over the world to "combine" and speak with one voice about their practical low status and rights in their families' and given countries, the International Conferences in Egypt in 1994, the Universal Regional Conferences towards Beijin in Lahore, Pakistan in December, 1994, and the 14-15 September Beijin meeting are breaking new grounds and creating new hopes for women in the family and in the Public.

The Muslim and English women worldwide met and stratezised their common problems as women in the family and in the society. For example, Women Living under Muslim Laws (WLUM), an International solidarity Network with Central Co-ordination at Grabels, France. WLUM to which Nigerian Women is an active member is "a network of women whose lives are shaped, conditioned or governed by laws, both written and unwritten drawn from interpretations of the Quran tied up with local traditions". The WLUM recognized that:

Generally speaking men and some states use local traditions/cultures against women. Therefore WLUM addressed itself:

1. To women living where Islam is the religion of the state as well as to women who belong to muslim communities' ruled by minority laws.
2. To Women in secular states where Islam is rapidly expanding and where fundamentalists demands a minority religious laws, as well as to women from immigrant muslim communities, in Europe and the America.
3. And to non-muslim women, either national or foreigners, living in Muslim countries and communities, where muslim laws are applied to them and to their children[3]

At this juncture it is necessary to examine the reason behind the formation of WLUM below:

7.2.1 FORMATION OF THE WOMEN LIVING UNDER MUSLIM LAWS (WLUM) INTERNATIONAL NETWORK

The formation was necessitated in response to what women consider as serious situations that took place during the 1984-85 as followings:

1. The case of three women arrested and jailed without trial kept in communicado for seven months in Algeria for having discussed with other women the project of women and law known as "Family Code" which was highly unfavourable to women.
2. The case of an Indian Sunni woman who filed a petition in the Supreme Court arguing that the Muslim Minority law applied to her in her divorce denied her the rights otherwise guaranteed by the Constitution of India to all citizens, called for support.
3. The case of a woman in Abu Dhabi charged with adultery and sentenced to death after delivery and feeding her child for two months.
4. The case of the "Mothers of Algiers", who fought for custody of their children after divorce. Hence at the International gathering, referred to as the "Tribunal on Reproductive Rights" held in Amsterdam, Holland in July 1984, nine women from Muslim countries and communities: Algiers, Morocco, Sudan, Iran, Mauritius, Tanzania, Bangladesh and Pakistan

came together and formed the Action Committee of WLUM in Support of Women's struggles in the concerned contexts. It transformed into the present net-work[4] to which Nigerian women are inclusive.

7.2.2 THE OBJECTIVES OF WLUM ARE:

1. To create links amongst women and women's groups (including those prevented from organizing or facing repression if they attempt to do so) within Muslim countries and communities.
2. To increase women's knowledge about their common and diverse situations in various contexts,
3. To strengthen their struggles and to create the means to support themselves Internationally from within the Muslim world and outside[5].

7.2.3 AIMS OF WLUM

1. Providing information for Women and Women's groups from Muslim Countries and Communities.
2. Disseminating this information to other Women from Muslim Countries and Communities.

3. Supporting their struggles from within the Muslim Countries and Communities, and make them known out-side.
4. Providing a channel of communication amongst women from Muslim countries and communities[6].

7.2.4 THE METHODS OF ACHIEVING THE OBJECTIVES

1. By building a network of information and solidarity.
2. By disseminating information through "Dossiers"
3. By facilitating interaction and contact between women from Muslim countries and Communities, and between them and progressives and feminist groups at large.
4. By facilitating exchanges of women from one geographical area to another in the muslim world[7].

Thus in December 1994, there was a meeting by the Muslim world Women at Lahore Pakistan to strategies their common problems for the purpose of presenting them at Beijin, China from 4 to 15 September, 1995, examined Below.

7.2.5 THE BEIJIN PLATFORM FOR ACTION AND CLEAR MANDATE FOR WOMEN'S PROGRESS (FOURTH WOMEN WORLD CONFERENCE 4 AUGUST 15 SEPTEMBER, 1995)

This platform of action was for the purpose of securing the equality of Women and men, in Law and in fact, was the greatest political project of the twentieth century. This crucial role for the realization of the project has been entrusted to the United Nations on Women issues. The world now has a comprehensive action-plan to enhance generally the social, economic and political empowerment of Women, improve their health, advance their education and end gender-based violence in the family and public lives.

With the adoption of the Beijin Declarations and the platform for Action by the fourth World conference on women, Mrs. Gertrude Mongella, secretary-general of the conference on the concluding day said:

> We have managed to transcend historical and cultural complexities; we have managed to transcend socio-economic disparities and diversities; we have kept aflame our common vision and goal of equality, development and peace[8].

U. N. Secretary General Boultros Boultros-Ghali said:

> ...the adoption of the Beijin Declaration and the platform for action was major step in that direction[9].

7.2.6 THE BEIJIN DECLARATION, 1995

This fourth World Conference on Women was the longest world Conference ever held by the United Nations.[10] Almost 50,000 people participated, more than 2/3rd were women 16,921 registered officials, 4,035 NGO representatives of delegates and 3, 250 Media representatives attended as well as delegates of 4, 995. This was the largest UN conference ever held on WOMEN. An estimated 30,000 people attended the NGO forum on Women in 30 August -8 Sept. 1995.

The Beijin Conference expanded the agenda for Women's empowerment issues both in the family and in public, which were never discussed, viewed as taboo or too sensitive. The unanimous adoption of the plat form for action formed the Women's ambitious blueprint of actions, which if implemented could lead to achieving the U.N objectives of full equality peace and development between women and men. The executive Director of the U. N. population fund Dr. Nafis Sadik after the conference said:

> Like Cairo the Beijin Conference set some new benchmarks; the role of women in Development is clearly spelt out; the correction between Women's status in society and violence against Women in all its forms is recognised and some action proposed. For the first time, it is agreed that women have the right to control their own sexual expression. Most important, the correction is made

between advancement for individual women and progress for the whole society[11].

Several issues were heatedly debated. Agreements were made on issues that broadened women's rights with proposed qualitative new measures as follows[12].

1. Women's rights as humans: It broadened the provisions agreed upon in groundbreaking in 1979 U. N. Convention on Elimination of Discrimination against Women (CEDAW). The platform asserts Women's right "to have control over and decide freely and responsibly on matters related to their sexuality including sexual and reproductive health-free of coercion, discrimination and violence.
2. Right to inherit
3. Parental responsibility: It recognises the "rights and duties of parents and legal guardians" to provide guidance in the exercise of the rights of young people, to information, privacy confidentiality and informed consent on matters related to sexuality and reproduction.
4. Reviewing laws on illegal abortion
5. Role of the family.

It recognises the family as the basic unit of society and acknowledged the "social significance of maternity, motherhood and the role of parents in the

family and in upbringing of children". It asserts that maternity must not be a basis for discrimination or restrict the full participation of women in society.

6. Culture and religion: The platform assets that religion, thought, conscience and belief can "contribute to fulfilling women's moral ethical and spiritual needs and to realizing their potential in society".
7. Rape is a War Crime: that rape in armed conflict constitutes a war crime as well as genocide, ethnic cleansing and that the perpetrators of such crime must be punished.
8. Women have unremunerated work: that women's household work and contribution to food production are largely under-valued and under-recorded. The platform calls for assessing the value of such works, unremunerated work in quantitative terms for possible reflection in accounts that may be produced separately but consistent with core national accounts.
9. Women leaders as Mothers and professionals: that women leaders have different life experiences including but not limited to their experiences in balancing work and family responsibilities as mothers, professionals, managers and entrepreneurs.

Whereas it mapped out twelve (12) critical areas of concern as the main obstacles to the advancement of women for actions to be taken by governments, the international communities, non-governmental organisations (NGO) and the private sectors for the next five (5) years to remove the existing obstacles from the date of the conference.

The lists are:

1. Poverty
2. Education
3. Health
4. Violence
5. Armed Conflict
6. Economic Structures
7. Power sharing
8. Institutional Mechanisms
9. Human Rights
10. Media
11. Environment
12. The girl child.

7.3.0 THE DRAFT NATIONAL POLICY ON WOMEN IN NIGERIA

On 5th November 1998, at the Hamdala Hotel, Kaduna the workshop on the Review of National Policy on Women took place. This was supported and organized by the Nigerian government through the Federal Ministry of

Women Affairs and Social Development with the assistance of the United Nations Development project (UNDP). The draft policy was the result of the Nation wide exercise and consultations made in 1993 with the three tiers of government; private sector; international Agencies, Non Governmental organisations (NGO) and individuals from the grass roots levels.

This action by women was as a result of a resolution by the General Assembly of the United Nations declared in 1975-85 as the decade for women which brought about a new direction in the role that Women have played globally today.

The National Policy on Women was aimed to the problems that they encounter in the society. Their problems are in the areas of education, health, science and Technology, Employment, Agriculture, industry, Environment, Legal Reforms/Legislative protection, social services, politics and Decision making, Publicity and Media Relations, etc.

7.3.1 POLICY THRUST OF THE DRAFT NATIONAL POLICY ON WOMEN IN NIGERIA

The Draft Policy is based on "equity, social order and social well being" stated below:

> In joining other nations to adopt the United Nations Declaration on the Elimination of Discrimination Against women, Nigeria affirms its support for the alleviation of the numerous constraints to Women's full integration into its development process.

Mechanisms for planned interventions aimed at re-awakening women's self consciousness and re-evolution of their self-concept shall be instituted to empower and encourage them to speak for their rights to equitable distribution of resources and social justice.

Programmes shall be designed to remove social malaise associated with gender inequality, which is destroying social cohesiveness and eroding social order at National Community and family levels. In effect, the society will be re-oriented to accept equity, complementary roles, and respect for family values.

Clearly, improvements in the economy as well as hope for the future for all citizens remains largely a function of the level of integration of women into the total life of their communities and societies.

Comprehensive and coherently integrated programmes shall be designed and implemented for achieving effective and sustainable improvements in the quantity and quality of employment for women. The

President, Chief Olusegun Aremu Obasanjo in August 2000, has now signed the draft into law.

7.3.2 PATRIARCHY, IDEOLOGY AND LEGAL FRAME-WORK

The policy states that patriarchy and its related practices constitute major impediments to the full integration of women into the Nigerian economy. That it gives men ascendancy in inheritance, authority, social justice and constitutional provisions and protection of these principles, inter-alia.

7.3.3 CULTURE

The Policy aims at eliminating those cultures that inhibit the development of positive self-identity of women and their participation in society. It is generally agreed that social customs and traditions from time immemorial have been stronger in use than law and religion. It therefore agrees that it is religion (Bible) that denies women their rights in the family or outside it.

But a male Muslim feminist explained that:

> Muslim Law, before any other legal system, legalized woman's equality with men and asserted their freedom and liberty at the time when women were in most debased condition in all the nations of the world. Islam granted

> her all human rights and recognised her legal capacity, equal to that of men in all matters...[13(b)]

Fatima 'Mernissi, formerly professor of sociology at Muhammad University Morocco wrote a book titled "Beyond the veil to which Kalem Amin made observation of grasping the "Logic of Women's seclusion and veiling and the basis of sexual segregation".

She inferred that Amin concluded that women are better placed to control their sexual emotions than men and that such sexual segregation is a device to protect men not women.[14] Lest the men fall prey to "fitna" when confronted with an unveiled woman she wrote:-

> Every-one is afraid of change, but Muslims are more so, because what are at stake are their fantasies about power. And women all over the world know very well how important power fantasies are to one's self-empowerment. The secret of Islam's sweeping resurgence today is that it gives men at birth an inherited right to claim world hegemony as a horizon and a guiding dream...But the ability of Islam to equip its members to see the entire universe as their playground is stunning to any one who takes the time to go through the classical religious literature.[15]

Again, it is very instructive to read what Fatima Mernissi said in the same book about education, culture, and Islam. She dwelled a great deal with facts and figures on how;

> Centuries ago women's exclusion from knowledge have resulted in femininity being confused with illiteracy until a few decades ago... However, illiteracy was such a certain fate for women that my grandmother would not believe that women's education was a serious stake undertaking.[16]

She explained that it became a culture of Islam not to send girls to school such that while a few decades ago, the majority of women married before the age of 20. Today 22.0% of that age group in Egypt and 38.4% in Iran are married.[17] To get an idea of how perturbing it is for Iranian society to deal with an army of unmarried adolescent, one has only to remember that legal age for marriage for females in Iran was thirteen (13) and for males fifteen (15). The idea of an adolescent unmarried woman was a completely new idea in the Muslim world, where previously you had only a female child and a menstruating woman who had to be married off immediately so as to prevent dishonorable engagement in pre-marital sex. The whole concept of patriarchal honour was built around the idea of virginity, which reduced a woman's role to its sexual dimension: to reproduction within early marriage"[18].

Morocco is an example of this demographic revolution in gender role. Nigeria is inclusive and the marriageable age limit in some rural areas are the same; girls between 12, 14 and at puberty, are married off. The situation in

the Arab countries have been altered by statutes for the marriageable age limit as follows:

CHART SHOWING COUNTRIES AND MARRIAGEABLE AGES OF MEN AND WOMEN IN THE MUSLIM WORLD.[19]

S/N	COUNTRIES	WOMEN	MEN
1	Egypt	21	27
2	Tunisia	21	27
3	Algiers	18	24
4	Morocco	19	35
5	Libya	19	25
6	Sudan	19	25
7	Oil Arab Countries	20	27
8	Nigeria	12/13/14	

There has been a positive relationship between level of education and age at first marriage, which is increasing educational opportunities for young women in Egypt, which led to decline in early marriages and upward trends in age at marriage, and level of education.[20]

Also, not only it is difficult to find a husband at early age, but it is true that there is a high rate of instability where marriages ends in divorce.

The conservative wave against women's rights in the Muslim world is a defense mechanism against profound changes in both gender roles and the "touchy" subject of sexual identity.

Being male or female is biological, while men themselves determine their roles in patrichial system of family societies. Therefore, roles are not biological. Thus, learning the Islamic literature and teaching it is not only for the men but women were customarily told to learn only the portions that they can perform their five daily prayers while the interpretation of it, etc. are left to the men.

Knowledge and practice of the respective duties of each spouse in marriage helps a great deal to make the marriage functional for functional society. It is necessary for each party going into marriage of any kind to understand the objectives of it and what it is all about. This aspect leads to functional family and society. Hence the saying "the nation begins with the family". The society is to be built on complimentary roles of both sexes for peace and development so that the children will be raised in a peaceful atmosphere for a virile society. To conclude the following therefore are my recommendations in order to strengthen and support family relationship.

On the part of the government/authority of muslim umma. It should be put in place, a mechanisms to guide and check attitudes in the form of abusing the religious injunctions on plural marriages in order to up-build respectful and peaceful co-existence in marriages.

Such mechanisms proposed are:

(a) The authority should investigate the proposed additional marriage in respect of the financial ability to ascertain the man's capacity to maintain his wives;

(b) To provide equal treatment law for co-wives in the personal status law, failure to comply, should give court the power to dissolve the marriage.

(c) To provide a section in the law the duty to explain to the intending husbands the Quranic injunction on his obligations;

(d) Intending husbands should be made to give notice to his wife(s) and the Khadi of the district where each wife resides.

8. The Nigerian government is called upon to implement the Beijin platform of Action, Declarations (Sept. 1995) as part of the national Policy on women together with all other Declarations:

The U. N. Convention on the Rights of the child (September 1990) as well as the International Conference on Population and Development (Cairo 1944)

Recommendations; There should be a National Women Policy on Women for Nigeria to be capable of removing those aspects of negative cultures against the right of women in the family that prevents the development of their positive self-identity of women and their participation in the society.

The National Policy on women should aim inter - alia at the stability of the family and the complimentary gender roles generally.

9. There should be law fixing the Marriageable age of marriage for both boys and girls and particularly the girls to at least 18-20 years and ensuring that they remain at school during those years to a learn trade/skill.

11)The Economic empowerment of spouses and the creation of a separate ministry for women affairs and social development by government will go long way in enhancing the rights of wives and women generally.

12)All Marriages should be registered particularly the marriages under Islamic Law with limitation on taking, more wives as it is the case in some Arab countries which depends on the financial strength of the man to maintain the wives he marries. .

NOTES AND REFERENCES

1. (1868) L.R. 3 H.L. 55

2. (1891) 1 QB 671, CA.

3. See Women Living Under Muslim Law (WLUM) International Solidarity Net-Work hand bill on aims, objectives and methods of achieving the objectives, Grabels, France 1993-4

4. Ibid

5. Ibid

6. Ibid

7. Ibid

8. Ibid

9. Ibid

10. Women from Beijin: A plat form for Action, and a clear mandate for women's progress by United Nations Department of Public Information Paper New-York, 1995, P.5.

11. Ibid

12. Ibid

13(a) Revised Indiana University Press, 1985.

13(b) Ibid

14. Ibid

15. Ibid

16. Mernissi, Fatima, Beyond the Veil: Male-Female Dynamics in Modern Muslim Society, Revised Edition (Indiana University Press, 1985,) Pp. Xi-xxii.

17. Ibid. P. x

18(a) Ibid. Pp. Xxiii-xxiv.

18(b) Ibid

19. Ibid. x

20. Ibid. Pp. xxiii-xxiv.

BIBLIOGRAPHY

1. 'Abd al'Ati, Hammudah (1982) The Family Structure in Islam (Islamic Publication Bureau).

2. Adamu, L. Fatima, "Muslim Women and family life in Contemporary Africa" a paper presented at the International Workshop Organised by Islam in Africa Organisation, Zaria, Nigeria. June, 18-21 1984.

3. Ahmad, K, (1974). Family Life in Islam (The Islamic Foundation, Leicester).

4. Ali, A. Y. Quran (Translation and Commentaries) (Islamic Foundation).

5. Aliyu, I.A. (1988) Legal Basis and Objectives of Marriage Under Islamic Law (LL.M. thesis – Ahmadu Bello University, Zaria.

6. Al-Azheri S, (ND) Jauahil Iklil Kutubul Arabiyya, Kano, Vol. 1

7. Ambali, M. A. (1998) The Practice of Muslim Family Law in Nigeria (Tamaza Publishing Co. Ltd. Zaria).

8. As qalami, I. Buhigul-Muram Min 'Adillati Ahka'm, Nikah, edited by Al faqi.

9. Ash-Shawkani, (1973) Nailul-Awtar Vol. III Darul – Jil Beirut.

10. Atiyah, P. S. (1981) An Introduction to the Law of Contract 3rd Edition (Clarendon Law Series Oxford).

11. Baille, N. B. (1974) A Digest of Muhammadan Law Premier Book House, Lahore.

12. Bromley, P. M. (1966) Family Law 3rd edition (Butterworth London).

13. Daura, B. M. (Translation) Tuhfat Al-Hukkam, Centre for Islamic Legal Studies, A.B.U., Zaria.

14. Dasuq. M. Hashiyatut Dasuqi, Darul-Fikra Vol. 2. (ND).

15. Doi, A. I, (1983) Women in Sharia (Gaskiya Corporation Zaria).

16. El-IMari, M. T.(1978) Muslim Personal Law: According to Maliki Law, Centre for Islamic Legal Studies, A. B. U., Zaria.

17. Gurin, A. M. (ND): Introduction to Islamic Family Law (Centre For Islamic Legal Studies, A. B. U. Zaria.)

18. Gwandu, A. A. (1986) "Aspects of the Administration of Justice in Nigeria (Islamic Publication Bureau) edited by S. D. Khalid.

19. Hamilton, C. (1979) the Hedeya, Kitab Bhavan.

20. Hall, J. C. (1966) Sources of Family Law (Sweet and Maxwell)

21. Ibn Qudama, (ND), Al Mugni vol. 6 Maktabatul - Jumhuriyyatul Arabiyyan Cairo.

22. Ibn Qayyim, A.A. (1973) Zadul-Ma'ad fi Hadyi Khairi Ibad Vol. 4 (Al-Maktabatul Misriyyah).

23. Ibn Rush, (1966) Biodayatul Mujtahid wa Niheyatul Muqtasid Vol. 2. (Darfiler Beirut).

24. Jeffrey, M. D. W., Libolo is Child Price.

25. Khan, M. M. (1996) (Wanslation) Sahihil Al Bukhari Vol. V.

26 Kumo, Suleiman, (1986) "The application of Islam in Northern Nigeria: Problems and Prospects" in Islamic Law in Nigeria (Islamic Publication Bureau) edited by S.D. Khalid.

27. Mahmud, A.B. (ND) The Supremacy of Islamic Law, Hudadahuwa Publication Zaria.

28. Malik, Immam Al Muwatta

29. Maliki, (NA) Al-Mudawwannah, Al-Kubra (Halabi Foundation Cairo).

30. Mernissi, Fatima, (1985) Beyond the Veil: Male – Female Dynamics in Modern Muslim Society (Indiana University Press).

31. Muhammed, J. A. (1999) The Legal and Social Implication of Interference with Spouses Rights to Consortium LL.M. thesis, A.B.U., Zaria.

32. Murdock, G. P. (1965) Social Structure (Colli ex-Macmillan Ltd London.

33. Murtada, M.: (1981) The Rights of Women in Islam (World Org. for Islamic Services Tehran, Iran).

34. Naseef, A. O. (1982) Encyclopaedia of Seerah, Vol. 2. (The Muslim School of Trust, London).

35. Nwogugu, E. I. (1990) Family Law in Nigeria, (Heinmann Education Books Nigeria).

36. Okonkwo, C. and Naish, M. (1964) Criminal Law in Nigeria (Sweet and Maxwell London).

37. Osborn, Roger B. (1983) Concise Law Dictionary 7th edition (Sweet and Maxwell).

38. Poynter, Thomas (1824) Ecclesiastical Courts. (2nd edition).

39. Pollock, F. and Maitland, F. W.: The History of English Law Before the Time of Edward I (Cambridge University Press, Vol. 2.

40. Qardawi, Y. (1972) Al-Halal Wal-Haram fil-Islam (Al-Maktabul-Islam Beirut).

41. Qutb, M. (1964) Shabuhat Hawlal-Islam (Malba'atul Istiqlal at-kubra, Bagdad).

42. Sabiq, S. (1977) Fiqh Al-Sunna Vol. 11 (Darul-Fikr, Beirut).

43. Shukwui, A. (1966) Muhammadan Law of Marriage and Divorce (A.M.S. Press Inc. New York).

44. Stern, G. H. (1939) Marriage in Early Islam (Islamic Publications Bureau).

45. Westermarck, K. (1973) Muhammadan Civilization (Philo Press, Amsterdam).

47. Yusfuf, A. Q. Quran (Translation.)

48. Federal Ministry of Justice Law Review Series (1992) Women and Children Under the Nigeria Law Vol. 6.