COMPARATIVE STUDY OF MATRIMONIAL LAW OF NORTHERN NIGERIA WITH EMPHASIS ON ISLAMIC LAW

BY

A, M. GURIN

I hereby declare that this Project has been produced by me. It has not been presented on any previous application for a higher degree. All references and quotations are indicated in the footnotes and sources of information are duly acknowledged by means of list of references.

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CERTIFICATION

The thesis entitled COMPARATIVE STUDY OF MATRIMONIAL LAWS OF NORTHERN NIGERIA WITH EMPHASIS ON ISLAMIC LAW by Aminu Muhammad Gurin, meets the regulations governing the award of the degree of DOCTOR OF PHILOSOPHY IN LAW Of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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In all, I remain totally accountable for errors of omission or commission that could be dictated within the thesis. May All-Mighty Allah forgive us all, for our shortcomings.

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A B S T R A C T

COMPARATIVE STUDY OF MATRIMONIAL LAW OF NORTHERN NIGERIA WITH EMPHASIS ON ISLAMIC LAW,

Nigeria being a country with a dual if not triple system of Laws is largely faced with the difficult of finding the demarcating line between the rules of Islamic Law/ proper, especially in the Southern part of the country and other laws applicable into the country (Customary and English Common Laws). Legal pluralism and the conflict of Laws in Nigeria is a product of both historical circumstances and perduring systems of belief, values and social relations. In this study I shall be primarily concerned with those features of legal pluralism and conflict of Law which exists within heterogeneous environment like Nigeria.

The study is a comparative study of both theory and practice of marriage laws in Nigeria. The Laws are that of Islamic Law, Customary Law and English Law, but with emphasis on the application of Islamic Law.

Chapter one opens with a discriptive Sketch of the historical background of Nigeria examining the coming of Islam, the jihad of Skeikh Usmann Fodio and the coming of the European to the country. In discussing the colonial period, it will critically analyse the introduction of the English Lav; and other institutions associated with it into Nigeria. Specifically, it will critically examine the interrelationship of the introduced legal system with it indigenous counterpart.

Chapter two discusses the nature and scope of Islamic Law (Shariah). The Chapter has also deals in detail with

the sources of Islamic Law and the development of fiqh. It has also looks into the judicial and legal policy of the British administration and the legal harmonisation in Nigeria.

Chapter three deals with the formation of contract of 300 marriage and the concept of betrothal, its legal implications and consequences under Islamic Law. An attmept to compare this concept with the concept of engagement under both the customary and English Laws are also made. Under customary Law, the Chapter looks in to the marriage formalities of three selected communities in the Northern Part of Nigeria, these are (1) Nupe people from Niger State, (2) Ogori people from Kwara State and (3) Bachama people from Gongola State.

Chapter four contains a bried account of the concept of dower in Islam, pre-Islamic Arabian customs and the customs prevencent among the non-muslim communities in Nigeria. The Chapter has also discusses the rights and. duties accouraing to the spouses individually and jointly arising from the contract of marriage with particular emphasis on the doctrines of Nafaga (maintenance) and Nushuz (disobedience) and its legal consequences.

Chapter Five Sketches the system of family in Nigeria, its scope and nature. This is made possible by discussing the polygyamous nature of Islamic and customary Laws in comparism with the monogamous nature of the English Law, their advantages and disadvantages and the possibility and acceptability of their application in Nigeria society.

Chapter six is devoted to the dissolution of marriage and the ensuring effects on the spouses and the Community at large. Special attention is apaid to devorce as the main method for terminating a marriage contract under the three legal systems in operation in Nigeria. It has also looks into the issue of legitimacy and legitimasation and the law of custody under the three legal systems.

Chapter seven contain an analysis of the variou topics, the problems and their solutions discussed in the thesis and offers some suggestions for the future that may hopefully help in solving the problem affecting marriage institution in our society. It has also looks into possibility or impossibility of having a uniformed legal system in Nigeria.

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INTRODUCTION

1. SIGNIFICANCE OF FAMILY LAW

In every society the institution of family is very important. Its significance stans from the fact that no part of Law and institutions of a society or a country can be of more vitally importance to its members or inhabitants than those which regulate the institution of marriage. Marriage is the basic unit of human civilization and is the first principle of the whole social structure and the foundation of a family is laid down through marriage.

The term family may mean husband and wife (or in polygamous society like our, wives) and children as well. It may mean all blood relations who are descended from a common ancestor. In another, it means all the wife, children, other relatives, servants and even lodgers. In Nigeria, however, there may be two meanings to the word family: The principal meaning and the secondary meaning. The principal meaning is the primary or the nucleus of family which would comprise the man his wife and children, while the secondary meaning comprises the nucleus and all other relatives of both the man and the woman under the so-colled extended family system.

In early times human soeiety was organized on the basis of family grouping. The members of each social unit believed themselves to belong to a common ancestor. Moreover, each group was a closed, self-maintained unit. Its members cooprated in securing the means of their own survival. They worked together, each identifying his own

interests with those of his family. Together they defend their honour and sought their sustenance. The family was so large and so self-sufficient that the individual member, who was a very precious asset to it, could spend all his life span inside the group and fulfill all his basic and recreational needs within it, including his physical, economic and emotional security.

During its long history on earth, human life under went profound changes in response to the changing mode of its ecology, but until the industrial revolution, the changes came slowly and the social fabric and the people's values and traditions started reducing and finally eliminated the traditional values which held together the social fabric through which basic psychological meeds were fulfilled and the cherised heritage was successfully transmitted and perpetuated. The traditional pattens of family relationship have been severely disturbed, uncontralled sensual practices unduly elerated and marriage is sometimes described as the woman's prison and the man's unnecessary burden, and is accused of breeding jealousy, of perpetuating sexual fascims and of stifling the healthy growth of the individual.

Some suggest artificial insemination as a measure of eliminating the need for marriage; some scienties are busy incubating babies in a test tube; and a call is made on people to engage in sex merely for fun. The work of suspected invisible immoral forces is further manifested in widespread pornography. The leniency lent to the promoters of these horrendous practices is much regretted.

People talk freely of "open marriages" of swinging couples", of "communal life", of "group sex" of homosexuality", as if these appalling prastices were natural, moral, and healthy pursuits. They read about them, sex illustrated in print, and watch them practiced on the screens and in life shows. Adulterous and incestuous practices are openly confessed and easily tolerated.

The religious leaders both Muslims and Christians have came out with statements and produced usful literature explaining the views of their respective religions towards sex, the status of women, marriage and the institution of the family. The aim of this research is to provide some material which would be used not only as a guidlines, but also as enlightening source on crucial issues for the interested general reader and the student of humanities especially those of Law Sociologist and Anthropologists. The study is a comparative study of both theory and practice of matrimonial Laws under the three divegent legal systems in operation in Nigeria (Islamic Law, Customary Law and General Law i.e. English Law).

ii. SIGNIFICANCE OF THE TOPIC IN NIGERIA.

A society cannot survive without family because the latter is the basic unit of human society and the foundation of a family is laid down through the institution of marriage. Thus, every human being is a member of a family. Nigeria a country with a triple system of Law is largely bown to be fuced by conflict of Laws which is the

result of the Colonial rule. Therefore, an urgent inquiry into the nature of the multiple legal and other institutional aspects of these plural societies is both significant and challenging. In this study, we shall attempt the preliminary task of identifying the various indigenous and extraneous legal tradition on Matrimonial Laws that are being enforce concurrently within Nigeria.

The parallel existance of these relatively disparate juridical units, generally suggests a simultaneous presence of conflict and complementation, both processes which may have significant consequences for legal development generally as well as for related institutions, individuals and groups, and social change within the multi-cultural system at large. The study will also explore those inadequacies or sociolegal processes generated by the interaction of the different legal traditions.

It sometimes became difficult to find the demacating line between the rules of Islamic Law proper, especially in the Southern part of the country and the non-Islamic customary Law. This arises from the dubious conception that Islamic Law is regarded as customary Law,"[1] and it is sometimes styled as "Islamic Law as Customarily applied."[2]

It must be dismissed from the onset that Islamic Law is not a Customary Law of any tribe in Nigeria or else where in the world, but rather a universal Law which has its sources from the Holy Quran, the Sunna of the Prophet (S.A.W.), the Ijma- (the consensus of Muslim jurist) and Ijtihad (analogical deductions.). It is therefore

1. Section 2, of the Northern Region High Court Law, 1955.
2. Section 15(a), of The Sharia Court of Appeal Law, 1960.

wrong to think, that Islamic Law is a collection of custom and usuages of any society. The study will restate the basic rules governing the Islamic Law of marriage with emphasis on the Maliki doctrines and principles because it is the school of Law governing the muslims in this country. It will also attempt to highlight those areas where customs and usuages, not repugnant to the Principles of Islamic Law have been accepted in the day to day administration of justice in the field of Islamic Law of marriage.

iii. METHODOLOGY AND APPROACH.

The relfvant materials to this thesis were collected intermitently within the six years of study. During the period, scheduled interviews were held while questionnaires were administered. Many written works were consulted in libraries and achieves. Records of proceeding in many courts were perused. A considerable time was spent in observing court Sessions of Islamic, Customary and General Courts, and recorded how rural and municipal judges, mediators, and family heads of various customary clans reached dicisions on family law disputes. This observation of the judicial process is intended to serve as a background to the comprehension of the actual working of the three legal systems under study especially on the issue of customary law bulk of which is unwritten. The best and the most authoritative source of information is the judge who applies the native Law and custom and is himself bound by it. The outcome of the interviews, questionnaires, and observations was supplemented with informations found in administrative,

achieval and historical documents, legal Books, jurnals, handbocks, reports legislations and decrees. The published and unpublished materials has provided a wealth of cases.

The three main approaches open to this type of study is used in producing this work.

a. The substantive rule approach, which involves the collection and running of commentary on available statutes. It was adopted inorder to determine the extend to which law officers interprete the different aspects of such laws.

b. The case study approach, which often reveals some trends in social life was also employed. The extent to which people (involved in a case) know their respective legal rights and demand them is always reflected in case records and this, we find useful indetermining the level of people's understanding of the laws and their modus operandi:

c. The comparitive approach was also applied because the operation of multiple laws in a society ipso facto leads to conflict of laws. Nigeria, with its legal plurality, an advocate of legal harmony, may be right or wrong in that advocation since certain complications and advantages surely abound in any legal pluralism. In deed, the adoption of a comparative approach leads us to an objective conclusion in our recommendation to put the legal crisis and tension in Nigeria into oblivion.

Some problems were encountered in the process of collecting data for this work. First, the response of some people interviewed revealed to us a kind of mistrust, fear or lack of confidence in us and they were possible biased in the information given to us. Moreover, because of the language barriers, several interviews had to be conducted through an interpreter, a factor which increases the risk of error.

LAW MAKING IN NIGERIA: HISTORICAL PERSPECTIVES

This chapter is intended to discuss the religion of Islam and its introduction to Nigeria. The Socio-political and legal systems which obtained prior to the colonial rule will also be briefly discussed with a view to setting the scene for a proper understanding of the context of the introduction of English rule and its legal system in Nigeria. The subsequent chapter will analyse the phenomenon of advent and the development of English Law from the inception of colonial rule to the time when the country achieved political independence. Finally, an analysis of the conflict of laws and the effect of legal pluralism in Nigeria will provide the epilogue.

1.1 ISLAM AS A WAY OF LIFE

Since this work is based mainly on Islamic Law, it may not be out of place to say a few words here about the religion of Islam which, one may be happy to note, is now getting a deserving consideration in the West after ages of prejudicial misunderstanding. The Word Islam is drived from the Word Aslama, which literally means "complete surrender" to the will of Almighty God. The Din or religion which means "submission" being a divine institution for the guidance of rational beings, by choosing it for salvation here and thereafter inclusive of belief and action, is Islam which is external and internal submission to the will of God. Therefore Islam is based upon a firm belief in the existence, perfection, uniqueness and absoluteness of God, who, in the past and at intervals sent Prophets with missions which provide the seeds of more and religious guidance. The noble service of the Prophets began with Adam and continued through Noah, Abraham, Moses, Jesue to the time of Prophet Mohammed as the last Prophet and messenger of Allah.

.../2

The will of God is that mankind should pursue husn, i.e beauty, of life and character as explained in revelations from time to time culminating into the final revelation by the Quran and sunnah ofthe prophet(S.A.W). The Qur'an is quite explicit on the religion of Islam when it says:-

> "The Religion before God, Is Islam (Submission to the will of God). Nor did the people of the Book dissent therefrom except through envy of each other, after knowledge had come to them. But if any deny the signs of God, God is swift in calling to account."(1)

This divine declarations has been mentioned in the earlier revelations(2). The divine missions culminated in the ministry of the prophet Muhammad (S.A.W.) The followers of Islam, called Muslims firmly believe in all the past prophets who preceded Muhammad whom God is spoken of in the Quran as being Muslims(3). Thus showing that Islam is the true religion for the whole of humanity, the various prophets being the preachers of that religion among different nations in different times and Prophet Muhammad (S.A.W) its last and most perfect exponent.

Islam is the last of the great religions those mighty movements which have revolutionized the whole world. Islam requires its followers as stated earlier to believe in all the past prophets as prophets from God and to their sacred Books, especially the attauvah(Torah), Engjed, (Holy Gospel) and Zaburah (Psalms) as have been revealed by the Almighty God.

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1. Qur'an Chapter 3 Verse 19
2. Bible, John, XIV, 16, XV.26, XVII 7; Deut, XVIII.18-19.
3. Qur'an 2:132 and 5:44

The Holy Qur'an says" and who believe in the Revelation sent to thee, and that sent before they time..."(4). The Holy Qur'an also says in another verse:

> Says: We believe (in) God; and that which has been revealed to us, and (in) that which was revealed to Abraham, Isma'il, Isaac, Jacob, and the tribes, and (in) that which was given to Moses and Jesus, and (in) that which was given to the Prophets from their Lord; we do not make any distinction between any of them"(5).

The Apostle believes in what has been revealed to him from his Lord, and so do the believers; they all believe in Allah and His angels, His Books and His Apostles..."(6). The Logical conclusion to the evolution of religious history is a non-sectarian, non-doctrinal and universal religion. Religion is not a mere ideological vision. It is a practical system of life, for it balanceshuman requirements, reason and spirit and resolves conflicts in the interest of society between spiritual and temporal, economic and social principles with its independent existence. The Holy Qur'an says" This day have I perfected your religion for you, completed my favour upon you and have chosen for you Islam as your religion(7).

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4. Qur'an 2;4
5. Qur'an 2;136.
6. Qur'an 2:285
7. Qur'an 5:4

.../4

1.2 ISLAM AS A UNIFYIN FORCE

In spite of the rise of rival dynasties over the centuries, Islam succeded in uniting its followers. A new idea of the unity of human race as a whole, not of the unity of this or that nation, was introduced into the world by Islam - an idea so mighty that it welded together nations which had faught with one another through out human history. It was not only in the Arabian penisula that from the tribal wars were a Common occurance that this greate miracle of Ratification. As said by one English writer took place, that "A more disunited people it would be hard to find till suddenly the miracle took place. A man arose who, by his personility and by his claim to direct Divine guidance, actually brought about the impossible, namely, the union of all those warring factions"[8] commenting on the achievement of Islam in the unification of many races, another English writer has this to say:-

> In the 5th and 6th centuries the civilised world stood on the verge of chaos. The old emotional cultures that had made civilization possible, since they had given to men a sense of unity and of reverence for their rulers, had broken down and nothing had been found adequate to to take their place..... It seems then that the great civilization which it had taken four thousand years to construct was on the verge of disintegration and that mankind was likely to return

8. The Ins and Outs of Mesopotanian P.99 as quoted by Muhammad Ali, in the religion of Islam at P.8.

to that condition of barbarism where every tribe and sect was against the next and law and order were unknown.... The old tribals sanotions had lost their power.... The new sanctions sreated by christianity were working divisions and distructions instead of unity and order..... Civilization like a gigantic tree whose foliage had over-reached the world stood tottering rotted to the cove..... Was there any emotional culture that could be brought in to gather mankind once more into unity and to save civilization?" And speaking of Arabia, the learned author adds that, "it was among these people that the man was born who was to unite the whole known world of the east and south."[9].

Based upon the Quranic provisions revealed to the Prophet Muhammad and his Prophetic Traditions and generalizations pertaining to human conduct, a legal spectrum, known as Sharia or Islamic Law was immediately developed. As a term. Islamic Law may be defined as: "an infallible doctrine regulating the individual's relationship to God and his interactions with his fellow human beings."[10]. It comprises the whole of the spiritual, political, economic, Social, Domestic and Private life of the adherenits of the Religion.

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9. J.H. Denison, Emotion as the Basis of Civilization, pp.265 - 268.

10. Shariah is fully discussed in the next chapter.

.../6

Though infallible, the Law is by no means rigid. The fact that it is based on principles with relatively few specific injunctions and that much is left to the judgement of the human mind, has made the Law reasonably flixible and responsive to the needs of time and environment.

Therefore, Islam, spread within a few decades of its birth into almost all parts of the then known continents and the number of its adherents continued to steadly increase. Under Islamic system the barriers separating ancient civilizations were demolished. On the enlighted foundation of Islam, blended with remanants of the ancient heritages, a progressive splendid civilization, one of the best history has ever known, was built. Although based on divine revelations, the Islamic Law is not a theocratic Law, as the faith does not recognize religious ranking. All are equal and have direct access to God. Nor can the Law be described as secular, since there is no dichotomy of secular and spiritual in Islam.

1.3 THE REFOMATIVE NATURE OF ISLAM.

The characteristic of Islam and its institutions lie in the full identification of its origin and the personility of its Prophet. The steps he took to discourage slavery were for its future prohibition which came later by conventions abolishing it; he breathed among the faithfuls a spirit of charity and friendliness and recommend[illegible] Practice of Social virtues, checked by Laws and precepts, the thirst for revenge and appression of widows, orphans and the weak virtually terminated. He took the middle course for the upheld the authority of the husband over the

wife, as the surest safeguard of the honour and happiness of both; he laid down strict rules with regard to the many in which wives were to be treated, not merely in respect of necessities of life, like food, lodging, closing etc; but also regarding the husband's mode of conversing with them, the companionship which it was his duty to supply. He found women in general as cattled, but left them as mates and helpers; found them without any legal status) and left them in complete enjoyment of legal rights, in matters of family relations domestic leadership and other social relations within the framework of family and public welfare, and man's individual behaviour.

1.4 ISLAM IN NIGERIA (HISTORICAL BACKGROUND)

Islam was first introduced into Nigeria as early as the first half of the 14th century by traders from the Maghrib, itinerant Scholars and travellers. Although historians and other chroniclers disagree as to how wide spread the religion was prior to the jihad of Sokoto, there is little doubt about the fact that within the preceeding two centuries before the jihad, many rulers of the kingdom and commoners had accepted Islam. It was recorded that King Umaru of Kano who ruled from 1410-1421 A.D, was the first King to accept Islam in Kano. He was followed by Muhammadu Korau the King of Katsina who ruled from 1380 to 1420."[1].

.../8

Before the introduction of Islam into this Country most of the people are either Pagans or animists engaging in the worship of ancestral spirits and Bori cults. Even long after conversion, some of the pagan practices were carried over and syncretited with Islam especially by the rulers. Despite the firmly establishment of Islam in most of the parts of the Country, especially in Northern, yet by the 18th Century what remained of Islamic teaching and practice in most of the areas was no more than a shadow of real and true Islamic teachings and practice. Committed Muslim Schoolers like Sheikh Jibril[12] who was one of the most prominent Schoolars in Hausa Land, decried the glaring condition of Islam and the application of Shari'ah by the corrupt schoolars, the greedy oppressive and ignorant nominal Muslim rulers and the populace the majority of whom were ignorant of the true teachings of Islam.

1.5 BACKGROUND TO THE SOKOTO JIHAD

"At the turn of the 18th Century" writes Hiskett and the established of Shari'a revolutionary movement, otherwise known as the jihad of Shehu Usuman bin Fodio, arose in Hausaland that was to have a profound influence on the subsequent history of the area... the movement (which) was) fought to reform Islam brought about important changes in this part of Africa."[13]

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11. Hiskett, The Song of Bagauda' S.O.A.S., Vol.xxvii, p.369
12. Sheikh Jibril bin Umar was a teacher to both Usman bin Fodio and Malam Abdullah bin Fodio.
13. M.Hiskett, The Suword of Truth: The Life and Times of Sheikh Usuman bin Fodio (1973).

The jihad led by Sheikh Usuman bin Fodio, supported by his able lietenants like Abdullah bin Fodio, Muhammad Bello, Aliyu Jedo and a host of others in Hausaland, which led to the overthrow of the Hausa Kings, is a logical and inevitable result of the eventsin Hausaland in the 18th and early 19th Centuries.

A Fulani who emigrated from Senegambia because of the troubled times and a member of the Torankawa clan was called Musa Jakollo. He made his way eastwards, and in due course arrived in Hausaland. He first settled in Bernin-Konni (now in Niger Republic) where he stayed for a long time, before he finally moved in to the Gobir Empire. It was to this family that a child was born in the year 1755 whose name was Usuman bin Fodio. His father Muhammadu Fodio, was a man of piety and learning, and he made sure that his two Sons Usuman and his younger brother Abdullahi received the best education. In those days education was based upon the study of Arabic and Islamic theology. Usuman was an apt pupil, with an insatiable thirst for knowledge, and he absorbed all that his instructors were able to teach him. Before reaching the age of twenty five he himself had became the instructor of his younger brother.(14)

Among the Sheikh Usuman's teachers were two prominent ones who seemed to have exerted a very special influence on him. The first was his uncle, Malam Usuman Bibnuduwa, with whom he had spent nearly two years of his adolecence and who was evidently a man of high principle and strong conscience.

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14. Abdullahi Bin Muhammad, Ida al-Nusukh, Tran. by M. Hiskett, BSOAS, Vol xix, p. 561

He was renowned for righteousness and for the fearless manner in which he forbade the wrong and upheld the right. And it was because of his character that his pupil took him as a model[15] and it is highly probable that he played a very important role in steering Usuman's mind to the parth of militant reform. The second teacher who greatly contributed to Usuman's evolution as a religions reformer was Malam Jibril Bin Umar who was then recognized as the most learned man in the central Sudan. He was described as very simple and friendly, but very rigid opponent of any form of compromise on religions questions.[16]

Sheikh Usuman, having studied Islam at an early age, and fired by the desire to rid his Society of corruption and ignorance, started to preach and guide his people. He knew that no permanent change was possible without first, educating and enlightening the people. He therefore started preaching around 1775. Accompanied by his brother, Abdullahi, he travelled from one place to another calling people to the true teachings of Islam. The preachings were normally made in Local vernaculars of Hausa and Fulfulde. As more and more people flocked in to listen to his preachings and take formal leassns from him, he established a very high reputation in all the sorrounding areas the years his group of followers increased and a community of orthodox Islamic believers who established.

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15. Abdullahi, in (hiskett, pp. 563 and 575).

16. Hiskett, An Islamic Tradition of Reform in the Western Sudan from the 16th to the 18th Century.

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While Sheikh Usman initially succeeded in winning over the ordinary people to the cause of the true and pure Islam, the story was different with the corrupt scholars and the Hausa rulers they supported. Both groups had a lot to gain from maintaing the prevailing condition so that they can continue oppressing and manipulating their people. It is because of this that the rulers would not contemplate the idea of giving up their absolute power for the purpose of the application of Islamic Law (Shari'ah) which demand absolute justice and fairness by those in authority and which makes no distinction between the ruler and the ruled and between the rich and the poor. The Hausa Kings did everything possible to see that the true Islam is not firmly rooted. The sorts of strategies were employed to stop people from embracing Islam. The King's supporters were encourage to attack those who listened to Sheikh Usuman and his supporters.

The persecution of Sheikh Usuman and his followers went to the extent that, the then Sarkin Gobir Nafata enacted a law curbing the activities of Sheikh Usuman and his followers, and prohibiting conversion into Islam and the manifestation of Islamic teachings on the mode of dressing. This edict was proclaimed in the market places all over the kindom and it became operatio with immediate effect(17). The last l act of hostility from the rulers came in the form of pillage and plundering attacks on the Sheikh's Scattered Community of followers.

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17. Muhammad Bello, Infagal Maisuri, p. 67.

Sarkin Gobir Yunfa, attacked the Muslims and ordered Sheikh to vacate his home town Degel so that he can destroy the rest of the inhabitants. As a result of these threats, Sheikh Usuman decided to migrate with his followers to Gudu on 21st February 1804. This led to the first military confrontation between the Sheikh and his now declared enemies, the rulers of Hausaland."[18].

At Gudu, a new settlement for Sheikh Usuman and his followers, was established and many people from far and near joined his rank. When Yunfa heard of the number of men who were now taking refuge in Gudu, he issued out an order to the effect that the properties of those emigrating to join the Sheikh be consficated"[19] and finally decided to attack the Sheikh and his people. He therefore sent a message to the Sheikh Saying: "Tell Shehu that I am preparing for war, and let him get ready against our meeting."[20]. When this message reached Sheikh and his followers, they realized that the Community now needed a leader, so there and then they paid homage to Sheikh Usuman as their leader. He thus became the leader and Commander of the faithfuls (Sarkin Musulmi). Accepting the allegiance, he himself swore to be guided by the Holy Qur'an, the Book of Allah, and the Sunnah of the Prophet (S.A.W.). With this development, two different communities now existed in Hausaland, the Muslim Community under the leadership of Sheikh Usuman, and the other Community under the Hausa Kings who did not accept Islam as their way of life.

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18. Tazyinul Waragat, M. Hiskett ed. PP.107-109.
19. Usuman bin Fodio, Tambihu'l Ikhwan, (Palmer, Journal of the African Society, Vol.xiv, p.190).
20. Bello, Infaq-al-Maisuri, P.7 .

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Since a muslim Community has now been established within the Hausaland, the Hausa Kings became united in their effort to crush the threat posed by the Muslim Community and its leader Sheikh Usuman bin Fodio. The Military confrontation that followed same the emergence or victory of Shiek Usman. It is this War that is commonly referred to the Jihad, The Jihad succeeded especially with fall of the citade of power of Gobir, Alkalawa in 1808. What has thus started in the early part of 18th Century as a defensive battle led to be a complete defeat and overthrow of the Kingdoms of Hausaland and the establishment of Sokoto Caliphate under the leadership of Sheikh Usuman bin Fodio as Amin-al-Muminin or commander of the faithful. The administration of the Caliphate was, from then on, to be based on the Shari'ah, the Qur'an and the Sunna which became the Law of the Land (Constitution).

The administration of justice is always regarded as one of the most important functions of any Muslim Government. It is an incumbent duty upon the Caliph, the leader of the Muslim Community, to establish and maintain justice among the members of the Community. The political structure of the Caliphate provides for other officers appointed by the caliph to assist him in the governance of the Caliphate. These include the office of the Wazir, who in addition to serving some what like a Prime Minister, also assumes the role of being the conscience of the supreme leaders;[21] the public complaints department, (considering the nature of human society) Sheikh Abdullah bin Fodio recognised the

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21. Abdullahi Bin Fodio, Diya al-Hukkam, p. 19.

fact that it is not realistic to expect an ordinary judge to try cases where very powerful Government Officers were involved. In such cases only superior officers like the Caliph himself, or Wali al-Mazalim, a sort of superior judge, could try the cases.(22) Other officers includes that of the Amir (Emir or subordinate Governor) and Qadis (judges) whom the Caliph delegated some authority or function of ensuring injustice, redressing wrongs and restraining possible oppressors and to ensure prevalence of justice generally according to Shari'ah.

The State through its appropriate organs is to strive to promote and defend the faith of the Community. It is also to provide amenities and means of livelihood for all the members of the Community for a meaningful life on earth and to facilitate their services of the Almighty Allah. It should be borne in mind that the Caliph acts as the guardian of the Law whose supremacy is complete. In Islam everyone, from the Caliph to the most humble membersof the community must submit to the rule of the Shari'ah. This was in essence the administrative and judicial structure and social system established by the jihad movement which M. Hiskett referred to above, at pp.7 - 8. It reigned for almost a century prior to the advant of the British Colonial administration in this Country.

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21. Abdullahi Bin Fodio, Diya al-Hukkam, P. 19.
22. Ibid, at P.22.

1.6 THE COLONIAL PERIOD

This portion of the Chapter will traces the history of the advent of Colonial rule in Nigeria. especially it analyses the development of the imposed English Law and its effects on the pre-existing Islamic system.

Upon the arrival of the British Conquerors, they found an established system of both Law and Government, Organised on the basis of the Shari'ah. Having established themselves as the new rulers, a change of policy and direction were ipso facto brought; so that the application of Shari'ah they found not only ceased to be ultimate legal basis and the sole test of legitimacy, but its very application became dependent on the Laws introduced by the conquerors. Historical records showed clearly that long before the 19th century each of the territories which togather now constitute Nigeria had a system of administration of justice.

Before the 19th Century British and other foreign merchants had started to trade with the indigenous people on the West Coast of Africa. The trading coastal areas which later formed part of Nigeria included Lagos, Benin, Bonny and others. The Berlin conference of 1884, brought about the parfitioning of Africa amongs the various European nations that were competing to gain control various parts of the continent due to their economic interest.

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The conference had given the scrumbling nation legitimate power of control over the various African States. Futhermore, it had given the various European nations power to introduce their Laws in the States that they were able to get hold of(23). The introduction of the Europeans Laws was done in cleverly and cunning manner. At first and before the Berlin conference, the Laws were introduced by treaties in order to protect European intrest - intrest of foreign traders, Missionaries and explorers.

Most of the Southern especially the Costal areas of Nigeria had by mid-nineteenth Century came under British control either as protectories or ceded trritories. As a result of the Occupation, Colony of Lagos was created in 1862. In that part of the country, the first action of the British authorities was to introduce into the territory the main body of English Law.(24) Even before that occurred there were established for the Colony a legislature and a system of courts of the English type to deal with oases which involved the Missionaries and the European trader directly or to settle trading dispute between the Europeans and the indigenous people. Europeans never submitted themselves under the jurisdiction of the established customary courts they met. Because to them, the customary court system was very strange and primitive.

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23. Article of the Berlin Conference gave the European nations on Africa power to establish political, administrative and Legal Control.

24. Ordinance No.3 of 1863

The Interiour part of the Country where they were yet to establish themselves was ruled by powerful Muslim rulers who had imposed a military domination upon the Country and were not prepared to open their territories to the Europeans. The Royal Niger Company however, succeeded in negotiating treaties with some of the most prominent of these rulers. It has been advanced that British fears of further movements of Germany from the South-East, and of France in the West and North of the hinterland Couple, of course, with pure imperial ambitions, compelled the British Government acting through its subjects to extend its territorial control across the river Niger. The Royal Niger Company which already had trading out posts and other interests in the Southern areas of the North, under the Command of Lord Lugard led military expenditions which they subdued and deposed some Emirs and concluded treaties with others. On 1st January 1900, Northern protectorate was established and Lord Lugard was appointed as the first High Commissioner with his headquaters at Lokoja.

After the conquest of Kontagora and the occupation of Bida, Lord Lugard sent a massage to Sultan of Sokoto Abdurrahman for the appointment of successors of the deposed Emirs.(25)

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25. Annual Report, Northern Nigeria, 1901, P.15.

In his reply the Sultan wrote:

> "From us to you, know that I do not Consent to any of your people dwelling among us. I myself shall never be reconciled to you, nor shall I permit any futher dealings with you. Henceforth there shall be no exchanges between us save those between Muslims and unbelivers Holy War as the Almight has enjoined on us. There is neither authority no power save in God on High."(26)

As a result of this letter, Lugard plans to attack Sokoto and on 17th March 1903 Sokoto submitted after the Sultan Attahiru Ahmadu fled, and on 21st March 1903 Muhammad Attahiru was appointed as a new Sultan. On his appointment Lugard compelled him to accept the following conditions imposed by the British in his speach:

(1) that all rights of Conquest, acquired by the Fulani throught Northern Nigeria, passed to Britain.

(2) that for the future, every Sultan and Emir and principal officers of State should be appointed by Britain.

(3) that Emirs and chiefs so appointed should obey the laws of the British Government, [illegible] by Britain.

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26. D.J.M. Muffett, (Concerning Brave Captains), London, 1964, pp.42-51.

(4) that they should import no fire arms, except flintlocks; and

(5) that the British Government should in future hold rights in Land and taxation.

The conquest of Hausa States, in 1902-03, brought the wole country under effective British control. On 1st January 1914, the Southern and Northern protectorates were formally amalgamated with Lugard as the first Governor-General of the whole Country.

The British, evolved the now famous policy of "Indirect Rule" which allowed the institutions of State and the machinery of government which were in existence in Northern parts of the Country to Continue functioning within limits and subject to certain conditions. Lugard himself admitted this when he wrote that "Since the political staff is inadequate for the administration of a protectorate of such vast size, it is obvious that we cannot in any sense administer it, hence we must utilize the existing machinery and endeavour only to improve it."[27]. The Colonia policy in this case was to follow the long-established practical set-up and legal system. While justifying British conquest of the area by usurpation, Lugar, now the Sole administrator, stated the policy of his administration towards the conquered Hausa-Fulani Emirs, their pre-existing political and administrative set-up and judicial system. Writing to his political and administrative officers, Lugard Stated the policy thus:

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27. Lugar, Political Instructions, Memo 18, PP.264-5.

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> "Where a Hausa-Fulani ruler is recognized by government, his authority will be supported in every way.... His just tributed from his subordinate villages will be enforced and his native Courts upheld.... Subject to proclamations and instructions."[38].

Having found that throughout the Northern part of this country, especially in principal towns, a cmplex network of Courts in which Islamic Law was administered by an Alkali who is a man of considerable learning esisted Lugard Stated his policy towards the judicial system thus:

> "It is not the policy of the Government to interfere unnecessarily with these Courts, but rather to increase their influence, and to make them in every way effective instruments of justice."[39]

For obvious reasons, Colonial policy could not be openly directed towards the abolishing of Islamic Law. Islam had become an integral part of the life of the people in the Sokoto Caliphate, the preservation of Islamic Law and the Alkali Courts was therefore dictated by necessity. Moreover, in the sophisticated system of administration of justice already in existence, the British found an effective instrument which they could use, with careful manipulation, preserve peace and order for their own Colonial purposes.

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38. Lugard, Id, at P.264.
39. Lugard, Id, Memo 3, at pp.168-9.

.../21

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38. Lugard, Id, at P.264
39. Lugard, Id, Memo 3, at pp.168-9

Hence the principles of Indirect Rule. Therefore, to consolidate their rule and avoid possible uprisings by the people on religious grounds, the Colonial rulers had given firm undertakings not to interfere with the Islamic religion.

However, while claiming that just prior to or at the beginning of colonial administration, the system of justice priviously referred to had deteriorated, been corrupted and often the judges' decisions were replaced by despotic act of the Emirs and that the system was generally be set with a catalogue of evils, Lugard futher stated that it would be his government's policy to regulate the system by assuming the following:

(i) Power to appoint or approve the appointment of judicial officers.

(ii) A supervisory roles to review courts' decisions so as to ensure that old abuses of the system were discontinued, and

(iii) The power to establish by warrant new and different gradations of Courts(40).

These provisions laid down the new pattern of organisation of Courts and subsequent enactments continued to incorporate the substance of the proclamation. Thus the courts now derived their authority and jurisdiction from the 'warrant' which contained the name of the judge and defined the area of jurisdication of the Court.

40. Lugard, Supra, Memo 3, at pp.168-70 See also Proclamation No. 5 of 1900.

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1.7 THE INTRODUCTION AND DEVELOPMENT OF ENGLISH LAWS IN NIGERIA.

In the forgoing discussion the pre-colonial historical background of the Country and the introduction of Colonial rule have been very briefly examined. This was done with a view to setting the scene for the discussions of the development of the imposed English Common Law System in the Country. Within a relatively short period the English administration became rather well-established after amalgamating the Northern and Southern protectorates of Nigeria which started what is known as the first major reorganization of the judicial system. As earlier stated, one of the first actions of the British authorities was to introduce into the Country the main body of Englsih Law."[41] At the first stage, the Courts were established to settle debts and contractual disagreements between the natives and Europeans. The Second stage brought the introduction of more general Courts like the Magistrate and District Courts to handle cases of more general nature"[42] The third stage was the establishment of higher Courts that handled appeals from Magistrate and District Courts"[43]. In some cases Zonal appellate Courts were established,"[44] and the highest Court for the Country was based in Lond...[45]

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41. By Ordiance No.37 of 1863.

42. Ordiance No 3 of 1876 introduced British Court's System to Nigeria.

43. High Court Ordinance of 1924.

44. E.g. West African Courts of Appeal.

45. E.g. The Judicial Committee of Privy Council.

According to one authority, "Lugard's aim was to establish a super-imposed Court Organisation consisting of the Supreme and Provincial Courts to enforce the protectorate's Penal Laws and make available a standard of justice appropriate to a British Protectorate, but at the same time to utilise existing indigenous Court systems which would be under supervision and Control by the Government, continue to dispense justice to the masses of the people in a firm understood by them."(46) Such a policy was possible in the Northern Part of the Country where there was an established Alkali's Courts administartering Shari'a, which included the all embracing civil code of Islam and some specific criminal offences. But on the other hand such a policy was not be found in the Southern parts of the Country where there was no such clearly defind system.

Earlier it was seen that Lugard's administration promised not to temper with the pre-Colonial legal system, if sidetract this promise and interfered with them through the reorganisation and grading of Native Courts in the year 1914. This state of affairs continued untill 1933 when a new was introduced. Prior to this date, administrative officers could not, in the exercise of their review powers, reverse decisions of Native Courts. Now the 1933 Ordinance conferred upon them more comprehensive powers of transfer and review of any proceedings of Native Courts

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46. Key and Richadson, The Native and Customary Courts of pp. 19-20.

(except homicide) and to make such order or pass such sentence therein as the Native Court could have made or pass.(47) With the creation of various grades of Native Courts, provision were made to limit their power as to the degree of sentences they could pass or, in civil cases, the amount of money involved in the suit, damage claim, debts etc. Moreover all Native Courts were barred from imposing punishments which involved mutilation, torture or which were repugnant to natural justice and humanity.

1.8 THE VALIDITY OF CUSTOMARY LAW AND REPUGNANCY CLAUSE

It has always been the British Colonial policy to recognized the application of Customary Laws in all Courts established by its administration. Section 10(1) of 1933 Ordinance defined the Law a Native Court could administer as:

(a) the Native Law and Custom prevailing in its area of jurisdiction;

(b) the Provisions of any Statute which it was by Order Empowered to administer; and

(c) Local by Laws.

Section 10(2) of the Ordinance further Stated:

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47. Sec. 28(1)(b), Cap.142, Laws of Federation of Nigeria, 1948.

> 10.(2) For offences against any native Law or Custom a Native Court may, subject to the provisions of this ordinance, impose a fine or imprisonment or both, or may inflict any punishment authorised by native law and custom, provided it does not involve mutilation or torture, and is not repugnant to natural justice and humanity.

By the introduction of this multifaceted test it was intended to deny a native the benifit of an Otherwise relevant and proven Customary Law principle if offensive to the test. The clause ousts Islamic Law (along with other forms of native Law and Custom) where its provisions conflict with any statutory Provision which are for the time being in force. Section 28 of the High Court Law has imported all English statutes of general application which were inforce in England on the first day of January 1900, in to Nigerian Legal System(48).

In spite of the apparent intention of the Colonial masters and their aids, the 1967 Area Courts Edict has not actually curtailed the application of Islamic Law. This is because Section 20 still requires the Courts to apply "The Native and Customs prevailing" in their respective areas of jurisdiction, or the Law "binding between the parties" subject only to the proviso that no native law may be applied which is repugnant to natural justice,

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48. See the High Court Law, See. 28 and see 23 of the District Court Law.

equity or good conscience or incompatible either directly or by necessary implication with any written Law for the time being in force." Thus the legislation itself has, in effect, rendered Islamic Law the applicable Law in most of Northern Nigeria and to the majority of its population(49). There was no attempt to defind the phrase "natural justice, equity and good conscience". However since the courts were European Courts and Personnel of the Courts were Europeans or who were trained in European Law, the inevitable meaning that was given to "natural justice, equity and good conscience" was the natural justice as perceived by Europeans, the "equity" as understood by them and the "good conscience" was that of the European standard. Thus in Lewis V. Bankole,(50) Speed Ag. C.J. Stated that while "natural justice" and "good conscience" were not definable, the Courts were well acquinted with the doctrines of equity; the rule submitted to him formed no part of the English system of equity.

The test has been applied in Nigeria in a variety of ways and to diverse causes. The principle was used in the case of Guri V. Hadejia Native Authority(51) where the Federal Supreme Court declared invalid a rule of Maliki Law that prevented persons accused of highway robbery (hiraba) from defending themselves.

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49. According to Statistical data about 94% cases (Civil and criminal goes to Area Courts, and over 75% of the cases ar governed by Islamic Law.
50. (1908) 1 N.L.R. 81
51. (1959) 4 F.S.C. 44

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Again in Edet v. Essien[52] it was applied to deny Custody of a child, to an appellant who, although not the biological father, was entitled to their custody under customary Law, since his dowry had not been repaid to him. Another Customary principle by which a child born within ten months after a divorce is the property of the former husband was rejected. The Court, on grounds of repugnancy to natural justice, equity and good conscience, declined to enfore the rule in the particular case, since it would have taken a child away from the couples who were universally acknowledged to be its parents[53]. In fairness, it must be added that the Court in this case explained that it was not prepared to declare the principle as it stood as being repugnant to the phrase. In another case, a lower court had rejected a customary rule of succession (which prescribed distribution ofthe estate of an intestate praepositus according to the number of wives and not the number of issues of the deceased) for being inconsistent with modern idea of equiality between children. This view was rejected by the appellate Courts which stated that what ever the modern idea might be, Idi-Igi was still in vigorous operation in Lagos and consequently it was decided that the Customary Law should be applied in the Case.[54]

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52. (1932) 11 W.L.R. 47.
53. 1961 N.R.N.L.R. 81 Maryamu v. Sadiku Ejo.
54. (1958) 3 F.S.C. 46, Sub non-Danmole V. Dawodu, (1962) W.L.R. 1058.

As far as Islamic Law was concerned the test was applied mostly in criminal cases. This was an area where there existed great differences between the English Common Law notion of Criminality and magnitude of punishment and Islamic Law. For example, the Nigerian Criminal Code's defination of the offence of murder contained what is known as mitigating factors such as provocation. Even though Islamic Law has its own conception of mitigating factors, these were not in majority of cases in accord with those recognized under the Criminal Code. Hence by the application of the repugnancy test the Islamic Law Courts were permitted to try Criminal cases, but they could not impose sentences greater than those recognised under the code. In many cases involving these and other conflicts, decisions of Alkali Courts, although unimpeachable under the Shari'a were set aside for offending the test.(55) Recently the test was applied in a probate proceedings where the deceased (testator) was born in Kwara State, educated in Lagos and died in Zaria made a will which gave the planitiff only ₦10.00 while the other children had houses and more money. Bello, J. (as he then was) ruled that a probate should not be granted of the will because it has violated the principles of Islamic Law which require non-discrimination of legal heirs and disentitled a testator from disposing by will of more than one-third of his property.

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55. Guri V. Hadejia Native Authority, (1959) 4 F.S.C. 44

On appeal Bello's decision was set-aside on the ground that the Islamic Law rule in question was incompatible with the English Wills Act of 1837"[56].

It is now clear that by now that the introduction of repugnancy and incompatibility test led to gradual and systematic erosion of the Islamic and Customary Laws. The ouster was total in some areas and partial in others. Public Law was the area where the greatest humbers and opportunities for divergencies and conflicts between the indiginous system and Englis' Laws. It occurred also that the area in which the capacity of the Customary Laws to cater for the administration's concern for Law and order and good government was for many reasons domonstrably inadequate. With the exception of Islamic Law, most of the Customary Laws were unwritten and this created uncertainties. / [illegible] foregoing discussion, the progressive development of English Law vis-a-vis the indigenous systems has been shown. This will give the picture from the low-level administrative intervention to proving by various devices and, finally, to gradual total or partial ouster of selected principles, rules and whole areas of customary Laws with the Englsih Law and ideas getting more and more entervenched.

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56. Timorthy Adesunbokan v. Razaki Yunusa, (1970) N.N.L.R. 174.

1.7.2 THE PROCESS OF LAW MAKING IN NIGERIA

Having seen the dominance of the English Law, over the indigenous Laws through the application of the repugnancy test, it is now intended to discuss the process used by the Colonial administrators which we have inherited after attaining independence in enacting their laws. The Law Making Process in Nigeria is as complex as the court system. There are three major sources of Law in Nigeria and each passess through a different process before it becames law. The three major sources of Law in Nigeria are the Customary Law, (including Islamic Law) foreign imposed English Law and legislations. Legal pluralism and the conflict of Laws in Nigeria is a product of both historic circumstances and perduring systems of beliefs, values, and social relations. In this Chapter the intention is to examine the source of Law making under the received English Law. For the Islamic and Customary Laws are discussed in Chapter one.

1.8 IMPOSED ENGLISH LAW

English Laws that today apply in Nigeria were usually said to have been received. Some prefer to say that the Laws were imposed. The choice of either <u>received or imposed</u> is a question of understanding and appreciation of how the Laws came into Nigeria. Element of free will or opportunity to decide to accept or not to, does exist in <u>receiving.</u>

The reception Statute which imported English Law in to Northern Region of Nigeria, contains similar provision. The Northern Region High Court Law [75] Section 28 provides:

> Sec.28" Subject to the Provisions of any written Law and in particular to this section:-
>
> (a) The Common Law.
>
> (b) The Doctrines of equity
>
> (c) The Statute of general application which were in force in England on the 1st day of January, 19[illegible].
>
> Shall in so far as they related to any matter with respect to which the legislature of the region is for the time being competent to make laws, be in force within the jurisdiction of the Court."

In Western and Midwestern Nigeria, the general reception Statute does not mention "statute of general application" in force in England on January 1st, 1990. The Common Law and equity alone were received in those regions. The regional legislature has enacted those statutes which it considered necessary"[76]. Up to 1970, through the above provisions, the various English legislations on matrimonial causes were applied directly to Nigeria in spite of its different Social, Cultural and economic background. Even after the Independence and the Republican the various indigenous

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75. Cap.49, 1963, Received Laws of Northern Nigeria.
76. Supra at 22.

When something is imposed, it means that the person upon whom it to imposed has no choice to exercise his will to receive or not to, received and the thing is forced upon him. It is correct to say that from the date the statute of General Application was said to apply, until independence, the law was imposed. This is so because the people of Nigeria at that time had no choice but to take the Law. Their consent or will was not requested before the Law was put into their Statute Books. Moreover, the legislature and or the executive at that time was either wholly British or largely British.

The situation today is different. If after twenty eight years of the existence of purely Nigerian elected legislatures or Exedtives and yet the statute of General Application clause is allowed to remain in the statute books, it is no longer <u>imposed</u> but <u>received</u> by consent. The Nigerian legislature after independence had all the the opportunity and power to review and repeal those laws for one reason or the other it has not done so. Originally the English Law was designed chiefly to promote and sustain territorial law and order, particularly on criminal and procedural issues, to regulate the personal and proprietary relationships between non-Africans, Britishn and others, with one another to set up systems for the educational, economic, and political development of the region, and above all, to allow intending Africans to opt out of

Customary Law in preference to a Western legal system, either in general, or in retrospect of specific transactions and relationships"[57].

The current English Law in Nigeria essentially consists of (1) the Common Law, equity and statutory Law. (2) Enactments by the Colonial legislature; (3) Enactments by the Nigerian legislature, (4) Enactments, Decrees, and Edicts by state Military Governments since 1966 and Acts of National Assembly and State legislatures, since October, 1979. To these may be added those extraneous Laws or bye-Laws proclamations made promulgated by various Local authorities or local governments within the country. Most of these by-laws are, but adaptations and re-enactments of foreign laws"[58]. English laws were brought into the country through the following ways.

1.8.2 General Reception.

The modern wording of the provision is contained in Section 45 of the Interpretation Act which provides as follows in S.45(1) that.

Subject to the provision of this Section, and except in so far as other provision are made by any Federal Law, the Common Law of England and the doctrines of Equity, together with the statute of general application that were inforce in England on the 1st day of

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57. Allot, New Essays in African Law, 1970, P.14.
58. Allot Id, at P.20.

January, 1900, shall be inforce in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be inforce elsewhere in the Federation.

Identical provisions are now codified in all the State High Court Laws of the Federation"[59].

Having discussed briefly the nature of the legislations and Court system whose enactments and decisions Constitute the bulk of the subject of this dissertation, We shall now turn to examine the sources of English Family Law which is the central theme of thés research work.

1.8.3 SOURCESE OF ENGLISH FAMILY LAW

"Matrimonial Law" is a term generally given to the body of legal principles governing the relationships of husband and wife and of parent and child. The received or imposed English Family Law applies in Nigeria by virtue of the general reception of English Law in Nigeria. The type of matrimonial law introduced into Nigeria by the British is the monogamous type, as obtained in England. Marriage under English Law must, therefore, be monogamous as the legal system outlaw the act of taking more than one wife during the subsistance of the marriage. According to the Interpretation Act 1964"[60].

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59. See for example, Section 28[a] High Court Law of form Northern Nigeria, 1963 edition.

60. No, 1 of 1964 Section 18.

a monogamous marriage is "a marriage which is recognised by the Law of the place where it is contracted as a volontary union of one man and one woman to the exlusion of all others during the continuance of the marriage". The Laws which govern the celebration and incidents of monogamous marriage in Nigeria are found principally in the Marriage Act 1914[61] and the Matrimonial Causes Decree 1970.[62] A monogamous marriage in Nigeria is the same as in England. It is the marriage which Lord Penzance described in Hyde V. Hyde[63] as ".... the voluntry union for life of one man and one woman to the exclusion of all others."

The Constitution of Federal Republic of Nigeria 1963 provides that the Federal Parliament shall have exclusive power to make Laws with respect to:

> "Marriages other than Marriages under Muslim Law or other Customary Law; annulment and dissolution of, and other matrimonial causes relating to marriages other than marriages under Muslim Law or other customary Laws."[64]

When the Constitution refers to"Marriages other than under Muslim Law or other customary Laws" it is referring to monoganous marriages, the celebration of which throughout Nigeria is governed by the Marriage Act.

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61. Cap. 115 Laws of the Federation of Nigeria, 1958.
62. Decree No. 18 of 1970
63. (1866) L.R. 1 P & D 130, at 133
64. Sec. 69(2) Constitution of the Federal Republic of Nig. 1963.

Though the constitution has provided for the application of "Matrimonial Causes" but it does not give clear meaning of the expression. However, it had a specific meaning in England and Nigeria before the 1963 Constitution came into effect. The English Supreme Court (Consolidation) Act 1925,"[65] and the High Court of Lagos Act (Cap.80),"[66] provide in identical terms that:

> "Matrimonial Cause", means any action for divorce, nullity of marriage, judicial separation of marriage and restitution of conjugal rights."

Since the expression had an established meaning long before the advent of the present constitution, and since the Constitution itself contains no defination, one can assume that "Matrimonial cause is to be given its established meaning.

The English System of family at it exists today in Nigeria has two main sources: (1) Local Nigerian Legislation and case Law, and (2) Received or Imposed Englsih Law.

(1) Local Nigerian Legislation and Case Law.

The Marriage Act brought to Nigeria the English system of marriage, the type which the Courts have traditionally characterized as the "Volutary Union

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65. Section 225.

66 Section 2, See also Section 114(1) Matrimonial Causes Decree 1970.

for life of one man and one woman to the exclusion of all others.(67) But the Local Nigerian Legislation had done very little to modify this system of family law. The only Federal Statute can be found in connection with matrimonial laws in Nigeria, is the Marriage Act(68) which established the conditions and formalities upon which a valid monogamous marriage can be contracted. But as to the nature of relationship to be created by the contract, or the grounds and means as to how the relationship may be terminated, neither the Act no any other Law gives assistance. Even though Section 33 of the Act does provide few grounds upon which a marriage may be declared void, but it does not establish a comprehensive Law of nullity. In short the Federal legislature has not made any Law dealing with divorce, judicial separation in the field of Nigerian Family Law. On the part of the regional legislatures, the story is the same. With the exception of the former Western Region of Nigeria no any other region has a local legislation in the areas of family law. The Wester Region is the most advanced in this respect since it has its own Will Laws (Cap. 133), Married Womens Property Law (Cap.76). Infants Law (Cap.49), and Administration of Estate Law (Cap.1). In each of the regions, there is inforce a legitimacy Law which allows children born out of Wedlock to be made legitimate by the subsequent marriage Act. This statute was enacted in 1929 when a unitary form of Government existed in Nigeria.

67. Per Lord Penzance in Hyde v. Hyde. (1866),L.R. I.P.& D. 130.
68. Cap. 115, 1958 Laws of the Federation of Nigeria & Lagos.

It becames a regional Statute when a Federation was established.(69) The bulk of Nigerian Law is made up of legislations enacted by an authority be it parliament, Assembly, Military or Civilian Governments. They reins Supreme among other Laws, because of its advantage over other laws.

1.8.5 The Received (Imposed) Law.

English Law was imposed on the people of Nigeria by means of reception statutes. The English Statutes were simply adopted by re-enacting the Laws for Nigeria almost verbatim. For example the Marriage Act of 1945 was a carbon-copy of the English Marriage Act of 1924. The statute which imposes on Nigerians the English Law of divorce, nullity, and other matrimonial causes, subject to non availability of specific Nigerian legislation is the Regional Courts (Federal Jurisdiction) Act(70) Section 4 of the Law Provides:

> "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 provisions 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 inforce in England".

69. Kasunmu and Salacusi's Nigerian Family Law P.8
70. Cap. 177.

The High Court of Lagos Act,[71] Section 16, contains similar provision. What the Laws has done was to establish the Law and gives the Courts jurisdiction to apply the Law.

The unfortunate situation of the law is that, the laws directs the High Courts to apply "the law... for the time being inforce in England." It makes no provision for modification of the laws to meet local conditions and circumstances despite the fact that the political, economical cultural and social changes of Nigeria is different from that of England. In Taylor v. Taylor[72] when construing section 16 of Nigerian Supreme Court Ordinance,[73] which provided that with regard to probate, divorce, and matrimonial causes, jurisdiction was to be exercised inconformity "with the Law for the time being in force in England."

> The West African Court of Appeal observed that "From this it is clear that in probate causes and proceedings the law and practice in Nigeria change as the law and practice in England change."[74]

From the decision in this case and other cases which has the words "for the time being in force" a time-less effect as to import into Nigeria all future laws which the English parliament might enact.

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71. Cap. 80
72. (1935), W.A.C.A., 348.
73. Cap. 3, 1923 Laws of Nigeria.
74. Ibid; at P. 349.

bodies that came into being in Nigeria did not consider the repeal of the Laws. This was the case up to 1970 when the Matrimonial Causes Decree[77] came in to force to mark the starting point of the quest for fashioning an indigenous Law on matrimonial causes to suit local circumstances.

Section 112[78] of the Decree, provided that the Chief justice of Nigeria, after consultation with the Chief Judges of the states, and, in it appropriate cases, with the Presidents of the Courts of Appeal, may make rules of practice and procedure for Local courts in regard to the Decree, It is provided also that until this has been done the English rules of practice and procedure immediately in force at the commencement of the Decree shall continue to apply. But on the Other Hand the English Common Law, the doctrines of equity and certain English Statutes of general application (having been expressly received into the local laws) still apply as residual Laws in fulling the gaps existing in the Decree. For example the Decree provides for the annulment of void and voidable marriages, but it does not provide for the rules under which it is the only parties to a voidable marriage that can bring proceedings for its annulment and this be done during their life time. It Seem that the above rules of English Law still apply as part of the received Common Law.

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76. Supra at 22
77. Decree, No. 18 of 1970.
78. Matrimonial Causes Decree, No. 18 of 1970.

1.9 INTERNAL CONFLICTS OF LAW

A close study of the legal system of Post-Colonial Nigeria is a study of the interaction, competation conflict and harmonisation of laws. The mere fact of the introduction of an "extraneous" law into Nigeria is not sufficient to explain the existence of internal conflicts of law. If such introduction has been accompained by a suppression of the pre-existing laws, no question of conflict would have arisen. The reason for these conflicts and the reason for the plural legal systems lies in the almost universal policy followed by the colonial power of retaining the Islamic and the indigenous legal systems inforce in parallel with the introduced law.

With the development of colonial administration the connections between the laws grew ever closer and more complex. New facilities were created by which Nigerians could opt out of customary law in respect of a particular transaction or relationship; the institution of monogamous ordinance marriage springs to mind here. In some cases it was even recognised that customary law might apply to Non-African in certain case as where a non-African had purported to deal with an African under the forms of customary law, such as where he had acquired land in the customary manner or had married a Nigerian in accordance with customary law.

This attitude of colonial administration created what is loosely called the "dual system" of Laws or a (plural

systems) with the imposed British Law (viz English Common Law, equity, and statutes) which also includes Local legislation on the one hand and customary and Islamic Laws (where it was recognised) on the other. The colonial legal system had the effect of multiplying the legal options, and hence of increasing the occasions when it might be necessary for a court to decide whether to apply one system of law or another to a given situation.

1.9.1 Conflict of Laws and the Areas of Application of Laws

The co-exltence of English Law Islamic Law and traditional laws in the same country raised the problems of their respective areas of application. As can be imagined, such a division of areas of competence, in the colonial contexts, was more than a simple mechnical or technical division or labour. It involved all kinds of assumption and value judgments. This delimitation was principally based on the personal status of the parties as well as the subject matter involved. The delimitation of areas of competence limited or reduced the areas and occasions of conflict.

(a) Subject matter as criterion for determining the applicable Law

It should be stated at the outset that in the colonial situation the most important matters of public law were not governed by traditional Law. The main aim of colonialism is to take over public power in a territory. It is therefore more surprising that the law of the colonial power constituttes the general public law.

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English law therefore governed matters of constitutional law, administrative law, judicial organisation and panel law.

To justify the seizure of public power by the colonialists, some writers came up with the idea that traditional laws do not distinguish between public and private law. Elias has demonstrated how untenable such a view (79) He shows that every legal system, of whatever nature and at whatever level of development, makes a distinction between what may be left to private initiative and what must be left to the determination of the public authority. The distinction between public and private law which is characteristic of the Romane-Germanic Legal Systems is not made in the English Common Law. But English jurists have no difficulty in determining what concerns public authority and what is essentially a private law matter.

In discussing law under the colonial regime, it is necessary to contract the French Policy of 'direct rule' with the British policy of 'Indirect rule'. Without going into details, it is sufficient to say that the practical consequences of the French and British Colonial rule have been rather similar if not identical(80). Both systems relegated traditional public law to an inferior position and quite often hastened its decay. With the elimination of traditional public law, the only other areas which called for the delimitation of competence was private law.

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79. See Nature of African Customary Law, Manchester 1956, P. 119.

80. See Opoku, 'Traditional Law Under French Colonial Rule' in Verfassung and Rech in Übersee, 1974, pp.139-153.

In private law, a lot room was given to traditional law. It was to be applied in all matters (e.g. land law, succession, family law) except where for some reason such as repugnancy to written law or a belief that it was contrary to equity, good conscience and public morality, it will be where superseded by English Law.

(b) Personal Status as criterion for determining the applicable Law

The general rule in Nigeria, as in all British colonies, was that Africans or to use the colonial term, 'natives' were subject to traditional African Law expressed as 'native law and custom'.

The colonial legislature often provided a definition of who is has been define as any a 'native'[81]. In Nigeria, 'native' person of African descent.[82] Customary law was to be applied to such persons provided that their mode of life was that of the general community and that in their country of originnthey were subject to African customary law.

An examination of the term 'native' or 'African native' shows how inadequate such a term is for the purposes of the administration of justice. These terms were employed to designate a large number of persons whose mode of life, law, religion, and customs were not identical. Africans have different modes of life, depending on their

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81. For definations of 'Native' See Allott, Essays in African Law (1960), p. 173; See also Park, The Sources of Nigerian Law 1963, pp. 102-103; See also section 15 of the Area Courts Edict, Kaduna State.

82. See Section 3 of the Intupretation Act, cap 89, for the Federation and the Northern Region.

different modes of life, and on their geographical situation, and above all, their financial means.

1.9.2 Conflicts of Laws.

The Source of authority for conflict rules under the Colonial regime is mainly to be found in the various enactments providing for the application of customary law in Nigerian.[83]

(i) Conflicts between English Law and traditional Laws. The combined effect of the main rules was that traditional law applied in the following cases:

(1) Where all the parties were 'natives';
(2) Where the parties were 'natives' and non-natives and agreed to be bound by traditional law;
(3) Where the parties included a 'non-native' substantial injustice would be done by a strict adherence to English law;
(4) Where the matters were by statute subject to customary law e.g. land tenure, transfer of real and personal property, inheritance and testamentary disposition and customary marriage.

English law applied in the following cases:

(1) Where the parties had by express agreement or by implication agreed to be subject to it;
(2) Where by the nature of the transaction, it was the only applicable law, i.e. the subject matter was unknown to customary law;
(3) Where English law became indirectly applicable, as where there was no applicable rule, customary or English law, the courts being enjoined in such cases to be guided by the principles of natural justice, equity and good conscience which meant generally, the application of English law;

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83. For Northern Nigeria, High Court Law, No. 8 of 1955, Section 34. For Western Nigeria, High Courts Law, cap. 44, Section 12; For Eastern Nigeria High Court Law, No. 27 of 1955, Section.

(4) Where a customary law rule had been declared to be repugnant to equity, good conscience and public morality;

(5) In a fair number of other cases, e.g. tort, contract, omicile private international law English rules were generally followed.

On the whole, wherethere is a conflict between traditional law and Enlgish Law, the latter was applied.

(ii) Conflicts between the various traditional laws.

The colonial legislature does not seem to have anticipated or envisaged situations of conflict between the various traditional laws. Most of the legislative enactments provided for the application of the customary law prevailing within the area of the jurisdication of the court, Some enactments provided in addition for the application to "any law bindling between the parties".

Such provisions were obviously not sufficient for solving cases of conflict. In many towns in Nigeria there are several systems of law which may be followed by members of distinct nationalities and one would be hard put to say which one is the prevailing law in the area. The courts do not seem on the whole to have been unduly perturbed by conflicts between the various traditional laws. As Elias put it:

> 'The judges are very often blissfully unaware of the problems of choice of law. The one sound instinct on which they seem to rely is that a solution to the dispute before them has somehow to be found, and in the process they seem to resort to an appeal to natural justice and 'sweet reasonableness' - a mixture of jusgentium and jus-naturale"(84)

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84. British Colonial Laws (1962) p. 222

Generally throughout Nigeria most of the inhabitants of a particular locality may belong to one tribe, but in most of the localities, there are some minorities where origins lie in different communities. It is principally in relation to such minorities that the problem is presented. When a member of these minorities became involved in a legal action arising in the area, assuming that English law or local statute law do not apply, the issue is whether the case is to be decided in accordance with the customary law. If this is so, then, which one of the customary laws?.the customary law prevailing in the area, or the customary law of the minority which may be called the "personal law" of the man involved.

There are not many reported cases on the conflict of laws in the higher courts of the country, but it must arise quite frequently in the lower courts i.e. (Area Courts and customary courts). The solutions are to be fund from statutory provisious contained in the various enactments that set up and regulate those courts. for instance Section 20 of the Native Courts Law, No.,6 of 1956 of Northern Nigeria Provides:-

> "Subject to the provisions of this law, and in particular of section 21, a native court shall in civil causes and matters administer :-
>
> (a) the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being inforce"(85).

85. See Sec. 23(1)(1) Customary Courts Law, No. 21 of 1956 for Eastern Nigeria; Customary Courts Law, Cap. 31 and High Courts Law, Cap. 44, both for Western Nigeria.

From the provisions of the enactments, there is nothing in the various laws to indicate when the law prevailing in the area of the juridication of the court rather than the law binding between the parties is to be applied, and vice versa.

The leading case on the interpretation of the phrase "The Law prevailing in the area of jurisdiction of the court" is R. V. Ilorin Native Court, ex parte Jimo Aremu[86]. The appellants had been convicted of riot by the Alkalis court Ilorin, applying Islamic Law, which is the law prevailing in the area since this is what the court is required to apply. The convicted persons applied to the High Court for write of certiorari in respect of the judgement, and appealed to the Federal Supreme Court against the High Court's refusal. Their claim was that Yoruba Native Law and custom should have been applied. Ademola J. (as he then was) rejected the submission that there could be more than one customary system prevailing in the area of jurisdiction of a court and held that the law "Prevailing" in the area was the Law "Predominant" in the area. According to the case, therefore, the customary Law of a minority group within the area of jurisdiction of a court cannot be the customary law prevailing in the area. In Tapa v. Kuka[87] the deceased was a Nipe of Bida in Niger State, and he died intestate in Lagos leaving property. It was admitted by both parties to the suit, and that admission was endorsed by Brook J. that the Law to be

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86. (1950) 20 N.L.R. 144
87. (1945) 18 N.L.R. 6

applied was the deceased personal law i.e. Nupe Law, and not the law prevailingin Lagos.

From the decision of these two cases, one would see there is a problem with respect to non-contractual relations, because it is not easy to determine the law binding between the parties. Beside this problem, there is another problem posed by exception to the general rule that cases between natives are governed by customary law. Though the parties to a traction may be natives, but some time the courts will refuse to apply the general rule on the ground that the party who is seeking to benifit from the customary rule agreed or preseumed to have agreed to be bound by English law, as in Okolie v. Ibo[88], where the chief Alkali of Jos applied Islamic Law in the settlement of their dispute, but the Northern High Court, on appeal, held that from their respective occupations and the nature of the transaction between them and the comonodity in which they dealt, "English Law was intended to apply to the exclusion of Islamic Law and Igbo Law. The Second exception to the general rule the courts use to claim is that where the transaction was unknown to customary law as was discussed by Charles J. in Salawu v. Aderibigbe[88] where he said that customary law related to and therefore governed those things which were closely connected with the customary way of life and which existed or were usually kept in the locality in which their owners or possessors lived, such as Land and simple chattles of a domestic or agricultural use which were

88. (1958) N.R.N.L.R. 89.
89. (1963) W.N.L.R. 80 at 86.

normally confined to the area in which the customary law was operative". In other words, if a transaction is unknown to customary law, or where the transaction is of such a nature that the members of the community concerned do not consider it to be subject to any of the existing customs accepted as binding upon them.

The general principles set out above as being applicable to internal conflicts between different customary laws in the North is qualified by the provision of Sharia Court of Appeal Law[90]. Section 11(e) of the Law empowers the court to apply Islamic Law to any matter where all the parties (whether or not they are Muslims) have submitted a written request to the court of first instance that, that law should be applied. It would seem to follow that, whenever such a request has been made, even if the appropriate law under sections 20 and 21 of the Area Courts Law[91] is not Islamic Law, that law will became applicable if the case comes up before the Sharia Court of Appeal. Although this is the Law, but the judges I had discussed with maintained that the problem rarely arises.

From the forgoing discussions we have seen that conflict of laws in the colonial period and even thereafter were less than satisfactorily regulated, and the discriminatory nature of the rules regarding relationship between English Law and Islamic and customary laws were the objects of criticism.

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90. Northern Nigeria Laws 1963; Cap. 122.
91. Sections 20 and 21 of the Area Courts Law 1967 and 1968 of each of the Northern States contains identically worded rules governing conflicts between different systems of customary law.

It would have been preferable for the legislaturesto work out a set of rules for all conflicts situations. In any case, for this country with various ethnic or racial groups and different religions with plural legal system, the distinction is not very useful if one examine the actual cases of conflict. Besides, there is an unstated belief that the various legal systems in the country do not all deserve equal respect and treatment.

1.9.3 Legal Pluralism

The diversity of laws in Nigeria is nothing pecular to the country nor even to African in general. It is a feature ofsocietiesat a certain period oftheirdevelopment when Local particularism and kinship systems still have an important role to play, the history of other countries and continents offers us examples of legal pluralism[92]. But the diversity of laws in African countries has been rendered more complicated by the imposition of an alien law and authority, entirely different from the pre-existing legal systems. The colonial regime forced several diverse peoples into one territorial unit and thereby exacerbated the difficulties which had previously existed. Whatever differences there may be between the traditional systems, they are, generally speaking,,less significant than the differences between them and the imposed European Law.

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92. M.B. Hooker, Legal Pluralism, Oxford (1975).

The predominance of the imposed English Law and the status of customary laws and Islamic law have the effect that plurality of laws often means essentially, the co-existence of traditional law and the imposed English law, i.e. plurality is reduced to duality. The plain question here is whether the various systems should be maintained or whether they should be replaced by a uniform system. This is clearly a political question for the laws do not exist by themselves, independent of social, economic and political structures. I have suggested elsewhere that the maintenance of legal pluralism may be an act of political wisdom and necessity.

It is pertinent to conclude this chapter by observing that the colonial masterpersued a policy which was aimed at curtailing the application of Islamic Law and other Customary Laws they have found in existence in this Country. The legal system they set up and institutions they established were governed by rules which were designed to achieve those objectives. Even after achieving independence, the Europeans, through the legislatures and judiciary of this country ensure that English law was promoted at the cost of Islamic Law and Customary Laws. The is so, when it is recalled that our Law reform efforts are almost always inspired from England. Whether this may be justifiable in some areas of law reform or not is debatable; but surely there can be no doubt that principles of English family Law can hardly have any relevance to any Section of Nigerian Society; yet our Matrimonial Causes Decree 1970 is based soley on English Law.

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CHAPTER TWO

2. THE NATURE, SOURCES AND SCOPE OF ISLAMIC LAW (SHARI'A)

In this chapter it is proposed first to give a brief outline of the nature and significance of the Shari'a; secondly, to evaluate its scope of application in modern times with special reference to Nigeria.

2.1.1 THE SIGNIFICANCE OF ISLAMIC LAW

In a dark period of history when nothing but ruin, squalor and desolation remained of what were once great civilizations, when oppression, exploitation and the right of might prevailed, when human rights had ceased to be recognised, when superstition and hedanistic cults were followed at many places and man was still terrified of the forces of nature and give a very low place to himself in the Scheme of creation, was born Muhammad(S.A.W.) the Prophet of Islam, on Monday the 12th Rabi-ul-Awwal (Corresponding to the 29th August, 570 A.D.) in the desert country of Arabia.[1]

Islamic Law is a highly topical subject today in the contemporary world with considerable significance, rich heritage and practical value. The significance of Islamic Law, stems from the fact that it is one of the great, mature and dynamic legal systems prevelent on the globe and applicable to about 65 millions people of Nigeria and to about one billion people around the world.

1. Athar Husain, the Prophet of Islam P. 1.

In other words, nearly one-third of the total world population is following Islam. And if there is anything which is characteristic of and fundamental to that religion, it is the Islamic Law (Shari'a). The Islamic Legal System so developed by Muslim Jurists was adopted throughout the length and breadth of the world of Islam. The inter-Continental expansion of Ottoman Empire in Asia, Africa and Europe and the influence of the Mughale in the Indian sub-continent strengthened the prevalence of Islamic Law. in all these parts of the world.[2]

2.1.2 THE MEANING OF SHARI'A

Shari'a is an Arabic word meaning "the source of water" or "the resort of one who is in need of water".[1] It can also mean "water hole", "drinking place", or " "approach to a water hole"[2]. Shari'ah was popular with, and important to, the pre-Islamic Arabs who were mostly desert-dwellers due to scarcity of water in their domain. Indeed, popularity and importance of water cannot be confined to the Arabs or the desert-dwellers but should be extended to every living being; since Allah made every living thing from water.[3]

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2. Tahir Mahmodd, Family Law Reform in the Muslim World, P.1
1. Ahmed B. Muhammad al-fayyun Kitab al Misbath al Munir Chiro: Wi Zarah al Ma'arifah al Umuniyyah, 1939.p.421.
2. J. Mitton Cowan A Dictionary of Modern Written Arabic, London: Macdonald & Evans Limited, 1974 p. 465.
3. Qur'an 21:30

With the advent of Islam, Shari'ah acquired a new specific meaning. It represents the revealed canonical law of Allah to mankind. It is the path laid down by Allah for mankind to follow in their search for Him on the one hand and in their dealings with one another and with other oreatures of His on the other hand. Man is created for no other purpose than to worship Allah.[4] In order to facilitate His Worship, Allah prescribes a law and an open way (called Shari'a) to every generation.[5] Shari'a is, therefore, the right way ordained by Allah for humanity in order to prosper and maintain peace in this world and also achieve bliss in the hereafter. It is the same Shari'ah which Allah vouchsafed to the Prophet Muhammad for the benefit of the whole world.[6]

2.1.3 Scope

The activity of man can be primarily classified into two, spiritual and mundane. These two are, however, interwoven under the Shari'ah. When man is performing his spiritually ordained duties, he is ipso facto training himself on how to conduct his mundane affairs in a way that peace may prevail in the society. When he performs his mundane duties, he is either rewarded by Allah for having dischanged such duties satisfactorily or punished by Him for his faulure

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4. Qur'an 51:56
5. Qur'an 45:18
6. Qur'an. 21, 107.

in that regard. The Shari'ah, thereby, covers every act of man from the time he is born till when he breathes his last, and from when he wakes up in the morning till he goes back to sleep at night. It even covers the mode of his sleep.[7]

The Shari'ah covers the following five aspects of human activity:

a) I tiqādāt (Belief)
b) Ibādāt (Devotions)
c) 'Ādāb (Moralities)
d) Mu āmālāt (Transactions), and
e) Uqūbāt (Punishments/Penalties).

The first two fall under the spiritual act of man while the other two fall under the mundane act. The fifth aspect relates to both the spiritual and the mundane features since it covers the four others on the one hand and the right of both Allah and man to, respectively, punish sinners and penalise criminals in the society on the other hand.

I tiqad is the first of five prescribed pillars of Islam. It requires that man should believe.

a) That Allah is Unique in existence,
b) that He is the Supreme Creator of all things, and
c) that He has absolute power over everything.

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7. There are many Prophetic Traditions guiding Muslims on what to say before they sleep and where to face during the sleep.

Such a belief in Allah has led the Muslims to the study of theology, philosophy and mysticism as distinct and impregnable disciplines in Islamic Studies.

Ibadah covers the remaining four pillars of Islam. It concerns the worship of Allah as prescribed by Him through the Prophet Muhammed. The four pillars are ritual prayer (Salat), at least five times a day,[8] legal alms (Zakat) in a year[9], obligatory fasts in the month of Ramadan[10], and pilgrimage to Makkah (Hajj) at least once in one's life time[11]. Every Muslim must testify to the existence of Allah and His unity (Aqidah). He should follow up the testimony with the execution of the remaining four pillars (Ibadah). Should he neglect the ibadah, his earlier Aqidah shall be regarded as meaningless.

'Adab reflects the social acts of man. It is the absolute virtue and etiquette prescribed by Allah through revelation. It is the act of doing good and forbiding evil. Its scope is wide, cutting across every act of man. Indeed, it regulates the relationship between man and his fellow human beings.

Mu amalat covers the economic, educational political and other social aspects of man's activities.

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8. Prayer Times.
9. It has a peculiar way of culculation and specific propotinate deductions accurding to the different materials from which it may be due.
10. Ramadan is the 9th Month of a lunar year.
11. It is observed in Dhul Hijjah, the 12th month of the lunar year and it is compulsory only on those who has the ability.

Its coverage does not exclude whatever profession man may choose in life and how to deal, or what to do, with his earnings, the type of education he may pursue (artistic, scientific, technological etc.) and how to utilise the knowledge derived therefore to the benefit of humanity in general. It also covers the political system a Community may adopt, as well as the role of the citizens (ruler or subject) within the context of politics and administration. Furthermore, it covers all sorts of contract the man may make with his fellow man as an individual, with a group of people, or with the society at large.

Uqubat deals with the rights of Allah to punish sinners and the rights of man to penalise criminals in the society. It covers all spheres of security for both the State and the individual citizens, either at home or abroad. The role of the law enforcement agents in their various groups and the duty of members of the bench in the Judiciary are not excluded. The scope of this fifth division of the Shari'ah covers all the other four divisions that precede it.

Its scope is very wide and comprehensive.

2.2 LEGAL PRACTICE

2.2.1 General and Legal Precepts of the Shari'ah

Shari'ah, as we have noted above, covers the entire sphere of the religion of Islam. The practice of the Shari'ah is, therefore, tantamount to the practice of Islam as a religion.

The two may, therefore, be regarded as sybonymous in this context. However, certain precepts of the Shari'ah carry the force of law while others do not. In this thesis, those precepts which carry the force of law are termed Shari'ah Legal Practice while the others are referred to as general practice of the Shari'ah. An example of the general practice as distinct from the legal practice is the process of the general practice of the Shari'ah. An example of the general practice as distinct from the Legal practice is the process of amending a ritual prayer (Salat) in case of omission or commission during its observance. Such a mistake in prayer can be rectified by the preseribed prostrations (Sujud as-Sahw)[12] without necessarily leading to a court action against the worshipper. The legal practice on the other hand involves the act of violating any directive of the Shari'ah which is enforeceable in the court of Law. An example is the breach of marriage contract between a couple.

Shair'ah legal practice covers the five divisions highlighted above. For instance, the act of apostasy (a violation of the 'Aquidah) warrants death penalty.[13] The same death penalty has been prescribed for a complete denial of Salat (an act of Ibadah) by a Muslim who consequently refrains from its observance[14].

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12. For details on Sujud as Sahwi, see Aby Zayd Abdur Rahman b. M. As Saghir al akdari Mukhtasar al Akhdari-Trans Y.A. Guadri-Shebiotimo Islamic Publications 1985 P. 37.
13. Al-Sayyid Ushman bin Hasanayn Birri al Ju'ali al-Maliki Siraj as Salik Vol. II Beirut Dar Al Fikr 1402/1982 P.218. See al so Abd al, Qadir Awdah At-Tashri-al-Islami vol.1 Beirut Dar Al-Katib al-Arabi P. 661
14. al-Maliki op. cit. p.102.

Furthermore, dealing in Alcohol (Khamr) and intentional killing of a fellow human being have their respective penalties (under the promotion of Adab)[15]. As regards the Mu amalat, such acts as marriage, inheritance, and many other contractual obligations are enforceable, in Shari'ah law Courts and therefore fall under the Shari'ah legal practice.

2.2.2 Legal Theory and Legal Practice

Shari'a legal theory is different from Shari'a legal practice, though both are inter-related. The theory covers the speculative aspect of the law which developed through the legal speculation (Ijtihad) of individual jurists and jurisconsults (Mufti) with or without the open or tacit approval of a government[16]. It involves the act of interpreting the legislation vouchsafed by Allah, the Law-Giver.

Historical development of Shari'ah legal theory has attracted much attention of many writers among whom are Orientalists[17], Occidentalist[18], and Orthodox or Traditional Scholars[19]. Their writings cover the era of Prophet Muhammad, the reign of the orthodox caliphs, runs through the rule of the Umayyads and the Abbasids to this modern age.

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15. Qur'an. 2; 178.
16. Imams, Malik, Shafi etc.
17. J. Schicht, J.N.D. Anderson, N.J. Culsum etc.
18. Muh. al Khudari, Ahmad Amin, Ali as Sayisi etc.
19. Usman bin Fodio and his Student.

Such writings reveal that the Qur'an, the Sunnah, Ijma and Qiyas are the principal sources of the Shari'ah. Eash source was studied extensively.

The legal practice deals with the execution of the legal theory in the law courts. It covers the administration of justice in its general term. It deals with the organisational structure of courts, their jurisdiction as well as practice and procedure. It also covers court personnel and their welfare, court building, and many other related matters to the court.

From the foregoing discussion we have seen that sharIah is an all - embracing legal system that regulate and guide the life and conduct of Muslims concerning their rights and duties. The purpose of the law is to promote the welfare of people both individually and collectively and its basic principles are justice, equality, liberty and fraternity. Sharia, simply, is a way of life which Almightly Allah enjoines all those who accept Islam to follow. The word Islam itself means a compelete submission to the way of Allah in all matters of life both in this world and the world here after. The Almighty Allah is saying in the Holy Qur'an that;

> "Then we put thee on the (right) way on Religion: so fellow thou that (way) and follow not the desires of those who know not."

Commenting on Sharia Ibn Qayyim a Hanbali jurists says:-

"The Foundation of the Shari'a is wisdom and the safeguarding of the people's interests in this world and the next. In its entirety, it is justice, mercy and wisdom. Every rule which Sacrifices justice to tyranny, mercy to its opposite, the good to the evil, and wisdom to triviality does not belong to the Shari'a ---- the Shari'a is God's justice and blessing among His people-----Every good that exists is derived from it and every deficiency in being results loss and dissipation - for the Shari'a which G d entrusted His Prophet to transmit, is the pillar of the world and key to success and happiness in this world and the next."[4]

Islamic Law is divine in its origin, human in its subject matter and application, ideal in its principles, scientific in its method, comprehensive in its scope and dynamic in its nature. These unique features and characteristics of Islamic Law well demostrate that it is a living force vital system and an ever-growing organism among the contemporary legal systems.

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4. Ibn-Al-Qayyim, A'lamal-Muwaqinin, Vol.III, P.1.

The purpose of the Law is to establish the rule of Law, to secure justice, to maintain peace and security and to promote the welfare of prople both individually and socially. Its basic principles are justice, equality liberty and fraternity which is the bed-rock of modern democracy.

There was a time when Shar'a exclusively regulated all aspects of human conduct in this Country especially in Northern Nigeria[5], which were ruled by Muslims. Criminal Law and procedure, contracts, judicial administration, trade and commerce, were all governed by Islamic Law(Shari'a). With the coming of Europeans, the history then, underwent a momentous change. Subject after subject was gradually excluded from the purview of the Shari'a, and eventually the Scope of Islamic Law was considerably narrowed down to the application of only personal Law as they called it, which means personal status and family matters including marriage, divorce, rights and obligations relating to maintenance, legitimacy, guardianship, succession, hiba and wasiyya.

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5. From the period of Sheikh Usuman bin Fadio up to the coming of the Europeans.

2.3. SUPERIORITY OF SHARI'A OVER ALL OTHER MANMADE INSTITUTIONS AND IDEOLOGIES.

Man is a social being who cannot be able to live alone, like other creatures and has the need of mutual assistance and joint action. By reason of the fact that there remains the need for practical rules of conduct under which man may live, God has provided practical proposition of Shari'a which refer either to matters of future life as ibadat or to matters of life on this earth into different branches of civilisation. In this Almighty God decreed the continuation of this world until the appointed time. This depends upon the perpetuation of man which depends upon his concept of the rules of conduct for his progress and welfare and for his prosperous and peaceful life; spiritually and materially in perpetuation of civilisation.[6]

It is historical to remark that the propositions of the Shari'a have guided the systems of the contemporary world from the very stages of its formation for the welfare of man. It should be kept in mind, nevertheless, that the conceptions of the sacred principles vitally differ in origin from man-made systems. The former are divine while the latter are manufactured or selfishly empirical.

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6. Ibn Khaldun, Muqaddim, Passim.

The former are given by God who is just and who establishes justice and right, while the latter are made by th$_o$se who believe and act on the ideology that "this is better than that", or because it is given by a positive group temporally opportunist. The Shari'a, containing a complete code of life through its evidences has many principles still to be uncovered by human siences. The progress of man is dependent upon his imprefection and the unfolding of mysteries of the universe. The Shari'a is constant invitation, ever superior in this direction.

The Shari'a thus conceives of a social Order as a means of discovering the signs of God and putting them to the service of humanity; it enables the people belonging to that order to show capacity for initiative and unfold the immense possibilities in these signs. The society conceived is called Ummah, which has to set virtues as the object of its social life under the framework of Taqwa, i.e. justice and righteousness. The Holy Qur'an, in this respect, directs: Thus have We made of you an Ummah justly balanced, that ye might be witnesses over the nations, and the Apostle a witness over yourself..."[7] This extra territorial concept of Ummah, according to the principles of Shari'a follows the conscience and acts also in person under the provisions of the set rules.

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7. Qur'an 2:143.

Among the people wholly belonging to an Ummah, the state functions as an instrument providing fields of operation for the righteous people. It means the setting up of standards of righteousnes in all dealings and thus, naturally, the Ummah being the pre-requisite of the state, the power to govern or being a state is granted in the light of the Qur'anic principles.

The absolute sovereignty belongs to Allah, and the same is administered on His behalf by the Ummah as a divine trust placed in the hands of the rulers, i.e. the government for the benefit of humanity. The props of the government are thus trust and justice as the state has trust and justice as ends of religious and secular matters. The government enjoys the right of obedience by the people so long as it conducts the affairs of the Ummah according to the Islamic Spirit and ideals, and no sooner the same is violated, than the government, or those who form it, lose their right and the Ummah may change them. The actual sovereign being God, the ruler or the state has to abide by the limits set up by Shari'a (in the Qur'an, Sunnah of the Prophet (S.A.W),(Ijms and Qiyas) under which every thing is regulated by principle of justice and righteousness which are to be cherished and achieved.

Man-made laws, unable to stisfy human needs, are always subject to amendment and are modified from time to time, according to the changes in man's social life,

The principles of the Shari'a on the other hand are adaptive, dynamic and progressive to meet the challenges of the changing conditions and current demands of life and society, and caters for the Social needs and the genuine requirements of the people. For Shari'ah Laws are flexible containing instructions for the rules of law arising in every society. The modern systems of law, as framed by different Societies, are for a particular social set-up and, in nature being transitory, do not always fully and completely satisfy human needs. The systems are operative only under a rule of enforcement by a body impossing them. The Shari'ah system being divine, is operative for ever; it remains fine and is perennial. The man-made laws do not possess an internal mainfestation but remain operative only till such a time when they are kept enforced by the temporal power. The Shari'ah is operative by internal manifestation and works on human conscience. There is no need of enforcement through belief. It never requires any other authority to enforce it. The initiated system work through a negative approach and consider man wrong in his actions. Here the role of the system ends. In the Shari'ah on the other hand a positive approach is made by the principles of reward which makes man do good deeds, remain human and the best of the creatures. All these lead to the conclusion that the Shari'a system is supreme.

The latest or new movements from the West, like the publications of International Commission of jurist, the movement of democratic lawyers from France and Belgium, and the Legal working and international conventions for elimination of poverty, illiteracy nuclear treaties, women liberation movement and the attempts of many of the humanities to establish a world federation of all human beings go to show that man is in search of an order and a system more comprehensive, for the betterment of his breed. If we compare these new thoughts with the principles of Shari'ah, it may be seen that the solution for man's problems are available; and the solution is to go back and see what Shari'ah dictates about them. Because shariah is not only supreme and in accordance with the needs of man; it also contains principles which are for all time and place.

2.4 THE SOURCES OF ISLAMIC LAW(SHARI'A).

At this juncture, it becomes necessary to discuss the Sources of Islamic Law, to clear up a point of terminology. Muslim writers usually employ the terms Shari'ah and fighu to identify the Law, and maintain that the figh is a version of the Shari'ah if not a synonym,[8] To us the two terms do not designate the something. The Shari'ah is the divine law which Almighty God has revealed and He alone knows best its precise meaning and Commandments.

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8. Haskafi, Durr al-Mukhtar, Vol.1,p.6.

Figh is the process of discovering and understanding the injuctions of the Shari'ah.[9] Therefore figh is necessarily speculative by its very nature, Admittedly it could be changeable according to place and time. The Shari'ah is the substance. The figh is the procedure that makes the substance accessible, presumably within the available means. Hence the term shari'ah may be confined only to the Qur'an and Sunnah of the Prophet (S.A.W.) Therefore the Shari'a as revealed in the Qur'an and the Sunna of the Prophet (S.A.W.), is the creative origin of the Islamic Law, while figh is the demonstrative evidence of the Islamic principles.

The basic sources of Islamic Law are the Book that is, the Qur'an and, then, Sunna which clarifies the Qur'an. During his life time, the laws emanated directly from the Prophet. He had the Qur'anic revelation which he explains directly by his words and deeds. No transmission, speculation, or analogical reasoning was needed. After the death of the Prophet (S.A.W.), direct explanation of the Qur'anic legal significance was no longer available. As to the Sunna the Sahaba of the Prophet (S.A.W.) who were all agreed that it was necessary for the future Muslims to act in accordance with whatever of it reached them, as a statement or practice, through a sound tradition

9. Shafi'i, Risala, p. 78

that could be assumed to be truthful. It is in this sense that legal Sources under Islamic Law predetermined by the Qur'an and the Sunna.

Then, the next source to the Qur'an and Sunna is Ijma or consensus of Muslim jurists. The general consensus of Muslim jurists of a particular age on a question of Law became a substantial proof in legal affairs. The Prophet (S.A.W.) himself is reported to have said "Whatever the Muslims hold to be good is good before God". In another tradition he is reported to have said: "My followers will never agree upon what is wrong." Next Source to ijma is Qiyas (analogy), Many of the things that have happened after the Prophet (S.A.W.) were not included in the texts. Therefore the Muslim jurists compared and combined them with the established indications that were found in the texts, and drew their conclusions from analogy (Qiyas) according to certain rules that governed their combinations. This assured the soundness of their comparison of two similar cases, so that it could be assumed that one and the same divine law covered both the cases. This became another kind of source of Islamic Law.

2.4.1 THE PRIMARY SOURCES

The Primary Sources of Islamic Law which are universally recognised are four, viz.

(i) THE HOLY QUR'AN

Qur'an, is the name of the Book containing the direct revelations from Almighty God. Every word of it is that of the Almighty Communicated to the Prophet Muhammad (S.A.W.) through the angel - Gabriel (Jibril) for the guidance of mankind. "Verily this is a revelation from the Lord of two worlds: " With it came down the Spirit of faith and truth; To thy heart and mind that thou mayest admonish in the perspicuous Arabic tongue."[10] The Qur'an is the original, Primary and sovereign Source of Islamic Law from which all the principles, ordinances, teachings and practices of Islam are drawn. The authority of the Qur'an is supreme and paramount and it is the first source of law not only in point of time but also in point of importance. The name Qur'an, is frequently mentioned in the Book itself. "Ramadhan is the (month) in which was sent down the Qur'an as a guide to mankind, also clear (Signs) for guidance and judgement (between right and wrong---)"[11]

The Sovereign authority to enact laws primarily belongs to God and He is the sole law-giver and has absolute supreme legislative power. The Book contains every thing revealed by God from time to time through the medium of the Prophets and messengers.

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10. Qur'an 26:192-95.
11. Qur'an 2.185; See also 10:37 and 61

"We gave Moses the Book and followed him up with a success of Apostles. We gave Jesus the Son of Mary clear (Signs) and strengthened him with the Holy Spirit."[12] The Qur'an contains the truth, allegories, description, blessings, and shows light as to where right and justice lie. Giving a practical way for humanity, it contains the Shari'ah principles which are perfect and complete.

In the Qur'an, there are 114 Suras or chapters which are divided into ayats or verses. The chapters vary in length. The longest contains 286 and the shortest only 3 verses. Most of them, however, were revealed piecemeal to Prophet Muhammad (S.A.W.) during the two periods of his call.[13] "The unbelievers ask: (Why was the Qur'an not revealed to him all at once? (We have revealed it) thus so that we may strengthen your faith. We have imparted it to you by gradual revelation. No sooner will they come to you with an argument than we shall reveal to you the truth and properly explain 1."[14] Historically, the verses of the Qur'an are divided into:

(i) The Meccan verses which were revealed over the thirteen years of Prophet's ojourn in Mecca after his being raised to the dignity of Prophethood.

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12. Qur'an 2:87
13. The Makkan Period(610-622 A.D.) and the Madima Period (622-632 A.D.).
14. Qur'an 25:32 and 33.

Ninety suras or verses are said to have been revealed in Mecca and within the period. The verses, especially the oldest of them, all enjoin upon the Meccans belief in the Resurrection, the last day of judgement, and the final reward or punishment of human acts in the world to come (al-Akiyamah).

(ii) The Medinan verses relate to the ten years of the Prophet's residence at Medina, after the immigration. Twenty four suras or chapters are said to have been revealed within this period. The Medina verses are concerned with detailing the legal rules.

During the life time of the Prophet (S.A.W.) the verses of the Holy Qur'an were in a Scattered form, there being no complete collection of all the revelations. The Prophet used to recite the revealed portions, to his compaions, who would commit them to memory or record them, During his lifetime, therefore, the need was not felt for collecting the recorded parts in one volume. But following his death, the first Caliph Abubakar (632-634 A.D.) ordered on the advice of Umar that the recorded portions be collected and arranged in the form of a book. However the assemblage was not left to the arbitrary discretion of the Muslims but was a part of the divine Scheme.

"It is for us to collect it and to promulgate it. But when we have promulgated it, follow thou its recital as promulgated)[15]. Thus a copy of the Book was provided containing the complete version of the Qur'an. Under Uthman, the fourth Caliph, the collected portions were arranged in the present form.

The legal commandments of the Qur'an could be classified into two categories, in so far as interpretation is concerned namely, (1) The muhkam, decisive, which contain the fundamental precepts of Islam and are therefore, the basis of the Book. They are of obligatory character, force. (ii) the mutashabih, Obscure, which comprise the verses liable to different enterpretation.Primarily, they are not of an obligatory character since they need more elucidation. They may in a way, conform to what is defined in mordern terms as explicative interpretative and complementary rules. This classification is inferred from the Qur'an itself:

> "He, it is who has sent down to thee (Muhammad) the Book in it are verses Basic or fundamental (of established meaning); they are the foundation of the Book: Others are allegorical. But those in whose hearts is perversity follow the part thereof.

15. Qur'an 75:17 and 18.

> That is allegorical, Seeking discord, and searching for its hidden meanings. But no one knows its hidden meanings except Allah and those who are firmly grounded in knowledge, Say, "We believe in the Book; the whole of it is from our Lord:" And none will grasp the Message except men of understanding."[16]

The Qur'an is of very mixed content and deals with various subjects. The major portion of the Qur'an is Code of divine exhortation and moral principles. Approximately 500 verses of the Qur'an deal with the Legal matters. Thus, it may be seen that the Qur'an gives out and guides to a kind of polity or state to be formed by the Muslims under the predominance of the Ummah. Consultative principles are there, but the methods as how to establish the same for practical use are not given in details. The details are provided by the Sunnah of the Prophet (S.A.W.) His sayings or deeds, his approbation or disapprobations guide the particular issue. The Qur'an Says: "And what the Apostle gives you, take and what he forbids, desist from---"[17]. Similarly in another verse the Qur'an declares: "O ye who believe, Obey God, and obey the Apostle, and those charged with authority among you.

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16. Qur'an 3:6
17. Qur'an 59:9
18. Qur'an 4:59.

If ye differ in anything among yourselves, refer to God and His Apostle, if Ye do believe in God and the last Day. That is best, and most suitable for final determination."[18] With this background, the Tradition of the Prophet (S.A.W.) possess a place second to the Qur'an as an independent source of Law under the Shari'ah.

(ii) SUNNAH OR HADITH(TRADITION)

The Second important source of Islamic Law which ranks next to the Qur'an, is the Sunnah, the practice, the precedents and the precepts of the Prophet (S.A.W.) for the Prophet Muhammad (S.A.W.) was not only the transmitter of the Qur'an but he also interpreted and complemented it. The only difference between the ordinary expressions of the Prophet and his revelations consists in the fact that, where as the former are Divine content alone, the latter are divine in form also. The ground for this view is afforded by the Qur'an itself: "Your companion is neither astray nor being misled; Nor does he say (ought) of his own desire. It is no less than inspiration sent down to him. He was tought by one Mighty in power."[19] And in another verse it says: "(We sent them) with clear signs and Book of dark prophecies; and we have sent down unto thee (also) the Messege; that thou mayest explain clearly to men what is sent for them, and that they may give though."[20]

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19. Qur'an 53:2-5
20. Qur'an 16:44.

Sunnah literally means a way or rule, or manner of acting or mode of life. This in essence signifies the ideal practice, examplary conduct or the modern behaviour of the Prophet (S.A.W.). Sunnah is defined by jurist as the utterances of the Prophet (Other than the Qur'an) known as hadiths, or his personal acts and sayings of others tacitly approved by him. Sunnah has also another technical meaning in reference to religious duties namely, that which is recommended, although not obligatory according to the classification of the Shar'a values.

The exposition of the Qur'anic injunctions is thus, one of the main responsibilities of the Holy Prophet (S.A.W.) which he had to undertake on the authority of the Almighty Allah who had revealed to him the Holy Qur'an. This task of exposition and elucidation has a divine sanction behind it as the Prophet does not speak or act of his own accord. What ever he says and what ever he does emanates from the Almighty God - Himself.[21]"----- Say: "I follow only what is revealed to me by my Lord. This Book is a veritable proof from your Lord, a guide and a blessing to true believers."[22] This shows that he speaks only when there is an objective necessity for it and he acts because God Commands him to do so. In a number of verses of the Holy Qur'an, the Muslims are enjoined to accept his guidance as final in

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21. Qur'an 53:2-5
22. Qur'an 7:203

all spheres of life, since his guidance is divinely inspired and as such, is as binding on a Muslim as the guidance found in the Qur'an, "And what ever the Prophet gives you, accept; and what so ever he forbids you, avoid."[23]

It is as such apparent from the Qur'an itself that just as the recitation and preaching of the divine revelation form a part of the Apostolic duties of the Holy Prophet, so, also, does their exposition and interpretation. It follows, logically, that if the text of the Qur'an is binding and absolute, its interpretation, as furnished by the Prophet, is also the same, or else it will be meaningless to have charged him with the teaching of the Book and made it a part of his Prophethood mission. To sum up, on the basis of these Qur'anic pronouncements the Holy Prophet is not only the Messenger of Allah but the teacher and interpreter of the divine Message as well. Right from the time of the Sahaba (Companions) down to this day there has been consensus of opinion amongst the Muslims that what ever is authentically transmitted to us by the Holy Prophet (S.A.W.), be it in the form of the Qur'anic revelation or his commands, or his expatiations and enunciations of the will of God, is the only reliable source of Sharia. This is made clear by the Qur'an itself:

> "He that disobeys the Apostle after guidance has been made clear to him and follows a Path Other than that of the faithful, shall be given what he has chosen. We will cast him into Hell: A dismal end."[24]

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23. Qur'an 59:7
24. Qur'an 4:115

The teaching of "Wisdom", also has been declared in so many verses of the Holy Qur'an to be a function of the Prophet (S.A.W.) along with the teaching of the Holy Qur'an:

> "And Allah has revealed to thee the Book and the wisdom and tought thee what thou knewest not, and Allah's Grace on thee is very great.[25] And remember Allah's favour to you and that which He has revealed to you of the Book and wisdom administing you thereby[26].

Here, the point to note is that "Wisdom" is something separate from the Qur'an. Wisdom, therefore may mean the elucidations and enunciations of the Will of Allah by the Prophet (S.A.W.). If the Holy Qur'an embodies the will of God, the authentic records of ahadiths embody its practical implications which are called wisdom and which it was the duty of the Holy Prophet (S.A.W.) to vouchsafe to humanity as was his duty to vouchsafe to the people,[27] as the Qur'an itself testify:

> "Allah did confer a great favour on the believers when He sent among them an Apostle from among themselves, rehearsing unto them the signs of Allah, sanctifying them, and instructing them in Scripture and Wisdom, while before, that, they had been in manifest error."[28]

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25. Qur'an 4:113
26. Qur'an 2:231
27. Mishkat-ul-Masabih, Vol.I, Translated by Abdul-Hamid Siddiqi, 1980, New Delhi Page VI (Introduction)
28. Qur'an 3:164.

In view of these Qur'anic verses all Muslim jurists agree that the word "wisdom" as occurred in the veres denotes the Sunnah, and futher, that the Sunnah, too, is a kind of divine revelation. Ibn Qayyim, in commenting on the verses, remarks:[29]

> "Allah, the Glorious One, sent down two kinds of revelations to His Apostle, and made it obligatory to believe in and act upon both of them. These are the Holy Qur'an and wisdom. The "Scripture" mentioned in them means the Qur'an and "wisdom" in the unanimous opinion of the pious precursors, the Sunnah. What the Apostle communicated after knowing about it from God and what God revealed through the tongue of His Apostle are equally required to be accepted. It is a fundamental and universally accepted principle among the Muslims and whoever denies it is not one of them. The prophet, himself, has said, "The Qur'an was bestowed upon me, and, along with it, another thing which was similar to it."

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29. As quoted by Muhammad Manzoor Nomani in his Meaning and Message of the Traditions; vol.1, p.19.

During the life time of the Prophet (S.A.W.) Muslims restrained from compiling his tradition under the impression that it might get confused with the Qur'an, and memorywas the chief means of their preservation. The Prophet (S.A.W.) himself sometimes did object to the writing down of the deeds and sayings. Abu Hurairah is reported to have Said:

> "The Prophet of God came to us while we were writing traditions and said: What is this you are writing? We said: Saying which we hear from thee. He said; what! a book other than the Book of God?"

Now the disapproval in this case clearly shows fear lest his sayings be mixed up with the revealed word of the Qur'an. It is because of this that the Prophet's companions who were mostly Arabs and who had a wonderful memory with which they immaculately retain what ever they in the Prophet's life or whatever they heard from him. Despite the prohibition of putting down in record what the Prophet had said or deed and inview of the importance of the Prophet's ahadiths, some of the companions began to record the ahadiths in Sahifahs during the Prophets life time which were later on used either by them or their students. For example Abdullah bin Amar recorded thousands of ahadiths which later on known as Salifah as-Sadiqa others like Samura bin Jundub, Jabir bin Abdullah, Abdullah bin Abbas, Abdullah bin Mas'ud, Ali bin Abi Talib, Abu Huraira, Hamman bin Munabbih and Others are said to have Sahifahs from

which they have recorded some of the Prophets utterances and addresses, judgements and verdicts on different issues and his actions and deeds in all sorts of circumstances.

> "It is reported on the authority of Abu Said Khudri: We were sitting and writing what we were hearing from Allah's Messenger(S.A.W) that he turned his attention to us and said: What is that you are writing? We said: We are writing that what we are hearing from you. Where upon he said: Are you writing another Book along with the Book of Allah. Keep the Book of Allah Separate and make its text pure so that there may not be confusion in it.[30]

This explains the reason why the Prophet (S.A.W) at one stage prohibited the writing of his ahadiths. So it should not be taken as if he had prohibited the writing totally.

Imam Khattabi who was a famous Muhaddith writes:[31]

> "He (the Prophet S.A.W.) Prohibited the writing of the words of the Holy Qur'an and those of ahadith together lest there should be any inter-mingling in them and the reader may be confused. The writing of hadiths (itself) is in no way Prohibited."[32]

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30. Miskat-ul-Masabih, Translated by Abdul Hameed Saddiqui (introduction)iv. See also Sahih Muslim vol.1, Translated by the same person (Introduction) III.
31. Majma' al-Zawaid, vol.iv, p. 152
32. Ma'alim Sunnah, vol.iv, p. 184.

From this hadith it became clear that at first the Companions of the Prophet (S.A.W.) use to have their collection of ahadiths in memory or in writig.

(i) THE COMPILATION OF THE SUNNAH

After the death of the Prophet (S.A.W.) the Muslim Ummah felt the need of a collection of the ahadith to be available for consultation whenever there is need. After the death of the Prophet, every case that came up for decision had to be referred either to the Qur'an or Prophetic tradition, that is to his Sayings, judgement or deeds. When Umar, the Second Caliph was sending people into villages he ordered them to concentrate on teaching the Qur'an and not the traditions of the Prophet (S.A.W.) At that time, the authorised copy of the Qur'an had not been finalised and sent to the various provinces. There was a risk that people who are new to Islam may confuse the hadith for the Qur'an. Later, during the Second century of Islam, Umar Ibn Abdal-Aziz, one of the Umayyad Caliphs, sent out emissaries to all the outlying provinces to teach people Shari'a Law and to record traditions after consulting the learned jurists; because by that time there was no risk of confusing the hadith for the Qur'an and in his letter to his governor in Medina, Abubakar bin Hazm, the Caliph showed his concern for the preservation of knowledge of the Sunnah.[33]

Thus, in the middle of the Second Islamic Century, some Muslim theologians started the task of compiling of ahadith.

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33. Isliam Ghanem, An outline of Islamic jurisprudence, unpublished Research Memo Series [illegible] ABU, Zaria

In order to ascertain the authenticity of every hadith narrated, a number of strict rules were formulated by the traditionists. These rules relate to both parts of the hadith: Isnad (chain of transmission) and matn (tex). The life, the character and trustworthness of those through whom the hadith is transmitted, i.e Isnad can be reliably judged with the help of Asma al-Rijal, a Science which critically scrutinises the lives of the narrators of the Ahadith[34].

The compilation of the Ahadith are of two types:

(i) The Masanid. These consists of traditions complied in accordance with the sources of authority for their narration, i.e. in accordance with the names of the narrators who had quoted the tradition, down to the companion who had himself heard the statement or witnessed the event from the Prophet[35].

For example, Bukhari reported in his Book, (chapter 30, Tradition No.26) "Abdan related to us (Saying) Yazid bin Zurai informed us Saying: Hisham related to us Saying: Ibn Sirin related to us from Abu Huraira from the Prophet (S.A.W.) that he said "If any one forgets and eats and drinks, let him complete

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34. Doi, Shari'ah: The Islamic Law, p.53, Ta Ha Publishers London.
35. Doi, Ibid.

his fact; for it is Allah who caused him thus to eat and drink." The best known of these kind of traditions is the Musnad of the Imam Ahmad Bin Hanbal, which contained about 30,000 traditions.

(ii) The Musannafat. These consist of classification of the traditions in accordance with the various topics of jurisprudence. The most famous of these is al-Muwatta'a by Imam Malik. Ibn Anas, which contain over 300 traditions.

In the third century A.H., the famous Sunni compilations known as Sahah sitta (i.e. six Book) appeared. They consists of the two Sahih books and the four Sunan books. The two Sahihs are compiled by Muhammad Ibn Isma'il al-Bakhari (194-256 A.H; 870 A.D.) and Muslim bin al-Hajjaj bin Muslim (206-261 A.H., 875 A.D.) both travel widely to investigate meticulously the correctness of the narratives and the chain of authority of transmission. The four Sunnan books of Abu Dawud al-Sijistani, al-Tirmidhi, al-Nasa'i and Ibn Naja appeared after the two Sahihs. To the Shi'is, the leading compilation is al-Kafi by a Shi'i jurist called Muhammad bin Yaqub bin Ishaq, known as al-Kulini.

It should be clear. that the number of traditions is counted on the basis of chain of transmission and not on the basis of the text. It is essential to make it clear as the ignorance about this fact has given rise to some serious misgivings under which so many orientalists such

as Hurguronje, Goldziher and Schacht and other westernized Muslims such as Fyzee in the Second edition of his book have tried to show that every tradition is unrealable unless otherwise proved, is not only wrong but an attempt to represent traditions as an edifice created by forgery and fabrications. The Muhaddithin i.e. (Muslim theologians) themselves recognised that a number of such stories are daif (week not to be relied upon). They are doing this in order to attack Shari'a Law by totally destroying one of its principal foundations namely, Sunnah. A modern author, in commenting on this has said:

> "That the existence of false Traditions should not be taken to imply, as a number of Orientalists have alleged, that every tradition should be considered false until the contrary is proved. The doctors of the science of traditions did not accept traditions uncritically. In their criticism of narrators, and in their search for chain of authority, accuracy and trustworthiness, they had established a scientific and truthful criterion which made study in this field reliable and trustworthy."[36]

(ii) CLASSIFICATION OF AHADITH

The Traditionists classified traditions as Mutawatir (of consecutive testimony); Mashhur (famous); a hadi or Khabar al-Wahid (one-man narrative) or Mursal (not connected with the Prophet in its narration). This is a classification according to

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36. Mahmassani, 76

the number of narrators and was therefore used in the compilation of the traditions. After this, the specialists in ILM ul-Hadith proceeded to classify the hadith in accordance with quality as follows:

(i) Sahih (Sound). This is a tradition which is utterly faultless in which there is no weakness either with regard to the chain of transmission (Isnad) or with regard to the text (math).

(ii) Hasan (approved). This is like a Sahih tradition except for the fact that some of its narrators are found to have defective memory as compared to narrators of Sahih hadith.

(iii) Da'if (weak). The hadith in the chain of transmission of which the number of narrators is reduced to one at any stage is known as Da'if hadith, and which is not acceptable to jurists. So also a hadith which ranks as gharib (Strange) is not acceptable."[37]

(c) AL-HADITH AL-QUDSI

Beside the practices, the precedents and the precepts of the Prophet Muhammad (S.A.W.) which have been discussed above and regarded as the Sunnah of the Prophet, there is another special type of hadith

37. A.R. DOI Supra, 56-57 See also I. Ghanem Supra, P.17.

known as Hadith ul-Qudsi in which the Holy Prophet (S.A.W.), states something attributing that to All Mighty Allah: An example of Hadith ul-Qudusi related in Sahih Muslim is "O My Servants! I have made oppression unlawful for Me and have forbidden this oppression for you also. Therefore, don't oppress one another. You all go astray except one whom I direct to the right path. Hence beg guidance from Me only."

2.5. THE HUMAN LEGISLATIVE ELEMENT IN ISLAMIC LEGAL SYSTEM.

Despite its religious nature and divine origin, Islamic law, like any other legal systems dealing with human relations and activities, passed through a long process of development which in one way or another, was well associated with the development of the growing Muslim Community and the expanding Muslim State. It is noteworthy that the divine text (i.e Qur'an), upon which the whole structure of Islamic Law has been built, was revealed in parts and portions within a span of 23 or 24 years, according to the needs of the Muslim Umma. This gradual revelation necessarily resulted in gradual change in the Law which had been inforce. Islamic Law, does not ignore the necessities of the changing life and the needs and circumstances of individuals and the Community. Hence it can be unhesitantly stated, as one of the characteristics of Islamic Law, that it is a realistic, practical and flexible system. The following Qur'anic verses illustrate the point "Allah intends every facility for you: He does not want to put you to difficulties.[38]

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38. Qur'an 2: 185.

"One no soul does Allah place a burden greater than it can bear."[39]

While the Prophet (S.A.W.) was alive, it was always possible for individuals and officials, to find solutions for their problems by referring to the Prophet himself. On more than one occasion, where there was no direct Qur'anic provision covering a point, the Prophet and his companions (especially the governors, Commanders, judges of the dispatches and other officials) used their own discretion in discussing some problems. It was clear that, the Qur'an and the Sunnah of the Prophet (S.A.W.) continued to have legislative effect, but with the growth of time, it becomes necessary to deal with numerous problems which could not be decided by reference only to them. The Original law making, strictly speaking, terminated with death of the Prophet with no further possibility of any revelation. New problems of Law had to be decided on some other basis. Furthermore, as early as the days of the Prophet, the contributions of the well-versed Muslims in ascertaining the meanings of the text or deducing rules for new cases took the title of Ijtihad,[40] a general term comprising all the methods of interpretation and deduction were recognised.

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39. Qur'an 2:286
40. Literatly the word "Ijtihad" means to put in the maximum of efforts in performing a job but technically it signifies maximum effort to as certain, in a given proble or issue, the injunction of Islam and its real intent: Maududi P.72.

Sayyid Abul Ala Maududi who is a contemporary Islamic Scholar when writing on the Scope of human legislation under the Shari'a says:

> "In certain matters the Qur'an and the Sunnah have laid down clear and categorical injunctions and prescribed specific rules of conduct. In such matters no jurist; judge, legislative body, not even the Ummah as a whole, can alter the specific injunctions of the Shari'ah or the rules of behaviour expounded by it. This does not mean, however, that there is no scope of human legislation in relation to such matters as lies in,
>
> (a) finding out exactly and precisely what the law is: its nature and extent,
>
> (b) determining its meaning and intent;
>
> (c) investigating the conditions for which it is intended and the way in which it is to be applied to the practical problems.
>
> (d) working out minor details in the case of such laws as are too brief for a straight away application in actual life, and
>
> (e) determining the extent of its applicability or non-applicability in case of exceptional circumstances.[41]

41. Maududi Abu Ala, Islamic Law and Constitution, 5th Edition 1975, Lahore Pakistan, P. 70.

2.5.1 IJMA (Consensus of Opinion)

With new and complicated problems, the companions were in agreement that reference should be made first to the Qur'an and then to the Sunnah of the Prophet. And in the absence of the divine guidance they used to make their own judgements, using different types of reasoning by comparing cases and extending existing rules to cover new cases, (avoiding unreasonable hardship and unnecessary complications) or by Observing the aims and objectives of the Law or otherwise refering to the basic presumptions and the general principle of Shari'ah.(42) In major issues, the Caliphs who usually gave preference to Communal decisions, used to hear the opinions of the other Companions either in closed or open meetings especially in Medina, Kufah and Basrah.

Following this procedure, the Companions during the period of four rightly guided Caliphs reached certain agreements on several legal points, These agreements taken in the light of the Qur'anic verses ordering the Muslims to keep together and avoid divergence, and with reference to the traditions of the Prophet(S.A.W.) and the reports from his companions assuring the infalibility of the Muslim Community as a whole, were considered binding by the following generations, and henceforth the agreement of the companions or the Muslim jurist in any particular age on judicial rule was given the name of Ijma, (i.e. the consensus of opinion) which is regarded as the third source of Islamic Law.[43]

42. Abdur Rahim, The Principles of Muhammadan jurisprudence, 1911 edition, Lahore, P. 18.
43. Ali Hasaballah, Usul al-Tashrii, al-Islami, 4th edition, 1971 Cairo, pp.120-121.

Although the Muslim jurists give Ijma the third place in descending order, mordern criticts consider it to be the most important element and potent Source in Islamic Law, for an examination of the corpus of fiqh (Islamic jurisprudence) reveals that a major potion of the law consists of the consensus of opinion of jurists on legal questions.[44]

'QIYAS'

The continuous expansion of the Muslim state put more burden on the Muslim jurists. During this period, the Qur'an Sunnah and Ijma were taking the first three places as source of Islamic Law. But the new events could not be met by the direct provisions of the texts and the limited precedents of ijma and recourse was inevitably made to personal judgement based on case comparison deductions or by observing the aims and Objectives of the Law, or following the basic presumptions and the general principles of Shari'ah. The case-comparison method was generally given the name of Qiyas.'

Qiyas or analogy is a process of deduction by which the law of text is applied to cases which though not covered by the language, are governed by the reason of the text. Qiyas may be defined as follows:

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44. Snouck Hurgronje, Selected works, P.289.

"To apply to a new case, about which the Law is silent, the rule of an original one because of the Common illat or effective cause which is common to both of them."

The following example would make the above rule clear. Strong drink, for example is prohibited by explicit provisions. The cause for the prohibition is the intoxicating effect. If we assume that wine had not been explicitly prohibited, we are still able to equate it by analogy to strong drinks in general, since the causes for the prohibition is the effect of intoxication, to which both give rise. Similarly if there is no intoxication, there is no prohibition.[45] It is now clear that the bed-rock of Qiyas is the effective cause, illah, upon which the rule, hukum is based. It is defined as the attribute or indication which shows the rule or makes it known, with regard to a certain case.

The great majority of the Muslim jurists accepts Qiyas as a source of Islamic Law. Those who accept it as such include the main Sunni Schools and the Zaidi Shi'i School. On the other hand we find the Zahiri Sunni School leading the opposition against Qiyas and reasoning in general.[46] The Immamiyya Shia school is also counted among the opposers of Qiyas together

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45. Mahmassani, Falsafat Al-Tasrih Fil Islam: Translated by Farhat J. Ziadeh, Leiden, 1961, P.79.

46. Ibid, P. 80.

with individuals like Al-Shaukani who died (1255 A.H.)

Some orientalist like Margoliouth, Schacht, Arberry and Others, propagated a theory, which considers Qiyas "as a case of technical influence of Jewish on Muhammadan jurisprudence.[47] Qiyas, as a method and term, according to this theory, is borrowed from Jewish Law. The term as they say, is derived from the exegetical jewish term <u>hiqqish</u> from the Armaic root meaning to beat together. The word hiqqish as Schacht explained is used by Hillel in three meanings one of which is identical with that of Qiyas. Then he simply concludes that: "The existence of a concrete meaning in Armaic and not in Arabic, makes the foreign provenance of the term certain".

2.5.2. <u>DEVELOPMENT OF FIQH</u>

The corpus of what is known as Islamic Law as distinguished from the Shari'a was developed by Muslim jurists through the systematic Science of 'fiqh' in an attempt to meet one or all of the points stated earlier[48] which call for human effort to understand the divine injunctions and apply them to the believers' practical life and ever-changing circumstances. These processes and methods of developing fiqh evolved over centuries and the jurists have technical names for them.

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47. J. Schacht, <u>The Origin of Muhammadan Jurisprudence</u>, 1967, P. 99.
48. At Page 27.

The most prominent methods are Ijma, Qiyas and Ijtihad, "to put maximum effort to ascertan , in a given problem or issue, the injuction of Islam and its real intent" to use Maududi's definition.[49] These sources are Secondary to Qur'an and Sunnah in validity and authority. In any event they derived their binding force, for the most part, from the latter either directly or indirectly[50].

The Ijtihad, as Source of Islamic Law, is recognised on the authority of a tradition related to the Prophet (S.A.W.). "On being appointed Governor of Yamen Mu'az was asked by the Prophet (S.A.W.) as to the rule by which he would judge the affairs of his people. He replied that he would judge by the Law of the Holy Qur'an. But if you do not find any direction therein, asked the Prophet. Then I will act according to the Sunnah of the Prophet. But if you do not find any direction in the Sunnah, he was asked again. Then I will execise my judgement and act on that, came the reply. The Prophet (S.A.W) raised his hands and said Praise be to Allah who guides the Messenger of His Apostle as He Pleases." This human legislation, was approved by the Prophet (S.A.W). There are numerous Other Qur'anic and Sunnah authorities for this method and all the Others.[51]

During the life time of the Holy Prophet (S.A.W), there was no problem as it was always possible for the individuals and officials to find solutions for their problems by referring to him directly.

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49. Maududi, Op.Cit., p. 72
50. DOI, Op. Cit. , P. 64
51. These are too many to mention here. Refer to M, Abu Zahrah, Usul al-Fiqh, P. 107 Cairo; and Abdur Rahim, Op. Cit., For a more detailed treatment of these topics in Arabic and English respectively.

But, it was after his death and during the period of the four Rightly guided Calips that the need for greater use of the Secondary Source arose. Having been faced with difficult problems such as the rebellion of many Arab tribes, the collection of Holy Qur'an, the expansion of Muslim Community and many other complicated problems, the Companions were in agreement that reference should be made first to the Qur'an, and then to the Sunnah of the Prophet (S.A.W.). And in the absence of the divine guidence they used to make their own judgements, using different types of reasoning by comparing cases and extending existing rules to cover new cases.[52] Following this procedure, they reached certain agreements on several legal points. At the sametime they used to differ in several respects. These differences of views whether in interpreting the text, reconciling between conflicting authorities or in taking one way of reasoning or the other resulted afterwards in the emergence of different schools of Law.[53]

The period between the early part of the 2nd and the end of 4th Century after Hijra (mid-9th-12th century A.D.), the period which usually described as the golden age of Islam Law and literature witnessed the most active development of Islamic Law.

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52. Abdur Rahim, Op. Cit., P.18.
53. Muhammad Al-Khudari, Tarikh al-Tashri al-Islamic 8th edition, 1967, pp.97-107. See also Dasuq, Al-Ijtihad Fil Fiqh al-Islami pp. 63-76.

In addition to the continued exercise of ijtihad major Hadith works were compiled, the formulation of the science perfected, and the well-known Islamic schools of law were established. With the crystallization of the schools, the right of independent deduction , or ijtihad was regarded as having progressively fallen into abeyance, and in the classical view the door of ijtihad became closed by the end of the 3rd century which action resulted in the stopping of all original juristic activities to develop the fiqh and the subsequent classificatiorand rigidity of the body of Islamic Law which passed on to succeeding generations of Muslims to date.

In the 2nd century of Hijrah arose the great jurists who codified the Islamic Law according to the need of their time. As early as the period of "Tabi'un", a practice of identifying jurists of one centre of learning or another with some of their characteristic methodology of ijtihad as distinguished from that of the Others had started to develop. The Hijaz centre first under the leadership of jurist like Said bin Masayyib and later Malik bin Anas was referred to as school of "traditionalists". They were called so because of their refusal to accept or to pay any attention to any imaginary cases, looking only in the actual events with reference to the text and the traditional knowledge including the opinions of the companions and the earlier followers, and very rarely and hestitently depending on personal judgement.[54]

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54. Ibn Khaldun-The Mukaddima, England, Trans by F. Rosenthal, 2nd edition, London.

While the Iraqi centre under the leadership of jurists like Ibrahim al-Nakha'i and Abu Hanifa was identified as the School of "Ahl Al-Ra'ayi." They were so named because of their less restrained resort to independent opinion in the absence of clear Shari'a texts or precedents from the companions.[55]

With the development of these centres emerged the idea of schools of law. The idea developed further when disciples and common followers of a leading jurist in one centre began to ascribe juristic opinions and formulations to the leader in the name of the School even where, as was very often the case, the opinion was not originally his. Numerous such schools sprouted including the following who are well-known. The first of these in point of time is Abu Hanifa Nu'man Ibn Thabit who was of persian origion was born in the year 80 A.H. (6999A.D.). and died 150 A.H., (767 A.D.). He studied jurisprudence in Kufah under Sheikh Hammad Ibn Abi Sulaiman. In addition of being a student of Law he was also a textile merchant, and this calling enabled him to be practical in approach to Law. The main features of his school are, apart from the Qur'an and Sunnah which he used very sparingly, he also employed Qiyas and Istihsan, juristic preference as bases for Shari'a.[56]

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55. For more detailed discussions of the subject of Origin of the Islamic School of Law, See A.T. Pasha.
56. M. Mahmassani, Supra, P. 19.

Among the disciples of Abu Hanifa were two great jurists, Abu Yusuf 113-182 A.H. (731-798 A.D.) and Muhammad bin al-Hassan al-Shaibani 135-189 A.H. (749-802 A.D.) Abu Yusuf was the Chief judge of Baghdad during the time of Caliph Harun al-Rashid.

MALIKI SCHOOL

This school owes its name to its founder Imam Malik bin Anas, who was born in Madina in the Year 95 A.H. (711 A.D.) and died on 11th Rabi'ul Awwal, in the year 179 A.H., (795 A.D.). The Maliki School, while recognizing the Qur'an and Sunnah as Source of Law, it also relied heavily on the practice of the people of Madina and sayings of the Companions. He made reccurse to Qiyas in the absence of an explicit text. He has also made use of a Source unique to the School; known as al-Masalih al-Mursalah public interest. Maliki's major works includes his Muwatta. Madina was the birth place of the Maliki School and from there it spread throughout the Hijaz, North Africa and spain and now in West Africa there are alot of Maliki followers.

SHAFI'I SCHOOL

This School is known after the name of Imam Muhammad Idris Al-Shafi'i who was born at Gaza in the year 150 A.H. (767 A.D.) and died in the year of 204 A.H., (821 A.D.). He is generally regarded as the founder of the science of usul on which he has written his risalah which has made great impact on the Islamic jurisprudence in general. Imam Shafi'i during the early part of his academic carier was a follower of Imam Maliki.

However his journeys and experiences changed his views and led him to establish this school. The School as regarded by some jurists, is a compromise between the Hanafi and Maliki Schools. Mahmassani beautifully summed up the phlosophy of this School in the following words:

> "He (Imam) would accept the four Sources of Law; the Qur'an, the Sunnah, consensus of opinion and analogy. He would also accept Istidlal. However he rejected what the Hanafi school called Istihsan (Preference) and what Maliki School called al-Masali al-Mursala (Public Interest).[57]

This School is followed in many parts of Egypt, Syria and Lebanon (particularly in the city of Beirut) as well as Iraq, Pakistan, India, Indo-China, Java and among the Sunni inhabitants of Iran and Yamen. It is predominant in palestine and Jordan.[58]

HAMBALI SCHOOL

This is the last of the Sunni Schools. The School is known after Abu Abdullahi Ahmad bin Muhammad bin Hambali. Ibn Hambal was born in Baghdad in the year 164 A.H. (780 A.D.) and died in the year 241 A.H. (857 A.D.). Ibn Hambal travelled extensively through Iraq, Syria, Hijaz and Yamen in search of hadiths which he wrote down later on, in his book Musnad.

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57. Mahmassani, 27
58. Syed Khalid Rashid, Muslim Law, 2nd edition 1979, p.21

Ibn Hambal adhered rigidly to the Qur'an and Sunnah in formulating his legal theories and restricted Qiyas and ra'ay within narrow limits. This School is the least widespread of all the Sunni Schools. But it had however produced great Scholars in the field of Islamic jurisprudence. Foremost among these were Ibn Qudama, al-Maqdisi, Ibn Taymiyah and his disciple, Ibn Qyyaim, and, lately Muhammad Ibn Abd al-Wahab. This School has its followers mainly in Saudi Arabia and some very few in palestine, Syria, Iraq, and Other Countries.

In conclusion mention should be made of some of the extint Schools of Law. The most important of the extient Schools were those founded by Al-Awza'i who died in the 2nd Century A.H.; Dawud Ibn Ali al-Zahiri, who died in the 8th Century A.H.; and al-Tabari. Apart from these three extinct Schools and those four surviving ones no other School of Law emerged among the Orthodox Muslims. For, by the middle of the2nd Century of the hijra many individuals, instead of working out indepent doctorines of their own, started to follow the teaching of a recognized authority in its broad outlines; while reserving to themselves the right to differ from their masters on any point of detail. These latter jurist were known as Muqallidum, literally "those who follow another in what he says or does, firmly believing him to be right therein, regardless of proof or evidence".[59]

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59. Shorter Encyclopaedia of Islam, art. Shari'ah.

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While the founders of Schools and their immediate followers were each accorded the status of a Mujtahid, that is the person qualified to make ijtihad, and from the six century hardly anyone was allowed the status of mujtahid - with the possible exception of al-Suyuti and Ibn Taymiyah, both of whom claimed it with full justification. That is why people came to talk of the "closure of the door of ijtihad."

After the closure of the door of ijtihad, the Law became immutable and static. The work of the jurists was confined to the systematic analysis of the doctrine of their predecessors. Original works of the classical period were commented upon and some of the Commentaries were regarded as authoritative texts in various schools, e.g. the Mukhtasar Khalil for the Malikis, the Hedaya of Marginnani for the Hanafis and the Mughni of Ibn Qudama for the Shafi'is. But between the 10th Century and the present day the Muslims have undergone various changes both socially and economically. As a result of these changes some of the mediaeval doctrines have been found harsh and oppressive and the Competence of Shari'a Courts has been confined to matters of family law. The doctrine of Siyasa allowed the political authority to confine and define the jurisdiction of his courts by asking them to apply one view out of many. Resting upon the principle that the views of the different Schools and jurists are equally authoritative the reformers changed the nature of the Law applied in the Hanafi Courts considerably.

Through this processes a lot of reforms are made by some Muslim countries especially in the areas of family Law. With increasing use and recognition of ijtihad the Scope of reforms achieved has been immense and it is obvious that the Law is no longer immutable.

All jurists especially the leaders of the Orthodox Schools of Law did make the important acknowledgement that there was nothing rigid or canonical about their views or formulations; that they were fallible as all other human beings; and that the only sacrosant rules are the rules and injunctioncontainedin the Qur'an and Sunnah. They did not demand the blind and unquestionable allegiance accorded their views and schools either. Indeed Imam Malik is reported to have said, in a very famous statement, that there is no one from whose opinion you could not accept in part and reject in like manner except the Holy Prophet Muhammad (S.A.W.)[60] From this, it is clear the notion that the Shari'a was immutable came after the closing of the door of ijtihad not before it. Since modern research has disapproved the closing of the door of ijtihad, naturally the whole concept that the Shari'a is immutable is erroneous.

If the Shari'a is meant for all ages as Muslims claim, it must then adapt itself to the changing circumstances. This could only come about by applying ijtihad, a thing which modern jurists have an unquestionable right to do for that was what their predessors had done. There had arisen exceptional personalities in the past and there are signs and trends, though not very significant, pointing to a change for a better.

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60. Dasuqi, Supra, PP. 112-113.

For instance Sheikh Usman Bin Fodio, the leader of the early 18th century jihad movement in the Sokoto Caliphate, did engage in ijtihad in many ways, without ever claiming to be "Mujtahid."[61] And with the establishment of Law Faculties in some Nigerian Universities which offer a comparative and unified study of the Shari'a and the availability of so many books on the Laws of the various Schools of Islamic Law, it is reasonable to expect some change of attitude in these matters.

In most of what is now the Northern States, Islamic Law was, before the British conquest, the Law of the Land, On the arrival of the British Conquerors, they found an established system of both Law and government organised on the basis of the Shari'ah. When they established themselves as the new rulers, they decided that a change of policy and direction became necessary; so that the Shari'ah not only ceased to be the ultimate legal basis and the sole test of legitimacy, but its very application became dependent on the laws introduced by the conquerors. Since then, Islamic Law never enjoyed unrestricted application. It was made subject to English Law and common Law alike. Indeed in the Northern parts of the country where it was allowed to prevail, it was classified as customary law and made subject to the indignity of being classified unwritten law like the Customary Laws of the various ethnic groups that make up Nigeria.

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61. This can be understood from his book Hidayat al-Tullab in which he question Taqlid, the blind following of and binding nature of affliation to Schools of Law.

Even where many of its rules were superior they were held "repugnant" whenever they conflicted with the statutory laws of England, or the rules of Equity or the Local Legislation of Nigeria. Even though apparently at the beginning, the colonial policy was to preserve the application of Islamic Law, yet in reality it was to restrict its application as far as possible even among the Muslims. The apparent policy of preservation was only a facade to win over political support and loyalty of Muslims. The application of Islamic Law in Nigeria (Northern Part) came to be adversely affected by Colonial legislation in two ways: one by being totally replaced with the comparable provisions of English Law, as happened in the case of the enactment of the penal code which totally ousted the application of Islamic Criminal Law; and two, by statutorily recognising provisions of English Law on a given subject without abolishing the comparable provisions of Islamic Law. The Marriage Act of 1914 is an example which provides for a monogamous marriage without abolishing polygamous marriage under Islamic Law. Such legislation nontheless relegates the status of Islamic Law to the background and enhances that of English law when it provides that in case of conflict between the two, the provision of the English Law prevail. And so even though Islamic Law on the subject might not be abolished, yet certain aspects of it might not be abolished, yet certain aspects of it might become inconsistent with the provisions of the English Law and so void.

2.6. APPLICATION OF THE SHARI'AH UNDER THE COLONIAL RULE IN NIGERIA.

Shari'ah law was the fundamental law in all towns and villages of the Islamic State established by Uthman dan Fodio and his lieutenants prior to the advent of British rule in Nigeria. Islamic Law was applied in all its ramifications, ranging from moral to commercial and penal codes, throughout the Caliphate as well as in notable towns of Yorubaland. Maliki doctrines were their favourites among the doctrines of the famous schools of law. With the ability of Uthman dan Fodio's lieutenants to reform Islam in areas where the Shariah had governed for many centuries and to introduce it and its law as a new religion and a way of life to many other areas inhabited by the animists, Shari'ah thereby governed the political, economic, social, cultural, educational and juridical spheres of life in the lands under the Caliphate. However, it is customary for any conqueror to subjugate the inhabitants of the conquered territory to its political, economic, social and other spheres of life and the British rulers were no exceptions in this natural tendency. Soon after they had conquered Nigerian Land, their governor was empowered to grant "rights of occupancy to natives and non-natives, for definite or indefinite terms...."[63]

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63. Crown Lands Ordinance, 1918

whereas this is the land customarily owned by the native Nigerians.[64]

British administrators were however tactical in their approach towards the juridical subjugation of Nigeria. Their pronouncements revealed that they preferred a gradual approach in order to avoid violence. Lord Lugard said:[65]

> The time is now, in my opinion, ripe for a change, but the changes must be gradually introduced if they are to be effective, and not alienate the confidence of the people.

Furthermore, the Colony Commission's Report on Native Courts revealed that there was no desire by the British government to force the pace in introducing changes into laws to be administered and in procedure in Native Courts. "The aim is to develop the Native Court System until a single system of law applicable to all persons and all causes evolves but the dual system must continue to administer customary law in the Native Court and English Law in the English Court."[66] We hereby survey the extent to which the British notion of "single system of Law" had succeeded and the effect of such legal harmony on the existing native law and custom, particularly on the Shari'ah.

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64. J.N.D. Anderson, Islamic Law in Africa London: Frank Case, 1978 p. 179.
65. Lord Lugard, Political Memoranda. London: Frank Cass & Co. Ltd., 1970 p. 272.
66. Report of the Native Courts (Colony) Commission of Inquiry (RNCCCI). Lagos: Government Printer, 1952 p.49.

2.6.1 JUDICIAL AND LEGAL POLICY OF THE BRITISH

The Islamic systems of governance and administration, as found by the British conquerors in Northern part of Nigeria were of such a high quality that they had to be initially retained by the colonial rulers. There were lower Shari'ah courts in the principal towns, cities and villages. These were complemented by Emir's Siyasah tribunals which were courts of superior record. They were all regarded as Native Courts and they exercised both Civil and Criminal jurisdiction. However, the extent to which they could exercise criminal jurisdiction can be deduced from parts of Lord Lugard's address to the Sultan and the people of Sokoto in 1903.[68]

> The High Commissioner will be guided by the usual laws of succession and the wishes of the people and chiefs but shall set them aside if he desires for good cause to do so ... the Alkalais and Emirs will hold the Law courts as of old, but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful. The powers of each court will be contained in a warrant appointing it. Sentences of death will not be carried out without the consent of the Resident... Government will in no way interfere with the Mohammedan religion. Every person has the right to appeal to the Resident who will however endeavour to uphold the power of the native courts to deal with native cases according to the law and custom of the country.

Soon afterwards, the British rulers started to interfere with the system of justice administration in the Native Courts in order to forget legal harmony by which English Law system would eventually become the fundamental law in the Country.

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68. Ibid. P. 286.

They recognised the viability of Islamic Law as applied in Northern Nigeria but they continued to set in motion many machineries to whittle it down.[69] It was ruled that the practice and procedure of native courts should be in accordance with the Native Law and custom and it was simultaneously ruled that every Commissioner of the Provincial Court and of the Supreme Court had access at all times to a Native Court for the purpose of suspending or reducing a sentence or ordering a re-hearing or transfering a case to his own court at will.[70] Cases in which parties belonged to different religions were appropriately directed to Provincial Courts for trial but all rules that might be made locally by either the Emir or the Native Authority were in-appropriately subjected to the approval of the Governor.[71] All these were done by the British ruling authority so that in the long run "advanced commercial relations will... be regulated by English Law" and "the practice and procedure in the Native Courts would gradually follow the English practice and procedure."[72]

As the British met a system of administration which they found difficult to change in the North, it was easy for them to subdue Eastern part of Nigeria to their rule and system because according to Lugard,[73]

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69. For example, Lord Lugard extolled Islamic Law when prohibiting corporal punishment for women in Nigeria, (Lord Lugard op. cit. p. 289).
70. Lord Lugard, Op. Cit. p.89.
71. Ibid., p. 286.
72. NCCI-ASCR Op. Cit. p. 66
73. Lord Lugard, Op.Cit. P. 268.

there was anarchy and weak authority due to tribal disorganisation in the area. However, with regard to the Western part where the situation was an admixture of the prevailing features in both the North and the East, Islamic Law was not allowed to govern cases of Islamic matter. Many writers have attested to the in-formal application of Islamic Law in the Region during the colonial period. According to Shittu,[74] a Shari'ah court, established in Ede in 1913 shifted venue to another area of the town in 1914. He narrated further that the alkali of the court was called Sindiku who "recorded the proceedings in the Arabic Language".

In 1923, the Muslim population of Lagos renewed their request for the establishment of Shari'ah courts in the town but their petition was unattended to by the Government. They were spurred to that demand by the "unsatisfactory decision of a Lagos English Court in the case of one Awawu Thomas who had been married to a man against her wish". Muslims' request the establishment of Shari'ah courts in Yorubaland was not limited to Ede and Lagos, rather, it is on record that a group of Islamic scholars in Ibadan had equally demanded for such type of a court in 1938 while the Muslim Congress of Nigeria with its headquarters in Ijebu-Ode had addressed a letter on the same issue to the Chief Secretary to the Government sometime before Independence.

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74. D.O. Shitu, "The Nigerian Draft Constitution and Shari'ah Controversy" in NATAIS No.1, 1977 p. 114.

Shittu[76] also reviewed an earlier memorandum forwarded by the said Muslim Congress to Brooke Commissions of Inquiry and the review indicated that over 95% of the 4,000 divorce cases tried in only two of Ibadan native courts in the early 20s were between Muslim couples who were separated "like dogs without regard to the instructions laid down in the Holy Qur'an".

Many of the British officials were hostile, not only to the establishment of Shari'ah courts for the Muslims in Southern N igeria but also to the establishment of Native Courts in the colony.[77] Such officials adopted various methods to undermine the Shari'ah and the native law and custom which they found operating favourably to the natives before their arrival. They took advantage of many things to whittle down the status of the Shari'ah. First, they applied the British "repugnancy clause" to nullify Islamic cases. According to Sulaiman Kumo,[78] the share of one-eighth to either a wife or co-wives of the prepositus as alloted under Islamic law of succession, and the Islamic law of paternity by which a disputed child belongs to "the bed", would be regarded repugnant to natural officers. Second, personal confession of a party to a suit under Evidence law which is accepted in Islam was used to castigate the Shari'ah as discussed below.

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76. Ibid. p. 115

77. RNCCCI, op. cit. pp. 48 & 52.

78. Sulaiman Kumo, "Organisation and Procedure of Shari'ah Courts in Northern Nigeria" Unpublished Ph.D. Thesis, SOAS, University of London, 1972 p. 78

Third, case law through judicial precedent from superior courts was equally applied against the Shari'ah . Fourth, Native Authority Bye-Laws were mostly monitored and tailored by the British judicial officers to favour their own interest at the expense of the natives' interest which such bye-laws were inteded to project.[79] The colonial rulers who initially promised to protect the religion of every citizen later encroached on people's religious rights through legislations on some occassions and through disapproval of legitimate requests to establish Shari'ah Courts on some other occasions.[80]

2.6.2 British Proc.lamations, Ordinances and Laws

The first British legislation to govern Native Courts in Northern Nigeria was Native Courts' Proclamation No.5 of 1900. It gave recognition to the existing Alkali Courts prior to the subjugation of the area to British rule. It was amended by Native Courts Proclamation No.11 of 1904. This was later repealed in 1906 and re-enacted by Native Courts Proclamation No.1 of 1906 which had two distinct characteristics as compared to the proclamation it repealed:

(i) It was intended to meet the requirements and conditions of Pagan tribes in the North; and

(ii) The courts were graded with it to four (A,B,C,& D),[81]

79. Abdulmalik Bappa Mahmud, "Brief History of Shari'ah in the Defunct Northern Nigeria" January, 1906 p.13 ff.

80. Ibid, P.5 ff; A.I. Doi opcit. p.213; and J.N.D. Anderson op cit. p. 22 ff

81. NCCI-ASCR op cit. p. 44

The 1906 Proclamation later appeared as chapter 56 in the 1910 edition of Laws of Northern Nigeria before it was repealed and re-enacted by N ative Courts Ordinance No.8 of 1914 which was made applicable to the two Protectorates of Nigeria (North and South).

In the South, the first British legislation on Native Courts was N ative Courts Proclamation No.9 of 1900 which was repealed and re-enacted by Native Courts Proclamation No.25 of 1901. It was amended by Proclamation Nos. 17 and 23 of 1903 and later repealed and re-enacted by Native Courts (Protectorate, Cenral and Eastern Provinces) Proclamation N o.7 of 1906 which governed the N ative Courts in the Eastern and Western Provinces and which later appeared as chapter 123 in the 1908 British policy of legal harmony in Nigeria, the 1908 Proclamation was repealed and re-enacted by Native Courts Ordinance N o.8 of 1914. H owever, the Colony was not governed by the aforementioned Proclamations and Ordinance because it did not have its Native Courts of this nature until the promulgation of Native Courts Ordinance No. 40 of 1937 which came into effect on April 1, 1938. The 1937 Colony Ordinance in this regard appeared later as chapter 143 in the 1948 edition of Laws of Nigeria.

Native Courts Ordinance No.8 of 1914 was the first British Ordinance to govern all Native Courts in Nigeria at large. With it, Native Courts follwed the same pattern of organisation and applied the "Native law and custom".

The Orfinance was amended by N ative Courts Ordinance No.15 of 1915 and it was repealed and re-enacted by Ordinance No.5 of 1918 which later became chapter 5 in the 1923 edition of the laws of Nigeria. It was replaced by Native Courts Ordinance No.44 of 1933 which became chapter 142 in the 1948 Revised edition of the Laws. Native Courts Ordinance which emerged as No.36 of 1948 was later repealed by the amending Ordinances No.2 and 3 of 1951.

It becomes apparent from the foregoing that prior to 1914, separate proclamations governed the Northern and the Southern N igeria Native Courts but hence-forth the two areas were governed by uniform Ordinances. The British policy of legal harmony is discernible in both the Proclamations and the Ordinances which were aimed at super-imposing the British judicial and legal systems over the Shari'ah and local custom of the natives, For example, Native Courts Proclamation No.5 of 1900 empowered the Residents of establish courts at towns selected with the consent of the Principal Emir or the Chief but at the same time tied the establishment of such courts to the approval of the High Comissioner, Should an Emir or a Chief consent to the establishment of a court but the High Commissioner disapproved, a a clash of authority would be imminent and this would lead to bad blood and tension. Not only that; the Proclamation gave no provision for appeal but for transfer and review of cases by the Commissioners of the

Provincial Courts who would naturally be inclined to transfer cases to their superior position and status felt by the populace - an attitude which would undermine the status of the native judges who origionally tried Officer would tour the Native Courts in his area of jurisdiction in order to go through the proceedings and to change or cancel the decisions of the Court(s).

> Every month, the court clerks had to bring their record books to the District Officer who could read and cancel any decision which did not suit his views without seeing the parties and confirm the one which suited him, and then sign their books till the following month again.[82]

The British approach to whittle down the Shari'ah through legislation took various forms. In 1909, the Criminal Code was translated into Arabic for the understanding of the alkalai, perhaps they would prefer it to the Shari'ah penal law or at best to prepare them for the future application of British codes with the anticipated success of legal harmony. Anderson[83] has revealed how the confussion created by the wording of certain aspects of the Criminal Code had led the Crown Counsel of the Northern Provinces to set aside seven orders of retrial in the Kano Division of the Supreme Court in the late 40s. Would not such confusing contents of the Code lead the native court judges astray, should they be forced to apply them? Furthermore, Lord Lugard had in M ay 1915 directed that the functions of the

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82. Abdulmalik Bappa Mahmud,, op cit p. 11 ff.

83. J.N.D. Anderson, op, cit. p.182 ff

Judicial Council should as a rule be limited to certain matters, leaving to the Alkali's courts all ordinary criminal matters. He was surely apprehensive of the deficiencies of English Law by giving such a directive. Finally, the Native Courts were empowered to try some cases according to the dictates of the Shariah on the one hand, and the British officials could apply English Law to review such cases on the other hand.

2.6.3 LEGAL HARMONISATION IN NIGERIA

Legal harmony which was the goal of the British rulers in Nigeria and which is still being pursued by a group of Legal and Judicial administrators in the present Nigeria is having some adverse effects on the Sharia. Such effects were more pronounced in Criminal than in civil matters. Before we discuss the effects on Islamic penal Law, we hereby illustrate the effect on civil matter with M. Abba v. Marry T. Baikie(1943) which is a Mixed-cause case on Islamic Law of Inheritance. It is illegal under Islamic Law of succession for two people of different religions to inherit each other[85] and Marry was thereby disallowed from inheriting the property of her Muslim father by the Alkali Court. On appeal to the Supreme Court, the decision of the Alkali Court was set aside on the ground that Islamic law in this regard was repugnant to natural justice, equity and good conscience.

The reason given against Islamic Law in the above example notwithstanding, some of the British officials recognised the adequacy of Islamic Law in many other instances as applied in the North.

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85. Abdulmalik Pappa Mahmud, op.cit p. 17. He was quoting F/204/1943 - A Kaduna Court Case.

Lugard[86] maintained that the form of punishment to be inflicted for crimes should be "that which is most deterrent and most likely to suppress crime". Furthermore, the Chief Commissioner reported in 1937 that in Alkali Courts "Justice is as efficiently administered as in courts where modern procedure and practice exist".[87] Instead of practising a parallel legal system, the colonial rulers went ahead with the modification of level to be administered in Native Courts so that the judges could deal with other than Islamic Cases. One would initially feel that legal harmony was being pursued with genuine intention of uniting Nigerians irrespective of differences in religion, but the following extract from the Report of Brook Commissions of Inquiry[88] has given the actual intention of the British rulers:

> It appears to have been accepted that there would ultimately be one criminal code for the whole of Nigeria and that English Commercial law would take the place of Mohammedan and other customary law on the subject.

The plan was therefore to super-impose English Criminal and Commercial Laws over all other existing Laws in the country. Should unity of the country be the motive behind this plan, we still believe that tradition is difficult to change; for even if the British Government had succeeded to a large extent in forging legal harmony, yet the recent demands for application of Islamic Law in Nigeria vidicates our assertion. Details of such demands for the application of Sharia law are contained in Chapter Five of this work.

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86. Lord Lugard Op. Cit. p. 89
87. NCCI-ASCR, Op.Cit P. 72
88. Ibid. P. 74

In order to achieve the goal of abolishing Sharia law in Nigeria, efforts of British researchers on Nigerian Legal system during the colonial period were concentrated on cases of homicide and other Hudud cases with the view to discredit Islamic penal law. Prof. J.N.D. Anderson devoted many pages of his Islamic Law in Africa to the citation of a number of homicide cases decided in Northern Nigeria; such that were either quashed or retried by the Supreme Court (which applied English Criminal Codes)[89]. The research works revealed a number of conflicts between English Criminal Law and Islamic Penal Law.[90] For example, Islamic Law provides for the payment of blodd-wit (Diya) in some talon cases but the English law has no provision for such. With the confusion in the Nigerian Legal system as caused by the introduction of English Criminal Codes, the new codes had been attempting to replace the old laws under the pretextof forging legal harmony in the country. The 1953 Commissions of Inquiry discovered that legal harmony could cause confusion. It thereby recommended a parallel legal system for the country.[91]

Muslim rulers were equally apprenensive of the inherent evil in Legal harmony and they were consistent through-out the British rule in their call for non-interference with the Sharia by the colonialists. Evidence before the 1953 Commissions of inquiry showed their:

89. The cases include Borno Native Authority v. Yusuf and Dauna of Marte; Kano Native Authority v. Gwandai Bembem and Ahmadu Shokana; Katsina Native Authority v. Yakudi of Madaba and Danbaco of Rimace: and Adamawa Native Authority v. Kofi of Cike, See J.N.D. Anderson op.Cit pp. 199(N.5) & N.1); and 200 (n.6).

90. J.N.D. Anderson has testified to such conflicts in his article Conflict of Laws in Northern Nigeria published in the Journal of African Law 87. For details read, E.H. Ofori-Amakwah, The Penal Code and the Criminal Code - Their Origin and Differences in Journal of Islamic and Comparative Law Vol. 8, 1978.

91. NCCIASCR, Op. Cit. PP. 67 & 68

(a) opposition to the withdrawal of jurisdiction in homicide cases from the Emir's Court exercising it,

(b) unwillingness to administer any law except Mohammedan Law in Muslim Courts, and

(c) desire to retain Mohammedan practice and procedure even when the courts are enforcing Nigerian Ordinances.[92].

They agitated for the administration of the Sharia per se and they insisted that even in a case where both the Islamic and English Laws were concurrently applicable, they would prefer to apply the Sharia.[93]

Native Courts Proclamation (No.5 of 1900) recognized the practing system of court organisation prior to the advent of British rule in the North. It therefore contained no amendment to the appeal system in Alkali Courts. Native Courts Proclamation No. 1 of 1906) also gave no new provision for appeal "and the English and Native Courts were run on parallel lines" except that in 1904, a Native Court judge was appointed to review sentences of all Native Court.[181] The parallel judicial system continued until the promulgation of Native Courts Ordinance (No.8 of 1914) which introduced the English system of appeal into the entire Native Courts of the Northern and Southern Protectorates of Nigeria. The same appeal system was re-enacted by the Native Courts Ordinance (No.5 of 1918) which repealed the 1914 Ordinance. In the two Ordinances of 1914 and 1918, though the introduced appeal system was English in structure, appeal from lower Native Courts lay in superior Native Courts, and not in English Courts.

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92. Ibid. p. 89

93. Ibid. p. 92

181. NCCI-ASCR, Op. Cit p. 108

The integrated system of appeal by which from Native courts lay in English Courts was introduced with the 1933 reforms of Nigeria Courts.[182]

Consequent upon 1933 reforms, the need arose for a superior court of appeal for cases of Islamic subject matter tried in the Native Courts; but the Government was in a dilemma as to the modus operandi of the needed court. Would it be a separate Muslim court of Appeal per se or a compromised formular of "a branch of the High Court of Appeal" - that is, a special division of the supreme court presided over by a British Judge setting with Muslim assessors?[183] There were arguments for and against each of the two formulas and the Emirs were unequivocal in demanding a separate Muslim Court of Appeal.[184] When the Native Courts commission of Inquiry was set up, it received many letters from several other interested bodies on the establishment of a Muslim Court of Appeal per se. According to Joseph Schacht,[185] "extremist opinion would in fact like to make the projected Muslim Court of Appeal take the place of the West African Court of Appeal in all Native Cases". Schacht and Anderson both appeared not to have favoured the establishment of a separate native court of Appeal; the former stated in his report[186] that the creation of Muslims Court of Appeal is not recommended while the latter believed that "to set up such a court... would... be fatal; for it would not only cut right across the jurisdication of the Supreme Court but would serve to perpetuate the priviledged position of Islamic Law in the North ".[187] In the Long run. Brooke Commissions of Inquiry recommended that:

182. Ibid.
183. Ibid., and J.N.D. Anderson, Op.Cit P. 220.
184. The Emirs emphasized their demand in a letter of August 22, 1950 to Brooke Commissions of Inquiry on Native Courts. It was signed by the Sultan of Sokoto (NCCI-ASCR Op.Cit. P. 108).
185. Joseph Schacht, Op. Cit. Par. 50
186. Ibid., Par. 59.
187. J.N.D. Anderson, Op. Cit. P. 220

> There should be a Mohammedan Court of Appeal for Muslim Cases consisting of a single judge with assessors chosen from a penal of assessors and sitting either as a special court of appeal or as a division of the Supreme Courts. An appeal in such cases would be confined to a consideration of question of fact of Mohammedan Law as raised by the appellant. 188

Eventually, Moslem Court of Appeal Law (No.10 of 1956) was enacted and establish s Islamic court of appeal to hear appeals from Native Courts in the North, though its jurisdiction was confined to a number of civil Cases.[189]

Muslims actually won the establishment of a superior court of appeal to determine their cases but the established court was not the final court of appeal on such cases. Practically, appeals from the Moslem Court of Appeal could lie in the High Court of Appeals which comprised four judges - two from the English High Court and two others chosen from the Chief Alkalai in Northern provinces.[190] Appeals from this compromised higher court of appeal would lie in the Supreme Court, thence in the West African Court of appeal for further determination. It should be noted that few such cases reached the Supreme Court or the West African Court of Appeal, or still the Judicial Committee of privy Council, but officers of these courtswere not adequately knowledgeable in the shari'ah. The limited knowledge of the Shari'ah possessed by some of them could have been acquired from the following books of Islamic jurisprudence which the British government had on many occasions encouraged its officers to learn.[191]:

(i) First steps in Muslim Jurisprudence - a translation of parts of the Risalsh of Abu Zayd;
(ii) Perron's Jurisprudence Musalmane - translated by Ruxton;
(iii) Code of Khalil b. Ishaq called the Hedava - translated by Hamilton (W.H. Allen, London); and
(iv) Code Musalman by M. Seignette.

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188. NCCI-ASCR, Op.Cit. P. 110
189. Abdulmalik Bappa Mahmud, Op.Cit. P. 37
190. Ibid, P. 39.

That was how the appeal system of Northern Nigeria Courts began to witness confusion and crisis with regard to Islamic cases.

2.7 Appeal system in the Independence Laws with Particular Reference to the Shari'ah

The Panel of jurists which considered reforms on legal and judicial systems in Northern Nigeria recommended:[192]

(i) The establishment of Provincial Courts which would be of the same status with Chief Alkali's Grade 'A' Limited Courts and which would function as appeal courts for Grades D, C, and D Native Courts, The judges of such courts would be public servants appointed by the Judicial service Commission.

(ii) The establishment of Native Court Appellate Division of the High Court where two judges of the Grand Kadi or his representative would determine appeals from Native Courts on Criminal cases and other than cases of Islamic Law per se. All the three Judges would "have an equal voice in the decisions of the court and the Judge, considered to have the greatest knowledge of the law to be determined would preside".

(iii) The change in name of the Moslem Court of Appeal to Shari'ah Court of Appeal.

(iv) That the Composition of the Shari'ah Court of Appeal should be the Grand Kadi, Deputy Grand Kadi, and two other Kadis all of whom should be permanent and regular members of the Court.

(v) That the quorum of Shari'ah Court of Appeal Kadis to hear appeals should be three.

(vi) The confinement of Shari'ah Court of Appeals' jurisdiction to only cases involving the personal status of the Muslims and the finality of the Court's decision.

(vii) The establishment of a Court of Resolution to solve the problem of jurisdiction between the Shari'ah Court of appeal and the High Court.

The post-Independence Laws of Northern Nigeria featured all the recommendations of the reform panel with regard to appeal of islamic cases in toto. Shari'ah Court of Appeal Law (No.16 of 1960) was enacted to repeal the Moslem Court of Appeal Law (No. 10 of 1956). Native Courts (Amendment) Law (No.10 of 1960) was also enacted to establish Native Provincial Courts.

By these Laws, appeals from Native Courts lay in the Provincial Court and chance in either the Shari'ah Court of Appeal or in the Native Courts Appellate Division of the High Court which was established by the High Court (Amendment) Law (No.14 of 1960). In the High Court's appellate sitting, three judges - two from the High Court and one from the Shari'ah Court of Appeal should hear the case while the most knowledgeable of the three judges in the law applied in the lower court on a particular case should preside over the sitting. By that arrangement, Islamic cases would be adequately catered for in the High Court appellate division. Should there be a conflict of jurisdiction between the High Court and the Shari'ah Court of Appeal, a Court of Resolution was established to resolve the conflict. The Court was established by Court of resolution Law (No. 17. of 1960) and it consisted of the Chief Justice of the High Court, the Grand Kadi of the Shari'ah Court of Appeal and a judge each of the High Court and the Shari'ah court of Appeal nominated by the Chief Justice and the Grand Kadi respectively.

The relevant sections of the High Court Laws in the Laws of Northern Nigeria which allowed a Kadi of the Shari'ah Court Appeal to sit with two other judges of the High Court Appeallate Division was challenged by Mr. J.S. Olawoyin in Olawoyin v. Commissioner of Police I and II (1961) and the Supreme Court declared the sections of the Laws null and void[193] because they were viewed to be inconsistent with the 1960 constitution of northern Nigeria. After the judgement, no Kadi of the Shari'ah Court of appeal could sit in the High Court Appellate Division and Islamic cases in the court were there by exposed to danger of being tried with little or no knowledge of Shari'ah law.

It took the Premier of Northern Nigeria; Late Sir Ahmadu Bello, a considerable length of time to get the 1960 Constitution of Northern Nigeria amended in favour of restoring the sitting of a Kadi in the appellate division of the High Court.[194]

Still in 1961, Islamic Law faced a repuguancy test of the English system and failed. In Mariyama v. Sadiku Ejo (1961 the Islamic Law of Al-Walad li al-Firash on paternity[195] was said to be contrary to natural justice, equity and good conscience.[196] The lower court decided the case in accordance with Islamic Law but on appeal, the Northern Nigeria High Court reversed the decision of the lower court. This case indicates that even after Independence, the colonial repugnanoy clause continued to operate as it earlier operated on M. Abba v. Marry T. Daikie (1943).

The Laws of Northern Nigeria, as reformed for the 1963 republic, were in operation until the military took over the governance of the country in 1966 though the Revised editions of the laws could not be published until 1965. Still under the military, the adverse effect of legal harmony upon the Shari'ah continued to be felt. In 1968, the case of Yunusa Rasaki v. Titi which was decided in accordance with Islamic Law of request by justice Mohammed Bello in the High Court of Northern Nigeria (because the Justice was himself acquainted with the Shari'ah was set aside by the Supreme Court[197] on the ground that the judgement was "contrary to the provision of the wills Act, 1837 which permitted everybody to dispose of his property as one liked even to his dog"[198].

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194. Abdulmalik Bappa Mahmud, Op.Cit p. 42.
195. Muhammad B. Isma'ah al-Kanlani, op.cit p.210
196. N.R.N.L.R. 81
197. N.N.C.R. 97
198. Abdulmalik Bappa Mahmud, Op.Cit. P. 20.

The 1963 Constitution of the Federation empowered each Region to establish a Court of appeal to hear cases of aggrieved parties from the High Court of the Region as recommended by the All Party Constitutional Conference of Lagos, 1963[199] but only Western Region established on by the Constitution of Western Nigeria.[200] Other Regions provided in their respective Constitution that the legislature could establish a Regional Court of appeal of that nature, yet records show that none was established in the Regions,[201] except the already existing Shari'ah Court of appeal in the Northern Region. The Western Region did not appoint Justices for its established Court of Appeal until 1st April, 1967 when it issued court of Appeal (Commencement of provisions Notice,[202] and enacted the Court of Appeal Law No. 15 of 1967). Since the Shari'ah legal system was not formally established in the Region, the established Court of Appeal was not for the Shari'ah. Appeals from the Customary Courts which were decided ever by non-legal practitioners often lay in Customary Courts which were presided over by legal practitioners (that is grades A and B) or in Magistrates' Courts in places where there were no Grades A and B Courts. Appeals from the Magistrates' courts and the Customary Courts Grades A and B presided over by legal practitioners lay in the High Court, thence in the Court of Appeal. The Western Region Court of Appeal actually served Ogun, Ondon and Oyo States until 31st March, 1976 when it was abolished by section 3(1) of the Constitution (Amendment) (No.2) Decree (No.42 of 1976) which established a national court of appeal for Western-oriented courts in the Country.

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199. Proceedings of the Constituent Assembly: Official Report Vol. 1 (PCAOR) Lagos: Federal Ministry of Information, 1978 p.8
200. W.R.N. (1963) Cap. 26 s. 52,
201. D.I.O. Ewelukwa, Administration of Justice, in Introduction to Nigerian Law ed. by C.O. Okonkwo London: Sweet & Maxwell, 1980 p. 134.

2.7.1 Shari'ah in the (Federal) Court of Appeal

Northern Nigeria Shari'ah Court of Appeal continued to serve the six Northern States created in 1967 until it was partially centralised. Three divisions of the Court were established and each division serving two States. One division was serving Kaduna and Kwara States, one served Kano and North-Western State while the other served North-Eastern and Benue-Plateau States. The partial decentralisation was abolished in 1975 when more states were created and each Northern State appointed its own Grand Kadi and a number of Kadis for its Shari'ah Court of appeal except Benue and Plateau States which shared only one Shariah Court of Appeal till the present time. With the availability of Shariah Court of Appeal, it became desirable to establish a more superior Shari'ah Court of Appeal to which appeals from state Shari'ah Courts of Appeal would lie.

In 1972, the issue of establishing Federal Courts of Appeal was discussed at a Conference of All Nigerian Judges held in Lagos. Item 17 of the Communique issued at the end of the conference called for the establishement of (i) a Federal Court of Appeal for the high courts which could "operate through arms based in Lagos, Enugu, Kaduna and possibly Ibadan"[203] (ii) a Federal Shari'ah Court of Appeal which would serve as final appeal court for Islamic cases[204]. The Federal Government did not implement this aspect of the communique until when section 121 of the Constitution of the Federation was amended by Constitution (Amendment)(No.2) Decree (No. 42 of (1974) to establish a Federal Court of Appeal for only the High Courts.[205]

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203. D.I.O. Ewelukwa, Op. cit p.134.
204. Abdulmalik Bappa Mahmud, op, cit p, 42 ff.
205. A.O. Obilade, op.cit p. 176.

Hitherto in 1975, Late General Murtala Muhammad had wanted to implement item 17 of 1972 Conference of All Judges but he was confronted with some constraints[206].

Muslims were not satisfied with the situation and they argued convincingly that the establishment of a Federal Shari'ah Court of Appeal should be regarded as part of their fundamental human right. The Constitution Drafting Committee which worked on 18th October, 1975 to 14th September, 1976 thereby proposed in its draft Constitution the establishment of a Federal Shari'ah Court of Appeal which would be composed of a Grand Mufti and the muftis as judges[207]. When the Draft Constitution was introduced for public debate, sentiments were introduced into the proposed Federal Shari'ah Court of Appeal. Debates in form of open-door and close-door lectures, articles in newspapers, radio and Television discussions focussed on the proposed Federal Shari'ah Court of Appeal. Later, a Constituent Assembly was set up by the Federal Military Government to produce a final copy of the constitution. During the Assembly's sitting from 6th October, 1977 to 29th August, 1978 arguments for and against the same Federal Shari'ah Court of Appeal continued with hot temper leading to end, many favourities of the Court's establishment boycotting by staging a walkout from the Assembly. Hitherto, on 1st November 1977, Chief Rotimi Williams who was the Chairman of the Constitution Drafting Committee had enlightened the Assembly on the importance of establishing a separate Shari'ah Court of Appeal at the Federal Level. He addressed the Assembly, pointing out the inadequacies of any compromised

206. Abdulmalik Dappa Mahmud, Op.cit p. 42
207. Ibid. P. 43.

formula in this regard:

> The possibility of having the Shari'ah division of the Federal Court of Appeal, and or of the Supreme Court was considered and rejected by the majority of the Members of the Constitution Drafting Committee. Such a solution will create more problems than it is intended to solve. The Shari'ah division will not be a "division" of the Federal Court of Appeal in the true sense 208.

Before the return of the walk-out group to the Constituent assembly, the remaining members who were mostly against the establishment of the Federal Shari'ah Court of Appeal had created a division for the Shariah in the Federal Court of Appeal. They also created another division for customaryLaw which was not proposed by the Constitution Drafting Committee[209]. Those in favour of a Federal Shariah Court of Appeal thereby became loosers[210]. Below are some relevant Sharia sections of the 1979 constitution with particular reference to the (Federal) Court of Appeal.

> s. 217(2)(b) such number of Justices of the Federal Court of Appeal, not less than 15, of which not less than 3 shall be learned in Islamic Personal Law, and not less than 3 shall be learned in Customary law, as may be prescribed by an Act of the National Assembly.
>
> s. 218(3) A person shall not be qualified to hold the office of a Justice of the Federal Court of Appeal unless he is qualified as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years.
>
> s. 219 subject to the provisions of this Constitution, the Federal Court of Appeal shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of a State, Sharia Court of Appeal of a State and Customary Court of Appeal of a state.

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208. PCAOR, Op. Cit. P. 34
209. Abdulmalik Dappa Mahmud, op.cit p.45.

The provision of a uniform qualification for all justices of the (Federal) Court of Appeal by section 218(3) of the constitution seems desirable but the provise that every justice of the Court must be qualified as "a Legal Practitioner" in the country has ipso facto disqualified a Kadi of the Shari'a Court of appeal or a Grand Kadi of many years experience at the Bench but who is not a qualified legal practitioner in Nigeria from being appointed a Justice of the (Federal) Court of Appeal to try Islamic Cases. Consequent upon that and generally upon the creation of a division for the Shari'ah in the (Federal) Court of Appeal, many Islamic Cases have suffered through the decision of both Muslim and Non-Muslim Justice of the Court. Such cases include, among others;

(i) M. Ado, Hajia Rabi v. Hajia Dije(1983),[211]

(ii) Umaru Fannami v. Bukar Sarki (1985),[212]

(iii) Nartimatu Yakubu and Alhaji Mahmud Ndatsu v. Yakubu Tafida Paiko and Alhaji Umaru Gwagwada(1985)[213]

These cases and many others are discussed in detail in the following chapters of this thesis.

Now if we look at the general history of Nigeria, starting from the time of colonisation down to the time when Nigeria became independent, we may find that the Country during this period has witnessed the establishment of European domination over the Muslims of Nigeria. This domination was achieved as earlier stated in the last chapter by a brutal mixture of violence and treachery which cowed all resistence, and was maintained by the careful control of leadership, backed by superior military and economic powers. The most striking case of this country especially

211. FCA/K/69/85 of June 2, 1983 - A case from Kano State H/C.
212. CA/3/16s/84 of Jan., 30, 1985 - A case from Borno State Shari'ah Court of Appeal.
213. CA/K/80s/85 of Dec 11, '85 - A case from Niger State Sharia Court of Appeal

in the Northern States is that, Muslims, though numbering hundreds of thousands, and increasing in numbers daily, have exercised virtually no influence in it as Muslims. Indeed those who most devotedly try to live in accordance with their understanding of the Shari'ah seem to be the least influencial of all. It is true of course that there are some Muslim individuals who carry weight in the counsels of the affairs of Nigerians. But their influence does not usually derive from the fact of their Islam; rather from quite other sources such as the chance possession of material wealth and leadership. In this situation an outsider would be tempted, and many have been, to believe that the reason why Islamic ideas have so little influence in Nigeria today is that Islam has nothing of importance to contribute to the solution of Nigerian problems.

Thus, by the act of the colonial power, Muslims of Nigeria are compelled to place their religious Laws in an inferior position contrary to the prescription of their faith. Interestingly, this situation continued even after the entrenchment of the Fundamental Rights provisions in the Independence constitution of 1960, the Republican Constitution of 1963 and the 1979 Constitutions(62). The Sharia is a part of system that Muslims are enjoined to submit to. Although population figures given in this country from time to time are at best speculative, it is fair to say that a substantial proportion of the Nigerian population are Muslims. Yet these citizens are being denied a fundamental right to and freedom of religion since they have no opportunity to seek justice through the application of Shari'a or have it recognised and duly placed in the nation's legal system.

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62. See Section 25 of the

In the areas that were known as Western and Eastern Nigeria especially in the Western areas of Nigeria where there are numerous Muslims, Islamic Law was never given any place at all.

On the other hand, if we look at it in other way we may find that the Muslims themselves had - contributed in either totally or partially abandonment of utilization of the Shari'a - based and sanctioned techniques of developing and renovating it. Many Muslims have opted for other mostly alien methods. Others have chosen merely to pay lip-services to the Sharia or to use it as a legitimating ideology. Yet other muslims do not even seem to realize that certain problems do face the Shari'a legal system and their continued adherence to its precepts today. Regretably, Nigerian Muslims seem to fall within this last category. The attitude of the elite to Islamic Law, which acts as a powerful factor to wards the application of the Law, is undoubtedly to the influences of modern education and the exposure to modern ideas through contact with Europe.

It is highly desirable therefore to evolve a new policy towards the application of Islamic Law: a policy based on a fuller understanding of Islamic Law and its place in the Life of Muslims. It should entail an enlarged application of Islamic law and its implementation by the judges who would be allowed to use their ijtihad in appropriate cases; since as we have seen the modern research has proved beyond doubt that the idea of closing the door of ijtihad had no theoritical justification. Unless this is done, the situation would remain the same as before that, is, in cases of conflict between Islamic and English Laws, the former would continue to lose to the latter.

CHAPTER THREE

CONTRACT OF MARRIAGE AND ITS PRELIMINARIES ON COMPARATIVE ANALYSIS

3.1 OBJECTIVES OF THE CHAPTER

The institution of marriage is seen by all major world religions and civilisations as the foundation of the family in particular and society in general. In many communities the sanctity of the institution is recognised to a greater or lesser extent in accordance with the mood and mode of living of the people at any particular time. Muslim jurists are divided as to whether marriage is only a contract, albeit a sacred contract, while others hold that it is a religious sacrament. Similarly, the Christian world is also divided as to whether marriage is a sacrament. Other indigenous religions (Pegans) of Nigeria do not hold the institution in any lesser esteem.

In studying marriage laws of Nigeria i.e.(under Islamic, customary and English Laws), one is liable to be confronted at the onset with the question as to whether these are simply different forms of varieties of the same institution, or, on the other hand, fundamentally different institutions. In other words, does the relationship of husband and wife which in non-muslim communities constitutes marriage exist in its essentials in the Islamic social system? It has sometimes been doubted whether there is a sufficient basic identity between the three types of relationships to justify the use of a common term

of description. But generally, it may be legitimate to conclude that the three types of marriages have sufficient things in common to warrant the usage of describing it in a context such as the present one, by the same generic term "marriage." In consequence, any study directed to the elucidation of the laws regulating the institution with a view to point out the differences must be a profitable venture for the community at large.

In this chapter it is intended to trace the historical basis of the institution of marriage under Islamic Law; to analyse the essential contractual formalities relating to the above mentioned types of marriage to be observed by the parties and finally to evaluate the role of the community and other religious factors in stabilising the institution of marriage.

3.2 MARRIAGE UNDER ISLAMIC LAW

Islamic Law constitutes one of the most important systems of Law in Nigeria, particularly in Northern States where it is probably "more extensively followed and enforced than anywhere else in the world outside Arabia and Afghanistan"(1) In Northern States, the applicable Law is the Maliki Law (Code). The Muslim Court of Appeal Law No. 16, 1963 was the first Colonial Legislation that established a Shari'a Court and provided for the application of Islamic Law according to Maliki

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1. Anderson, Islamic Law in Africa 1970 ed. P. 3.

Law in the Court. Section 15 of the Law provides

> "The Court, in the exercise of the jurisdiction vested in it by this Law as regards both substantive Law and practice and procedure, shall administer, observe and enforce the observance of, the principles and provisions of (a) Muslim Law of the Maliki School as customarily interpreted at the place where the trial at first instance took place."(2)

Islamic Law has gradually became a pervasive feature in the area, and today it is considered to be the fundamental, that is, the most widely-enforced legal system within the Northern States. Despite the long history of Islam in the Western part of Nigeria, especially in Yoruba Land, the Shari'ah had never been given full authority over the life of the generality of the Yoruba Muslims except at Ilorin area, which came under the direct influence of the Sokoto Jihadists and thus became a Muslim stronghold in the early 19th Century. Although Islam Obtains in the South, it has had very little impact on the legal and judicial system compared with the North. There are no special courts to deal with cases involving Islamic Law as opposed to the North where special courts manned by specialists in Islamic Law operate side by side with other courts whose primary Laws are either English Law or Customary Law. It is because of this, it becomes very difficult to ascertain the School of Law, if any, applicable in the area. Therefore unless otherwise stated, if we refer to the application of Islamic Law of marriage in Nigeria, we are referring to Nigeria as a whole.

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2. See the Shari'a Court of Appeal Law Cap. 122, Laws of Northern Region of Nigeria, 1963 and Section 242(1) of the Constitution of the Federal Republic of Nigeria, 1979.

3.2.1 MARRIAGE: THE BASIS OF FAMILY

Islam recognizes the religious virtue, the social necessity, and the moral advantages of marriage. The normal course of behaviour for the Muslim individual is to be family oriented and to seek a family of his own. There are many Qur'anic provisions and Prophetic traditions which go as far as to say that when a Muslim marries, he has thereby perfected half of his religion; so let him be God-minded and careful with the Other half. The Holy Qur'an says:

> "O mankind, be conscious of your duty to your Lord, who created you from a Single Soul. From that soul He created its mate, and through them He bestowed the earth with court-less men and women. Fear Allah, in whose name you plead with one another, and honour the mothers who bore you. Allah is ever watching over you."(3)

In another chapter the creation of man and woman and the marriage relationship permeated with tranquility; love and mercy have been described as "Signs of God"(4). The institution of marriage and the family have been commended as the "way of the Prophets"(5) And the Holy Prophet (S.A.W.) has said, "marriage is a part of my Sunnah; who run away from my path is not from amongst us".

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4. Qur'an 30:21
5. Qur'an 13:38 "We indeed send Messengers before you (O, Muhammad) and We assigned them with wives and children."

It will be noted that, in many Qur'anic verses(6) the multiplication of the human race is mentioned as one of the objects of marriage. The family is the real unit of the human race and the first cohesive force which makes civilization possible owes its existence solely to marriage. If there is no marriage, then there can be no family, no ties of kinship, no force uniting the different elements of humanity and consequently no civilization. It is through the institution of family that humanity is held together and civilization is made possible. Marriage is a religious duty, a moral safeguard, and a social commitment. As a religious duty, it has to be fulfilled; but like other duties in Islam, it is enjoined only upon those who are capable of meeting the responsibilities involved.

3.2.2 PRE-ISLAMIC ARABIAN CUSTOMS

The Islamic Law of marriage is the reformed shape of the pre-Islamic Arabian Customs of marriage and to appreciate the reforms brought about by Islamic Law in this respect, it is necessary to cast a look on the pre-Islamic Arabian customs so that the nature and magnitude of the reforms may be noted.

The pre-Islamic Arabian customs regulating sexual relations and the status of children as mentioned in Kashful Gumna(7) were as follows:

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6. Qur'an 7:189, 16:72, 3:21, 42:21, etc.
7. Kashful Ghumna, Vol.II, P. 56.

(a) a custom according to which a man would say to his wife: "Send for so and so" (naming a famous man) and have intercourse with him." The husband would then keep away from her until she had conceived by that man, and then he would return to her. This custom originated from a desire to secure a noble seed.

(b) another custom was where by a number of men, less than ten, used to go to a woman and have a sexual connection with her. If she conceived and was delivered a child, she would send for them, and they would be all bound to come. When they assembled, she would address them saying: "you know what has happened. I have now brought forth a child. Then there she would name whomsoever she chooses, and say, "this is your child". The child would then be ascribed to the man, and he was not allowed to disclaim its paternity.

(c) another custom was where-by a number of men would visit a woman, who would not refuse any visitor. These women, were prostitutes and would find at the doors of their tents a flag as a sign of their calling. If a man of this class frequented her house or tent would be assembled, and physiognomists would decide to whom the child belonged.

(d) another custom, is whereby a man asks another for the hand of the latter's ward or daughter, and then marries her by paying dowry.

(e) another custom, is whereby a man asks another for the hand of the latter's ward or daughter and then marries her by paying dowry.

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3.2.3 CUSTOMS OF MARRIAGE IN NORTHERN NIGERIA

In Northern States, among the non-Muslim societies the position still remains the same although the bride and the bridegroom must first give their consent. Marriage is concluded upon payment of the dowry by the husband to the parents of the girl and this dowry remains the parent's property, even though sometimes the dowry may be services rendered to the father of the girl. Infact the woman married under the various customary laws, does not enjoy the emancipation indulgence as her counterpart enjoys under Islamic law. Upon termination of the marriage she is not free to marry another man of her choice like her counterpart would, under Islamic law. If the husband dies, then the marriage is not, infact, broken, but she is regarded as part of the estate of the deceased husband and could be inherited by another male member of the husband's family. Usually the eldest son of the husband, if he is adult, or the deceased brother, or the widows are distributed amongst the brothers of the deceased. If, however, she refuses to abide by the decision of the family council or refused to accept any member of her deceased husband's family, then she must refund the whole of the dowry that was paid on her by the deceased husband.

The idea of the widow inheritance in Nigerian society as suggested by Annes J. was that it was regarded as a sort of native customary economy for providing maintenance for the widow on the death of her husband.(8) While Jibow .J. (as he then was) thought that the concept was based on the principle that women were chattels.(9) The latter view might be the correct interpretation of this concept since it is recognised that if she refused to marry any member of the family she would have to refund the dowry. However, one might not totally disagree with the former view especially when there are children between her and the deceased husband. It might be that by keeping the wife within the family it might provide security to the children as the new husband would either be elder brother to the children or their uncle.

3.2.4 CONCEPT OF MARRIAGE IN ISLAM

The institution of marriage (nikah) occupies a paramount and pivotal position in the Islamic Family Law. Among the Arabs nikah is a wide term which means "joining together" or "sexual intercourse." But in Islamic Law it has a very definite legal sense and meaning, it is a contract for the legalization of sexual intercourse and the procreation of children.

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8. Estate of Agboruju, (1949) 19 N.L.R. 38.
9. Alleru V. Anibi, (1951) 20 N.L.R. 46.

"Marriage", says the author of (Tawdih) "is an institution which has been legalised for many objects. Islamic Law has ordained the institution of marriage thereby sanctioning sexual relation between two members of the opposite sexes with a view to the preservations of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning livelihood."(10)

It follows from the above theory, therefore, that marriage was instituted to ensure the permanence of the marriage relations by which foulness and unchastity may be prevented thereby promoting a normal family life. It is also an institution by which procreation of children is allowed and the legitimacy of the children is established. To the same effect Qur'an says:

> "And among His signs is this, that He created for you mates from among yourselves that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Verily in that are signs for those who reflect."(11)

Islam viewed marriage as a strong bond (mithaqun-ghaliz), a challenging commitment in the fullest sense of the word. It is a commitment to life itself, to society, and to the dignified meaningful survival of the human race.

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10. Al-Tawdih, P.7 as quoted by Habibi in his article "The Muslim concept of marriage" Published by the world Muslim league, singapore, Vol.1, No.11, October 1964, P. 33.

11. Qur'an 30:21.

It is a commitment that married partners make to one another as well as to God. It is the kind of commitment in which they find mutual fulfilment and self-realisation, love and peace, compassion and severity, comfort and hope. All this is because marriage in Islam is regarded first and foremost as a righteous act, an act of responsible devotion.(12) Marriage is a divinely ordained and inspired institution. It was an institution that come into existence with the creation of man. It is in the nature of a contract entered with the consent of the human parties as well as between the parties themselves."

However, laudable the concept of marriage in a society may be, it does not allow for free sexual intercourse. Some people especially in the Western world, find means of criticising the Islamic attitude against free sexual relations. For instance, Western Biologist accused Islam of repressing the vital energy of man and rendering his life very miserable. No religion is as frank as Islam in recognising the natural motives and treating them as clean and healthy. Qur'an says:

> "Fair in the eyes of men is the love of things they covet: Women and children; heaped-up hoards of gold and silver; horses branded (for blood and excellence; and (wealth) cattle and well-titled....." (13)

In this verse, the Qur'an names the earthly desires and recognises them as a matter of fact and states that

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12. Abdal [illegible] Indiana, 1975, P. 114.

13. Qur'an 3:14.

they are desirable things in the eyes of man, but does not object to these desires as such, nor does it disapprove of such feelings. However, Islam does not permit people to give way to such desires or to be dominated or enslaved by them. Humanity aims as long as it is dominated by its unruly passions which exhaust all the energy and lead it downwards to animalism. In its treatment of human soul, Islam recognises in principle, all the natural emotions and permits as may give pleasure without causing any harm of injury to the individual or to the community by the destruction of the concept of family thereby rendering human society to the society of animals.

The Prophet (S.A.W.) is reported to have said:-

> "A man is recompensed for the sexual act he performs with his wife". And when his companions asked: 'Is the person rewarded for satisfying his passions?" The Prophet (S.A.W.) answered:- "Do you not see that if he were to satisfy it in prohibited manner he would be committing a sin? So if he satisfies it in a lawful manner he will recompensed."(14)

From the above tradition it is clearly understood that since sexual intercourse between legally married couple attracts rewards, the act must therefore be pious. But on the other hand the institution of marriage in Islamic Law is contractual in nature constituted by offer and acceptance.

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14. Muslim, Sahih al-Muslim, Sharh al-Nawawi Vol. VII. P. 92.

3.2.5 DEFINITION

It is always very difficult to define anything accurately but nevertheless always writers use to offer their definitions in regard to the subject natter of their discussion. Let us examine sone of these definitions:

HEDAYA: "Nikah in its prinitive sense, neans carnal conjunction, sone have said that it signifies conjunction generally. In the language of the law it inplies a particular contract used for the purpose of legalising generation."(15)

AMEER ALI: "Marriage is an institution ordained for the protection of society and in order that human being nay guard thenselves fron foulness and unchastity."(16)

DURR AL-MUKHTAR:

"Marriage when treated as a contract is a pernanent relationship based on nutual consent on the part of the nan and the wonan between whon there is no bar to a lawful union."(17)

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15. The Hedaya (Commentary on the Islanic Law) Tr. Hanitton 1979, New Delhi, P. 25.
16. Aneer Ali (Muhannadan Law), 7th Ed., 1976, P.241.
17. Al-Haskafi (Durrul Mukltar), quoted in Syed Aneer Ali Muhannadan Law, Calcutta, 1922, P. 269.

TYABJI: "Marriage brings about a relationship based on, and arising from, a permanent contract for intercourse and procreation of children between man and woman, who are referred to as parties to the marriage and who after being married became husband and wife."(18)

ABDURRAHIM: "The Muhammadan jurist regard the institution of marriage as partaking both of the nature of ibadat or devotional acts and mu'amalat or dealings among men." It is founded on contract for which the consent of both the parties is essential."(19)

Abdurrahman al-Jaziriy, quoted various definitions offered by the four Sunni schools:

(i) Maliki Law: It is a contract which sanctions the right of enjoyment of the person not being determined in terms of purchase price and which is free from legal impediments imposed by the divine texts of (ijma)."(20)

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18. Tyabji, (Muhammadan Law), Bombay, 1940, PP. 95-96.
19. Abdurrahim (Muhammadan Jurisprudence), Lahore P.327.
20. Abdurrahman al-Jazuriy (Fight ala Madhahib al-Arba'a Vol. IV, P.2.

(ii) Hanafi Law: It is a contract by which the right of the enjoyment of (a woman) is legalised to the exclusion of all other men.(21)

(iii) Shafi'i Law: It is a contract which was concluded by the words "nikah" or "tajwiz" or equivalent terms and by which contract, the right of sexual intercourse and other services of the woman in matters of enjoyment are acquired and guaranteed in a reasonable manner.(22)

(iv) Hanbali Law: This school agrees with the Shari's definition.

As regards the concept of marriage Dr. S.A.M. Habibi(23) observe that the concept of marriage in Islam, differs from other concepts on the subject, either ancient or modern, for it is neither a "sacrament" nor is it a voluntary union for life of one man and one woman to the exclusion of all others, nor is it a marriage in the Roman sense, for those that were married by confarreato could not be divorced at all.

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21. Abdurrahman al-Jazuriy (Supra, PP. 2 - 3.
22. Abdurrahman al-Jazuriy (Supra, PP. 2 - 3.
23. S.A.M. Habib Supra P. 35.

While it is true that concept of marriage in Islan differs from the Roman confarreato nor is it the same as the principle laid down in an English case HYDE V. HYDE.(24) It is true that it partakes the nature of both the sacrament and contract, yet it is intended from the out-set, to be a life long union. Even though divorce under Islamic Law is permissable as remedy and in exceptional circumstances.

3.2.6 OBJECTS OF MARRIAGE

The strong emphasis that Islan has put on marriage may be seen more clearly in the context of the purposes that marriage is designated to serve. Islam favours marriage as a means of emotional and sexual gratification, as a mechanism of tension reduction, legitimate procreation and social placement. What is probably most characteristic of the Islamic position, is that, marriage, apart from these functions and perhaps also because of them is regarded first and foremost as an act of pity-sectual central may be a moral victory, reproduction a social necessity, and sound health, a gratifying state of mind. Yet, these values and purposes of marriage would take on a special meaning and be reinforced if they are inter-twined with the idea of God, conceived also as a religious commitment and internalized as divine blessings. And this seems to be the focal point of marriage in Islan. In the Holy Qur'an, the call is addressed to mankind to be dutiful

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24. Per Lord Penzance in Hyde V. Hyde (1866) L.R. Pad. 138.

to God who created them from a single soul, and from it created its mates, and from the two of them - scattered abroad many men and women.(25) Allah created men and women so that they can provide company to one another, Love one another, procreate children and live in peace and tranquility, all these cannot be possible except through marriage. The Qur'an says: "And among his signs is that, He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Undoubtdely in there are signs for those who reflects.(26) "And Allah has made for you your mates of your own nature and made for you, out of them sons and daughters, and grand-children and provide for you sustenanc of the best."(27) Even at most trying times, of marriage life, and in the minds of legal disputes and litigation, the Qur'an reminds the parties of God's Law; it commends them to be kind to one another, and above all dutiful to God.

Apart from these and many other Qur'anic provisions on the purposes of marriage, there are also alot of traditions of the Prophet (S.A.W.) which further explain the purposes of marriage institution. The Prophet is reported to have advised "O you youngmen, whoever is able to marry, should marry, for that will help him to lower his gaze and guard his modesty."(28) "Marriage is my tradition

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25. Qur'an 4:1
26. Qur'an 30:21
27. Qur'an 16:72
28. Al-Bukhari (Sahih al-Bukhari), Trans. Dr. Muhammad Muhsin Khan. Vol. VII, 1976, P. 3.

whosoever keeps away from it, is not from amongst us."[29] "Modesty is part of the faith." In order to achieve modesty and complete one's Iman, marriage is prescribed by the Prophet (S.A.W.). It will be noted that from the Qur'anic verses, the multiplication of the human race is mentioned as one of the purposes of marriage. This is to respond to the basic biological instinct of procreation. Children are realization of motherhood and fatherhood. Islam is particular in providing the most possible wholesome atmosphere for bringing up of the children. To give birth to children and neglect them is a crime towards society, towards the children and failure to perform the God given responsibility. Despite the importance of these moral values, rest, peace and love and mercy, Islam did not stop there, it went further by defining the roles of man and woman in the family and the society in general, in such a manner that each should act in accordance with his or her biological merits. The man with his stronger physique, is charged with the functions of maintenance, protection dealing with matters pertaining to outside world, and leadership within the family. The woman is entrusted with caring for and rearing the children, organizing and looking after the home, and creating the loving atmosphere within the family, because of the preponderence of the quality of love in her.

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29. Buhari, Quoted by Muh. Ali, The Religion of Islam, Lahore P. 496.

The institution of marriage is also responsible to a very great extent for the development of those feelings of love and service which are the pride of humanity today. The mutual love of husband and wife - a love not based on monetary passion but life long connection - and the consequent parental love of offsprings leads to a very high development of the feeling of love of man to man as such, and thus to the disinterested service of humanity. This love is described as a sign of God in the Qur'an.(30) The natural inclination of the male to the female and of the female to the male finds expansion through marriage and is developed, first, into a love for the children, then a love for one's kith and kin, and ultimately into a disinterested love for the whole of humanity. The home, is, infact the first training ground of love and service. Here the spouses finds real pleasure in the service of humanity and the sense of service is thus gradually developed and broadened. It is infact a training ground for every kind of morality, for it is in the home that a man learns to have a sense of his own obligation and responsibilities, to have respect for others rights, and above all to have a real pleasure in suffering for the sake of others. The Prophet is reported to have said: The best of you is he who treates his wife best."(31)

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30. Qur'an 30:21.
31. Ibn Majah, Quoted by Muh. Ali Supra P. 534.

The purposes of marriage and its functions are beautifully summed up by Khurshid Ahmad when he said "... It provides for the reproduction and continuation of the human race. It acts as the protector of the morals of the individuals and society. It creates a congenial context for the spiritual and emotional fulfilment of the spouses, as also of all other members of the family and promotes love, compassion and tranquility in society. It initiates the new generations in the culture, tradition and further evolution of their civilization. It is the shee-anchor of a system of socio-economic security. It sharpens the motivation of man and strengthens incentives for effort and social progress. It is the cradle of civilization and bridge that enables the new generations to move into the society. It is the link that joins the past with the present and with the future in such a way that social transition and change take place through a healthy and stable process. Thus, it is, on the one hand, the means adopted for regulating relations between the sexes and providing the mechanism by which the relation of a child of the community is determined and on the other, it is the basic unit of society integrating its members within and enabling them to play their ideological and cultural role in the world, (both now and in the future).(32)

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32. Khurshid Ahmad, Family life in Islam, Islamic Foundation London 1977.

3.2.7 NATURE OF MARRIAGE IN ISLAM

The institution of marriage under Islam is a divine institution combining the elements of both secular contract and a religious sacrament. Although it is essentially regarded as a civil contract, the validity of which, inter alia, is based on the consent of the contracting parties, the offer (ijab) and the acceptance (qabul) and the capacity of the parties, yet it has social and religious aspects. The words fard (duty), wajib (obligatory), haram (unlawful), makruh (abominable) and sunnah (obligatory practice) denote and determine the category to which marriage belongs.

These remarks which are based on Qur'anic injunction, the traditions of the Prophet (S.A.W.) and the consensus of opinion (ijma), establish that marriage is a religious rit and has been considered to be an institution of ibadat (devotional act), although clothed in the legal form of a contract. But let us not ignore an important fact that the notion of contract is brought into prominence because it renders facility for divorce, and allows separation of parties easy in the eye of the Law, whereas the sacramental aspect would make the marriage indissoluble. Consequently, it is not quite accurate, therefore, to designate marriage in Islam as either a secular contract or a religious sacrament; it has elements of both. The appropriate designation would seem to be that of a "divine institution.

For fair evaluation and correct approach to the concept of marriage, it is desirable to highlight the different aspects of marriage.

3.2.7 (i)RELIGIOUS ASPECT:

Marriage in Islan is a sacred contract which every Muslim must enter into, unless there are special reasons why he should not. Thus in the Qur'an it is said: "And marry those among you who are single and those who are fit among your male slaves and your female slaves, if they are needy, Allah will make them free from want out of His grace; and Allah is Ample-giving, knowing. And let those who do not find a match keep chaste until Allah makes them free from want out of his grace."(33) In another verse, marriage relationship is given the same importance as blood-relationship "And it is He who has created man from water: Then has He established relationships of lineage and marriage: For thy Lord Has Power (over all things). Prophetic traditons also lays stress upon living in a married state. The Prophet (S.A.W.), is reported to have said to certain people who talked of fasting in the day-time and keeping awake during the night, praying to God and keeping away from marriage." I keep a fast and I break it and I pray and I sleep, and I an married, so whoever inclines to any other way than my Sunnah, he is not of me."(34)

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33. Qur'an 24:32-33.

34. Bukhari, Quated by Muh. Ali Supra, P. 534.

In another tradition, the Prophet (S.A.W.) said, "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.(35)

Muslin jurists have interpreted the Qur'an to mean that marriage is a religious duty and is consequently a moral safe-guard as well as social necessity. As a religious duty it must be fulfilled, but like all other duties in Islam, it is enjoined only upon those who are capable of meeting the responsibilities involved. The predominant view among the jurists is that, although a duty in Islam, it is enjoined only upon those who are capable of meeting the responsibilities involved. The predominant view among the jurists is that, although marriage is a social necessity, it is not absolutely necessary for every individual. Maliki jurists take it that marriage in its origin is deemed to be recommended, but for certain reasons affecting certain individuals it take other shapes. Sometimes becomes obligatory and sometimes forbidden and so forth. Hanafis and Hanbalis agreed with Maliki's. But according to Shafi'i jurists marriage in its origin

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35. Bukhari, Supra, P. 3.

is nubah (Nafl) i.e., supererogatory, and according to Zahiri's it is obligatory.(36)

Here below are the detail views of Maliki jurists on this subject:

OBLIGATORY

Marriage becones obligatory for a nan who has strong sex desire and fears committing illicit relations and has the neans i.e., he has the dowry and the maintenance. For the woman marriage is also an obligation if she is unable to earn her living or she fears illicit relations.

FORBIDDEN

Marriage is forbidden for a man who controls himself and has not the means for marriage or who has a bad illness which will affect the wife or his expected offspring.

RECOMMENDED

Marriage is recommended for the man who has desire for sex but can control himself and keeps chastity but hope to have offspring.

MUBAH (Nafl)

Marriage is mubah i.e., Nafl or supererogatory, for a man who can control himself and does not hope

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36. Abu Zahra, Ahwal al-Shaksia, P. 24.

for offspring and marriage will not prevent him from performing his rituals.

MAKRUH

Marriage is condemned for a man who has no sex desire and at the same time marriage will prevent him performing his rituals.(37)

Although Islam advocated marriage and took various measures to regulate its functioning, it seems to have realized that marriage is not a light commitment. A person must be fairly certain of his ability to meet the responsibility of marriage before taking a wife, that is he has to have dowry and the way to maintain the wife. In Islam poverty is no barrier to a successful marriage; Allah has, as has been stated in the Qur'an undertaken to provide for every living creature, and He can, and has promised to, enrich the poor mates of His bounty.(38) But at the same time, Islam recognised that it may not always be possible for every one to have at his disposal the means to marriage. There sometimes arise the obstacles and some problems here and there; for example it is very common today among Muslim community for a young man of marriageable age who cannot marry, despite the Islamic injunctions which made marriage in itself the simplest social contract in a Muslim life. The socio-cultural traditions of the

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37. El-Inairi, Personal Status in Islam, P.5 (unpublished).

38. Qur'an 24:32.

people however, insisted on unncessary expenses which is contrary to the teaching of Islan on the respective bride and bridegroom, which finally culminated - into the most ugly situation people find themselves today.

Islan in respond to these problens and alike, is not in the direction of cellibacy, laxity, or avertion to marriage and sex altogether. Rather, it prescribes several specific measures, the last of which is resort to self discipline and temporary abstinence in the hope that the assured help of Allah will be forthcoming. The Prophet intinated that whoever can marry should do so, but he who cannot afford to i.e., (he has no dowry and maintenance), should keep on fasting, which helps him to safeguard his moral integrity and to assume command over his desires. The immediate implications of all this is probably that neither sex nor marriage is dismissed easily or taken lightly.

3.2.7 (ii) THE SOCIAL ASPECT

Islan gives to the woman a definitely high social status after marriage. Restrictions are placed upon the unlimited polygamy of pre-Islamic times, and a controlled polygamy is allowed in exceptional circumstances. The Prophet (S.A.W.) both by example and precept, encouraged the status of marriage. He positively enjoined marriage to all those who could afford it. And the well-known saying attributed to the Prophet (S.A.W.) "There is no mockery in Islam."

Islam for this reason provided a guarantee which would secure happiness to the family as well as to the whole society. Pursuant to the Qur'an, mutual companionship, love and peace are the main objectives of marriage:

> "And among his signs is this that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (hearts). Verily in that are the signs for those who reflect."(39)

Marriage in Islam check the unruly sexual passion which brings about the loss of dignity in both the man and woman and the production of the unwanted children invariably resulting in some cases, in the destruction of the unwanted babies. To safeguard the relations between males and females and as a preventive against the severe punishment of fornication and adultery, the Qur'an ordains the institution of marriage. Adultery and fornication have been expressly made unlawful by the Almighty Allah as otherwise the society would have been reduced to chaos and disorder. The Holy Qur'an proclaims: "And do not near fornication. Surely it is indecency and evil as a method."(40) "And do not compel your slave girls to prosititution when they desire to keep chaste."(41)

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39. Qur'an 30:21
40. Qur'an 17:32
41. Qur'an 24:33

Regarding the sentence of adultery, the Qur'an says:

> "The adulteress and the adulterer, flog each of them giving a hundred stripes; and let not pity for them move you in the matter of obedience to Allah if you believe in Allah and the last day, and let a party of the believers witness their chastisement."(42)

When this verse was revealed, it was ordained that those guilty of adultery should be given hundred lashes as a punishment. The Prophet (S.A.W.) was reported to have said:

> "Take from me, accept from me, undoubtedly Allah has now shown path for them. (Adulterers). For them unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stonning to death."(43)

It is only logical that Islam sets up the rules to regulate the functioning of the family whereby both spouses can find peace, love, security, and relatedness. The elements are necessary for accomplishing the greatest purpose of marriage in Islam.

Marriage creates a family consisting of children and wife. Families creates society. Marriage creates a new company of kith and kin, because sons and daughters go to create new families. Hospitalities, fellow feeling, kindness and mutual help become binding among these relations. Marriage therefore gives impetus to what is called "social virtues". Marriage gives the right of inheritance and ownership in property to the nearest

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42. Qur'an 24:2.
43. Bukhari Supra.

relations. The = Qur'an therefore say: "And He it is who has created men from water, and then He has made for him blood and marriage relationship.(44)

3.2.7 (iii) LEGAL ASPECT

The most important aspect of marriage under Islamic Law is its legal aspect. The contract of marriage by itself gives rise to many rights and obligations of the parties. Most of the incidents of marriages are wholly independent of any contractual obligations.

In the leading case of Abdulkadir V. Salima Mahmood .J. observed:

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

Now the legal effects of marriage as enumerated in the Fatawa-i-Alangiri, come into operation as soon as the contract of marriage is completed by proposal

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44. Qur'an 25:54.

and acceptance; their initiations is simultaneous, and there is authority in the Muhammadan Law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife."(45)

SUMMARY OF LEGAL EFFECT OF A VALID MARRIAGE

The legal effect of a valid marriage now be summarized:

(i) The marriage contract itself is a legal contract based on proposal and acceptance.

(ii) After the contract has been concluded all lawful condition and terms inserted by the parties into the contract became enforceable.

(iii) Sexual intercourse becomes lawful and the children born of the union are legitimate.

(iv) Mutual rights of inheritance are established.

(v) The wife becomes entitled to her dower(sadaq).

(vi) The wife becomes entitled to maintenance.

(vii) The husband is entitled to restraint the wife's movements in a reasonable manner and to exercise the marital authority.

(viii) The prohibitions regarding marriage due to the rules of affinity come into operation.

(ix) The wife has to observe idda after the dissolution of her marriage

(x) No merger of personalities or property after the marriage contract

45. (1886) 8. A.H. 149 at PP. 155 - 157.

3.3 PRELIMINARIES OF MARRIAGE CONTRACT

And which is the conclusion of the marriage contract is generally preceeded by preliminary steps to determine if the other is free to marry and by which the man expresses his intention for marriage, when it is proved to him that the proposed wife is not already committed to the betrothal of another legally competent suitor. The formal initiative of marriage proposal may come from either side directly or through parents or guardians of the two parties. From the period that the husband made up his mind that he would marry the proposed wife, some steps must be taken before the final conclusion of the marriage. These steps are referred to in Arabic as Khitba. As soon as a man thinks of marriage, he usually tries to acquire as much knowledge, as possible about the woman he intends to marry. Among the things normally he will try to find out, are, the social standard of her family, the morals, behaviour, reputation and so on. Nowadays, the educational background of the girl is one among the most important things to be taken into consideration.

After being satisfied with his findings, the next thing is to try and see the girl. The Prophet (S.A.W.) has recommend that in the selection of bride, a man should try to see the intended bride before betrothal, least a blunder in choice or an error in judgement should defeat the very purpose of the marriage. However, a man

should not throw a passionate gaze at the would be bride but to have a simple look at her face and hands to gain sufficient idea about her personality and beauty.(46) It is said that the face denotes the beauty and the hands show the fertility and delicacy of the body. The general principle of Islamic Law forbid a male from gazing at a female in a passionate way. Both sexes are ordered by the Holy Qur'an to lower their eyes from looking in a passionate way, and guard their modesty and chastity.

> "Say to the believing men that they should lower their gaze and guard their modesty: that they will make for greater purity, for their God is well acquainted with all that they do."(47)
> "And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear there-of; that they should draw their veils ever their bosoms and not display their beauty, except to their husbands, fathers...."(48)

The rule of the need for modesty applies to both men and women. A brazen stare by a man at a woman is a breach of refined manners, where sex is concerned, modesty is not only "good form". It is not only to guard the weaker sex, but also to guard the spiritual good of the stronger sex. But on account of the differentiation of the sexes, temperaments, and social life, a greater amount of privacy is required for woman than for man, especially in the matter of dress and the uncovering of bosom.

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46. Al-Dasuqi, (Hashiyat al-Dasuqi, Vol.II P.215
47. Qur'an 24:30
48. Qur'an 24:31

Though it has been disallowed by Islan to allow people of different sex to remain alone in a room, because of the saying of the Prophet (S.A.W.) that whenever a man and a woman remain together in a lonely place, a third person is present and that is the Shaitan, but Prophet (S.A.W.) recommended that, the suitor, is to be allowed to see his would be wife. It is preferred that when looking at the proposed woman her permission should be obtained before-hand, but he may have a look at her inadvertently. The would be wife also has the right to look at her suitor. The suitor may be allowed to sit in one room with the proposed wife provided she is decently covered, and provided there be present with her one of her near relatives who came within the prohibited degree of marriage, such as her father or brother.(49) The Holy Prophet (S.A.W.) is reported to have said: "When one of you makes proposal of marriage to a woman, then if he can, he should look at what attracts him to marry her." In another tradition, he is reported to have said; to one of his Sahabi Mungira Ibn Shu'ba who expressed his desire to marry" look at her, it is likely to bring about greater love and concord between you."(50)

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49. Al-Dasuqi Supra, Vol. II, P. 25
50. Al-Bukhari (Sahih al-Bukhari) Trans. 1976, P.1

Whenever one is proposing a wife, he must bear in mind the advice of the Prophet (S.A.W.) that a woman is married for her beauty, her wealth, her family, and her piety; the best of you is he who marries a pious woman. Also the Prophet (S.A.W.) is reported to have said: The best wife is that when you look at her you feel pleased and if you asked her anything she obeys and if you are absent she will be honest over your property and over herself."(51)

Whenever a man proposes to marry; he is only permitted to make such proposal to a woman who can be lawfully married to him and that there is no legal prohibition affecting them. Some of these prohibition come as a result of certain degree of relationship between the parties i.e., blood relationship, affinity and fosterage relationship, and these are everlasting relationships. Once, they exist, they will never be removed; while others are only temporary, and removable when the circumstances allow it, e.g., a Muslin cannot marry more than four wives at a time, or joining two sisters together as wives at a time, or, a married woman, or a woman during her idda period etc.

3.3.1 THE CASE OF TWO SUITORS AFTER A GIRL

The Prophet (S.A.W.) prohibited two suitors vying with one another for marriage to one girl. This is

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51. Al-Khirsiyyi ala Mukhtusar Vol. II, P. 10.

because such a situation may likely result into enmity between two Muslim brothers. He is reported to have said; "A believer is a brother to a believer, hence it is not lawful for him to bargain upon the bargain of a brother; nor propose the hand of a girl on the marriage proposal of his brother, until the latter (voluntarily) with-draws the proposal .. Also it is reported that the Prophet (S.A.W.) has said; a man should not demand in marriage a woman previously sought by another." So, any woman to whom a proposal was previously made and agreement has been reached between both suitors, would not be proposed to by another suitor. But if there has been no agreement reached between the parties, then the other suitor can proposed for marriage, Fatima Ibn Ngais once reported to the Prophet (S.A.W.) that Abu Gahan Bin Huzaifah and Mu'awiyah Ibn Abu Sufyan proposed her marriage; the Prophet (S.A.W.) advised her not to marry any of them on the ground that Abu Gahan Bin Huzaifah was cruel to women and Mu'awiyah had no property, so better marry Usamah. But on the other hand, where agreement has been reached with a suitor who is debauch, and a pious and better man step in, the latter is allowed to propose to that woman.

Where agreement has been reached between both parties and a second suitor of equal standard as the first, steps in and marries that woman previously proposed, Maliki jurists, hold three different views. The first group says that, such a marriage is held void and should

be annulled altogether whether before or after consummation or even after giving birth. The second group states that such a marriage is void and should be annulled before consummation, but becomes valid after consummation. The third group holds that such a marriage is valid and legal, but the second suitor would be held to have committed sin and that is a religious point of view only. This can be remedied by asking pardon from the first suitor and if he pardons it is alright but if he refuse , he has to ask God's pardon - Hanafi and Shafii agreed with the Maliki's third group.(52) On the other hand, Imam Zahiri considers such a marriage void altogether and should be annulled whether before or after consummation.(53)

3.3.2 THE PRACTICE OF BETROTHAL IN NORTHERN STATES

The practice of betrothal in the Northern States is nearly the same as the traditional Islamic Law, except for few variations here and there. When a man meets a girl and shows his intention to marry her and she responds, then she will invite him to go and see her parents. Normally, the suitor will first notify his parents about his intention, and then the parents or a family friend will be sent to the girl's parents with some presents. These presents differ from place

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52. Ibn Aakar, (Ashal al Madarik), Vol.2, P. 68; see also M.T. El-Imairi (Personal Status in Islamic Law) P. 12.

53. Adawi, (Kifayat al-Talib) Vol.11, P. 45

to place, for example in Zaria, the presents will comprise of one wrapper and some cosmetics to the parents. Among the Fulanis of Gongola they use to send some kolanuts, a bag of salt and some amount of money. The father of the girl or her guardian will then receive the presents, but will not give a definite answer to the request at that time. After that, he will summon the relations of the girl for a meeting in order to choose a suitable man for the girl, if the suitors are many, because in most cases, many other suitors would have sent in their requests for marriage to the same girl. Before the council of the girl's relatives meet, they normally consult her to make the choice and they normally approve . Sometimes if they think that the girl's choice is not acceptable, they will communicate to her the reason for rejecting her choice. The council in most cases considers whether the person selected by the girl is of good character and capable to maintaining her. But if she insists on her first choice, they may sometimes reluctantly approve with a warning that she has to put up with whatever happens to her during her marriage with the man.

After accepting the would be husband, they will communicate the same to his parents and suggest for a date for the formal betrothal or khidba (engagement) called "Baiko". On the date fixed for the betrothal, a small ceremony is to be held comprising people from both sides and their friends. The engagement is to be

publicly announced and the date for actual contract of the marriage is also to be fixed and announced. In the case of those suitors who were not successful in the contest, their presents would be returned to them. Some will accept back their presents, and some will forgive it to the girl's parents.

The practice now prevailing in Northern States has introduced alot of deviations from the way Islam prescribed bequeath - Islam does allows bequeath but a simple one, where no payment of anything is required. But contrary to this Islamic teachings, you will find that alot of payments used to be made, involving both money and other things like dresses, ornaments etc. either to the girl herself or to her parents, sometime to both. Customs with regard to these payments vary not only from state to state, or locality to locality, but from tribe to tribe. For example in Zaria, the local custom prescribes about seven different payments by the groom, some to the girl herself, some to her father or guardian and some for distribution to other members of her family. The payments here include the Sadaq(dowry), which will be handed to her father or guardian. Any body either within her family cycle or to other family friends who have received a share in these payments will contribute towards her tajhiz. In Bauchi town, the prospective husband will first send some money gift to the girl's father, and then from there to the prospective, wife, finally some kolanuts will be sent to the family for the distribution among

the members of the family. The distribution of the kolanuts will indicate that their daughter has been given to a husband. With the coming of Izala a religious group of preachers things are now going back to the traditional Islamic teaching with regard to the bad practice affecting marriages.

3.3.3 GIFTS MADE DURING AND AFTER BETROTHAL

The betrothal is only a promise to marry, therefore it cannot create any legal right of liability. Any of the parties is free to withdraw without any legal liability towards the other, Islamic Law of betrothal differs from that of English form of engagement. In the breach of Islamic betrothal, the withdrawing party has to pay back the presents he or she might have received in consideration of the marriage contract.(54) Any gift made by one party to the other during betrothal is the same as ordinary gifts. In law gratuitious gifts are non-refundable. Where the donee has taken delivery of the subject matter of gifts, property rights in the matter is transferred to him and he becomes the legal owner of that property, he can do whatever he likes with it. Therefore to retract the gift, would amount to taking away property from ownership of another without that other's consent.(55) But where a gift is made for consideration and with the expectation of some compensation

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54. Sayyid Sabiq, (Fiqh al Sunna(, Beirut, 1973, Vol. 11 P. 32.

55. Sayyid Sabiq, Supra, PP. 31-32.

and if the receiver fails to perform his part of the transaction the giver is permitted to recover back the property given. Where, therefore, a person makes a gift of property in consideration for marriage, and the marriage is not concluded, the giver can demand the return of his gifts which he made in consideration of the marriage.(56)

In Hanafi Law, they treated such presents and apply the law pertaining to gifts. In accordance to that, whoever is the one withdrawing, such presents should be returned if they are still in their original condition, but if some of the presents gets lost or undergone a change, the giver should not claim for compensation of the value of the property.(57) Under Maliki Law there are two different views, the favoured view of the school is that, such presents should not be returned if the suitor withdraws, but they should be returned if she withdraws, and the value of perished or changed property will also be returned. The second view of the school is that, nothing should be returned to whomsoever be the withdrawing party.(58) The Hanbali jurists treated such presents given during betrothal as gifts, and in the view of the school gifts after being received cannot be returned, so, according to the school, betrothal presents once

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56. Sayyid Sabiq, Supra, P. 33; See also Ibn Abdin Vol. 11, P. 374.
57. Sayyid Sabiq, Supra P. 33
58. Sayyid Sabiq, Supra, P. 33. See also Abu Zahra (Ahwal al Shakshiya) P.14

given, should not be returned, whether the presents remains in their original condition or not, and whether the withdrawing party is one who gave the present or who received them. The Shafi'i jurists state that such presents should be returned to whomsoever be the one withdrawing and the value of the perished and changed property should also be returned.(59)

Finally, we have seen the stages of betrothal under Islamic Law and in most cases to follow the steps is very important. This is because, the success of marriage depends on the rightful selection of a partner, because marriage under Islamic Law has certain objectives the achievement of which depends on the type of parties that enter into it. It is because of this, Islan explains in details the descriptions and qualities of partner with whom these objectives may be achieved. These descriptions and qualities pertain to both man and woman. With regard to the selection of a wife, the prophet (S.A.W.) is reported to have said:-

> "The woman is sought in marriage for four reasons: for her beauty and for her religiousity. Blessed is he who wins a religious woman."(60)

This indicates that even though people when marrying nowadays use to consider in most cases, wealth, beauty or nobility of the family of the woman, but the most

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59. Sayyid Sabiq Supra P. 33
60. Narrated by Bukhari and Muslin.

important criteria should be the religiousity and good character of the woman.

3.4 AGREEMENT TO MARRY UNDER CUSTOMARY LAW

Although it cannot be said categorically that an engagement is a necessary part of customary marriage, it is so frequent that one is tempted to say that marriage without previous engagement is unusual in traditional society.(61) An engagement is an agreement to marry between a woman and her family on the one hand, and a man and his family on the other, by which they promise to give her in marriage to the man who, alone or with his family agrees to take her as wife and to settle the agreed dower,(62) and to fulfil all the duties and responsibilities arising from such an agreement. This agreement is usually made in the presence of other members

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61. On engagement under Customary Law, See: G.B.A. Coker, Family Property Among the Yoruba, PP. 259-262; Kasunu and Salacuse, Nigerian Family Law, PP. 41-47; Obi, Modern Family Law in Southern Nigeria, PP.103-136; Philips (ed.) Survery of African Marriage and Family Life, PP. 121-122; 201-206. Radcliffe-Brown and Daryll Ford (ed.) African Systems of Kinship and and Marriage PP. 278-284.

62. It is a common practice among writers of designating the gifts and property given to the bride and her family by the bridegroom or his family as bride-price, marriage Compensation and other names. They make no distinction between the gifts given during betrothal, i.e after agreement to marry, and the actual payment of bride-price which is part of the marriage contract itself.

of the two families and the Other persons invited, who act as witnesses. This agreement concluded a long procedure started by the two families and often accompanied by manifestations such as dances, eatings and drinking and Other activities needed for such.

3.4.1 PARTIES TO THE AGREEMENT

The parties to an agreement under customary law are in reality the families of the future spouses and not the spouses themselves. In the olden days and this is still the case in many parts of the country, the parents could promise to give their children in marriage without consulting them. Indeed sometimes the children were too young to understand what was going on. Despite the fact that betrothal and child marriage were generally disapproved of, no direct attempts were made by colonial rulers to abolish it. However, both Penal Code and Criminal Code contains provisions designed to protect infants against such practices.(63) The Age of Marriage Law of 1956 (Former Eastern Region)(64) makes void an offer or promise of marriage concerning people one of whom is under the age of sixteen.(65)

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63. See Criminal Code, Cap. 42, Law of the Federation of Nigeria and Lagos, 1958, Sec. 218.

64. The Constitutional Structure of Nigeria has been changed since this law was passed but its applicability is not affect.

65. Cap.6, 1963 Laws of the Eastern Region, No.22 of 1956 Sec. 3.

Like Islamic Law, agreement to marry under Customary Law is just a simple promise to marry which carries no legal responsibility on either of the parties or their respective families. Kasumu and Salacuse declare that "betrothal is more of a social, than a legal relationship, for it gives the parties few rights which may be enforced in a court."(66) On the other hand, Dr. Obi declares that betrothal to a woann means a change of status to a considerable extent.(67)

Although the Customary rules on a particular point may vary in detail from tribe to tribe, one finds, nevertheless, that, they share one thing in common. For example, according to the field study conducted within some particular communities,(68) it was discovered that marriage without previous engagement is not possible. Each one of them seems to have its own particular routine and rituals in this respect. Each has its own peculiar rules with respect to the way in which the girl's parents are to be approached, the gifts which must be exchanged, the persons who must be present to arrange the marriage and the manner in which the agreement is to be sealed. Despite the fact of the differences, upon closer investigation, it is discovered that they are differences of detail rather than substance.

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66. Kasunu and Salacuse, Op. Cit. P. 44.
67. Obi, Op. Cit., P. 114.
68. The ethnic groups are Nupe (from Niger State) Idoma (Benue State), Ogori, (Kwara State) Bachama, (Gongola State) and Bolewa, (Borno State).

3.4.2 LEGAL EFFECT OF ENGAGEMENT

Although as stated earlier an agreement to marry is not entering into the marriage itself, it carries no legal responsibility in the legal sense. But, by entering into this agreement, the spouses become subject to some responsibilities, especially the husband. The future husband has to make some periodic gifts to both his future wife and her family. On the Other hand the woman is under obligation to behave correctly and respectfully towards the future husband and his family. During this period the husband in some localities is under obligation to go and help in farming his future wife's father's farm.(69) According to the research conducted on the gifts given during this period by the husband to his future wife and her family, it is not certain that this is an enforceable right. He may, and perhaps should, help the relatives of his future wife when they are in financial difficulties but there does not seem to exist any binding duty.

The agreement to marry, like any other agreements may be terminated either through its completion, in which case no further problem arises, or it may be terminated by a party who no longer desires to fulfil the promise. Unlike under Islamic Law where either of the two parties may terminate the agreement, under Customary Law marriage it is only the families of the spouses (except in very

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69. Under Bachama Customary Law.

remote cases where an adult male who may act alone) will terminate the agreement. Because strictly speaking, the parties to an agreement to marry under customary Law are the families of the spouses.

3.4.3 REMEDIES FOR BREACH OF AN AGREEMENT TO MARRY

Under Customary Law there is no provision for the agrieved spouse to clain general damages. Alloff, however, does not exclude the possibility of an action for breach of pronise when he declares that:

> "Breach of a bare pronise to narry which has not led to the establishment of the betrothal status often involves no legal liability to compensate.(70) If what Alloff is saying here is true, that the establishment of the betrothal status somehow given a general right of action to the rejected party, then it is a minority view. Kasunu and Salacuse found that there was not a single customary Law system in Nigeria which entertain a general action for breach of pronise of marriage.(71)

The absence of general right to remedies for breach of pronise does not imply that the rejected party is completely without remedy. Actions usually lie for the recovery of gifts and other payments. The general rule is that all gifts and advances nade to the other party whether in the name of gift or part payment of dowry are recoverable. But the problem is, how to distinguish between gifts nade as a nark of affection and those nade in view of narriage. The conduct of the party would not

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70. Alloff, Essay in African Law, 1960, P. 223.
71. Kasunu and Salacuse, OP. Cit., P. 44.

seem to be relevant here since the object of the action in the restitution of money or property for an objective which has not take place.(72)

In some localities the payment of bride-price may be started during the period of betrothal and sometimes it takes years before the completion. The rules as to how to recover the bride-price and other gifts differ from one ethnic group to the other. For example, the Ibo, Angas, Bachama, Nupe and Idoma customary rules make a distinction between gifts and bride-price payments, holding that only the latter are recoverable.(73) This may be, because of the influence of Maliki Law on the Customary Law of these ethnic groups; for according to one view under Maliki's Law that, a gift given during betrothal period, cannot be recovered in the case of withdrawal. Also according to some of the ethnic groups, if a man dies during the betrothal period, the man has no right to recover the gifts and the bride-price. But according to Yoruba Law, parents of deceased girl have a duty to return both.(74) Below I have discussed the prelininaries to marriage of some customary tribes.

3.4.4 (i) MARRIAGE NEGOTIATIONS AMONG NUPE PEOPLE

In Nupe society the negotiations involve two main

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72. Obi, Op. Cit., P. 132.
73. Kasumu and Salacuse's Supra, P. 45.
74. Ajisafe, Ibid, P. 61.

parties - the boy's family and the girl's family, with a go-between or an intermediary. The two parties do not come into direct contact but through the go-between known as Nda rinna. When a boy's parents want to go and ask for a girl's hand in marriage for their son, they normally find somebody who is reasonable and intelligent enough, to negotiate for them with the girl's parents. There are some people who are always contacted because they are reputable for successful negotiations.

In most cases, Ndarinna is somebody who has free access to the girl's parents. Probably the first day he goes there, he will not mention specifically the aim of his visit. The next visit will be purposeful and official. This time he will be given the message. He will also be given some amount-mostly one to two naira known as (Ewo emi Sa) - money for greeting plus (Ebi evo gafi) - half mudu (measure) of Kola nuts. When he gets to the girl's parents or guardian, he delivers the message of seeking their daughter as a wife and gives them the money plus the kola nuts. Normally, he is asked to come back in three of four day's time. During this period, the girl's parents make all necessary consultations; that is, consulting all relatives and Mallams to see whether the union will be a success. The boy's behaviour and his background is also considered. When Ndarinna goes back, what he will hear will depend on the outcome of their (parents) findings. If the result is positive, he will come with more gifts - about

the same amount as in the first case and now (ebi evo nini)- 100 kola nuts for lesser thanks - (godiyagi). These gifts will be shared between the father, mother and the girl herself. Ndarinna again brings another same amount of money and kola nuts for greater thanks (godiyako or Dangi Kana). This is divided into two equal parts, half for father's relatives and the other for the mother's side. It will be distributed among each and every relative, to inform them about the marriage plan. This information is now official and validates the union. Except in special cases, when this stage of negotiation is reached, there will be no going back. The next important process is the marriage contract - Bride-price.

In former times, marriage could be entered into at an early age, on the basis of betrothal method. In this regard choice of marriage partner was largely done by the parents, especially the father. The traditional procedure involves the boy's parents meeting the girl's parents to discuss the issue. As soon as a positive agreement is reached a black thread Owunobi, likened to a bracelet, is given to the girl to wear. This is meant to indicate that the girl is betrothed thereby preventing other intending parents from coming to demand her for their son. Until the bride price is paid the marriage is not considered legal, and this could be done as soon as the boy's parents are ready. At this juncture, it is important to note that the development that takes place before the bride-price is paid, could be regarded as a sort of promise, which if broken, no matter the reason, has no legal obligation.

Now with change in value orientation, parents no longer have to select marriage partners for their children - such an act would be considered elegant. However, as a matter of courtesy parents consent is necessary. Marriage is now generally contracted (with regard to both sexes) at the age of puberty. The boy, on finding a girl of his taste, talks to her and if given green light or the go ahead, could call the attention of his parents or near kin (whichever available) to approach the girl's father. When the proposal is accepted by the girl's parent, payment of bride-price, the requirement for valid marriage, could be paid afterwards. But before this is done, the boy would continue to render services in kind to the girl's parents.

3.4.4.(ii) BETROTHAL PERIOD AMONG OGORI PEOPLE

The parents take time to seek out a family with a son of the right age who is industrious and brave (oforo nene die siyutu aka nene gbena da na), a good farmer (erunro oboro), a good hunter or both if possible. Good looks and charm are not considered since the girl is not making the choice. Property, also, does not matter greatly for majority of the Ogoris only manage to make for their living by them. The equivalent of riches in Ogori life is perhaps the possession of many relatives (ukuba nene yodadana) who could be called on for help when ceremonial gifts are due or work is needed.

The girl's father (oyegbe-wea) consults his relatives and his wife as to the eligibility of the prospective bridegroom. Then he, and perhaps the wife, too, call upon the boy's parents (ororo-ero), stating, "we have a girl who is old enough to marry. We have taught her well and think she is industrious. We offer her to your son." "Ti sogbenoyegben ne gue oforo-susuna. Ti teyega dada, chana ediesutun dada. Te foyegbenaye ne nogben." The boy's parents in turn then go through the routine of consulting relatives (ukuba). If they object to the girl's family as allies, they give an equivocal answer and then perhaps move away so as not to be offended by a refusal.

Girls (iyegben) who have been promised as brides by their parents are not supposed to have lovers before marriage. While there is no particular concern with the virginity of such a bride, parents (ededa aka iya) do not like to see a daughter (ogbenoyegben) establish a love relationship when she has been promised to someone else. The risk that she will try to avoid the arranged marriage is too great. The usual solution to the problem is to see that a promised bride goes to her husband as soon as she is physically matured.

Only after these preliminaries are the young people told. According to most accounts they are accepted without question and the union takes place immediately after the payment of the bridewealth

(oviya uche) and initiation marriage ceremony (oviyinu) if she has not been initiated into womanhood.

3.4.4. (iii) MARRIAGE FORMALITIES AMONG THE BACHAMA

There are basically four forms of recognised marriage formalities among the Bachama. But they can be conveniently broken into two broad divisions. This can either be legitimate or illegitimate, depending on the nature of the marriage.(75)

The first form is what is called betrothal. Generally a father would go out and find a young girl and negotiate for betrothal to his child. He may also approach a prospective mother with the tidings that he wants his child to befriend the child of her pregnancy. If she consents, and the fruit being a female, betrothal is concluded.

The father of the boy gives presents to the girls parents and the child if old enough goes to help, on his in-laws farms. His service in which he would generally be helped by his friends, on the father-in-law's farm is considered a show of gratitude and appreciation (in advance) for her raising and training the girl to be a good wife. He is to continue these services until the girl comes of age for marriage i.e. eighteen to twenty years.

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75. This has been discussed in the preceeding pages. That is the legitimate and illegitimate forms of marriage. It has been stated that the latter form can be legitimized by re-adjustment to customary practice of marriage payments before any marriage is consummated.

The father arranges the marriage if he sees that the girl is old enough.(76)

But if however, the child so born is a male, he become a boy-friend to the older child. This practice was given a standing footing by tradition. Traditionally, it has been customary for children to obey their elders' order and directives. Thus a Bachana father could do the negotiation for a betrothal without having to consult or inform the child. He was also always certain that what he says is binding on the child. To talk of the continued existence of this practice up to this day will be a deliberate action to blur reality. This means that the practice of betrothing young men and women has been outdated.

The second form of marriage involves some role performance by the suitor's best friend or close relatives. Anyone brought in here will be his intermediary with the girl's family. The person is called his njo-tufe (lit ("the son of the path"). He represents the prospective husband in discussion with the girl's people. The role of the njo-tufe is very decisive for the suitor's chance of marrying the girl. It is for this reason that the most trusted and dependable person will be the most fit to assume the status of a njo-tufe. After winning the girl's consent all payments are to be made through

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76. See parent-child relationship for details of marriage arrangements and parents' responsibilities in this respect.

the nzo-tufe to the girl and finally to her people.(77)

But should the girl, after all customs have been observed awaiting the "final transfer" (Lokai), happens to fall for another man besides her husband-to-be, the man will have to refund the bride-wealth or gunoto (wealth) paid by the first man.

The third denotes what can be reasonably referred to as a subsequent marriage. Here an already married woman living with her husband can be secretly approached by another desirous man proposing marriage. If the woman consents, she breaks her marriage with the first man but very tactically anyway.

After she consents and a date for elopment reached, the new husband gives her presents. If the two live in the same village the woman has to take a Kpa mare ("calabash for oil"), lit,) leaving her husband's home in pretence of going to the stream. At this time the man taking her away will be waiting for her in an agreed hide-out. If this is successfully done it is called Ngura neto (lit. "taking or snatching a wife").

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77. Of these payments there are now recognisable difference in the items of payment following the introduction of a money economy. See latter discussions.

Once the woman reaches the man's house, she stays there until ' ask for his bride-wealth which the new husband has to refund. With the payment refunded the second marriage was concluded. But it never ends there. The man from whom the woman is taken (plus his close kinsman) awaits his own chance to revenge. This could be directed straight at the man or any of his close kinsmen awaits his own chance to revenge. This could be directed straight at the man or any of his close kinsman too.

Thus they remained concealed antagonists putting on weight to take revenge. This remains so until each party is satisfied with the revenge it has taken. This anatagonism might be retained over years and be held as inter-familiar source of conflict and hatred. And in cases of enslaving people, they may be capturing and selling members of each other's families by way of vengeance.

But if the man who takes the woman is from a different village, the tactics to be used become even much more secret because the venture (at this level) entails loosing one's life if caught in the act. The man has to stay in the outskirts of the village (i.e on the day of elopment) so as to avoid being spotted or suspected. The woman leaves her husband's house under the same pretence as before. She warns the man of any impending danger.

If her husband's people suspect her and they are convinced that their suspicion is not unfounded they will arm themselves and follow her. They will also be keeping their distance but following the woman who may not be aware of such a counter measure. They take all caution to prevent their being spotted by the woman and her lover.

Should they catch-up with them the man is either shot dead with arrows if he tries to escape or he may be speared to death and the woman taken back to her husband's house where she will from then on be under a severe hand. It is always the fear of this that necessitates the Ofk of's readiness to the extent of arming himself before venturing to Ngura meto ("snatch a wife"). In some cases the man might have his people kepping guard too. If this is the situation a fight normally ensures and if inconclusive, with time, the fight might engulf the two villages.

However, if the man succeeds in Ngura meto, he will keep the woman behind to go and inform his people and well wishers. Such an act is considered to be muroune (lit. "manness" or Hausa, "Mazantaka".) This muroune commands a sort of heroic noise called salamato to show the people's appreication of such bravery. This is usually a sort of applause that rings over a wide distance. Thus if the two villages are not very much part, the other village can hear the salamats. If they discover what is wrong they will be very annoyed if such salamato should continue. This may lead to an instant

raid on the village doing the salanato. Anyway, after the merriment the next problem is how to get the woman inside the new husband's house. Generally the woman would pretend to be refusing entering the house.

To make her enter the house, usually presents have to be distributed out on her. It was always by such presents that the consent of the woman to enter the new house was secured. Thus the more the presents the more likely the woman will enter the house without much time wasted.(78)

The fourth form or category of marriage was much pronounced in the past and very less likely occurring these days. It involves a re-Union of a widow and a close relative of her deceased husband. This approximates the English notion of levirate or 'widow-inheritance'. The inheritor's usually younger than the late husband.

3.5 AGREEMENT TO MARRY UNDER THE ENGLISH LAW(79)

Our discussion of agreement to marry under both

78. I would suggest here that the presents denote the success of the new house. This is because by Bachama standards success is assessed on the basis of how many and how large are one's granaries plus the number of animals kept. Thus the more a man displays of such things the greater the likelihood of his being esteemed a successful man. With much presents realised the woman would be convinced that her new house is a prosperous one. The partial hesitation.

79. Although Law of England on promise of marriage has been modified by the Law Reform Miscellaneous Provisions) Act of 1970, this does not affect the received English Law as applicable in Nigeria.

Islamic and Customary Laws has shown us the dominance or the part played by the parents of the spouses in the making of the agreement. In most cases they formally start the process and their consent is indispensable in some cases for the final accord. Contrary to this, under English Law, however, such agreements are entirely the affair of the spouses and as such a much care is taken towards breaches of promise to marry.

One would find it very difficult to say specifically what Law should govern agreements to marry under English Law. Looking from the fact that most Nigerians regulate their affairs, especially family matters in accordance with customary law. There is no reason to assume that those who intend to contract a statutory marriage necessarily intend to subject their agreements to English Law. The question then, is, what is the intention of the parties? Kasunu and Salacuse examined the case Law on agreements to marry under English Law and came to the conclusion that:

> "The Nigerian Courts have generally applied English Common Law, but they have never given any specific reason for doing so. Indeed they do not seem to have recognized that any problem in choice of Law existed at all in breach of promise cases and have simply applied English Law whenever they found an agreement to marry under the Act". (80)

The author argue that in view of the High Court Provisions which provide that the person who is

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80. Kasunu and Salacuse Op. Cit. 32.

ordinarily subject to customary law shall not be deprived of its benefits unless he intends that his transactions be governed by the common law or that the transaction be unknown to customary Law, the Courts should not presume that English Law applies to all such agreements. They refer to the practice, current in West Africa of preceeding statutory marriage by customary Law ceremonies, and submit that, "in terms of logic and public policy, there is nothing inconsistent in allowing customary Law to govern agreements to marry under the Act."(81) Against this view, Dr. Obi stated that when a plaintiff claims damages for a breach of contract to marry, she must bring her action in a non Customary Court, for customary Law gives no damages for breach of promise; agreements to marry under English Law are different from their counterpart in traditional Law. Obi submits that "if it be shown in evidence that the parties intended a christian marriage as the ultimate goal of their agreement, it must be presumed ipsofacto that they also intended that 'English' Law, not customary law should regulate their contractual relationship.(82)

It is not easy to choose between these two opposing views. But logically one would tend to agree with the view of Dr. Obi, in the sense that from the starting point the parties are supposed to know and determine which law is going to govern rights under customary law

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81. Kasunu and Salacuse, Op. Cit. P. 33.
82. Obi, Op. Cit., PP. 121 - 124.

and decided to transact their affairs under English Law. I see no reason why English Law should not be applied since it is their intention that English Law to govern their relationship. I did not support the view of Kasunu and Salacuse that an agreement to marry and a contract of marriage are two different things. To me, there is no way of Separating the two. One cannot go without the other, and therefore I submit that once it is evident that the parties intended to contract their marriage under English Law, it is the Law that would apply into all their transactions. This may be illustrated by the case of Ugboma V. Morah.(83) The plaintiff and the defendant had exchanged promises to marry at a registry. The defendant broke off the relationship and the plaintiff brought an action for breach of promise, an action unknown to the customary law of the parties(Ibo). On evidence that the parties intend to marry under the Ordinance (e.g. when the defendant wrote to the plaintiff about "our legal and private marriage in the Court") the court applied English Law without discussing the possibility that Ibo Law might apply to the agreement to marry. Similarly, in Aiyede V. Norman Williams(84) an action for breach of promise was decided on the basis of English law without any reference to customary Law. Here the parties had studied in England and had intended to marry according to English Law.

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83. (1940), 15 N.L.R. 78.
84. (1960, L.L.R. 253.

Engagement under English Law, is a contract between two parties resulting from a mutual exchange of promises. Responsibility for fulfilling the promise lies on the parties and not their respective families. Similarly, they do not require consent of their parents in order to enter into such an agreement, since even a minor may enter into an agreement to marry under English Law without parental consent. The general principles of contract relating to capacity then come into play. An infant can always enforce such agreements, but if on the other hand he happened to be the defendant, then he cannot be sued. Nor can he ratify a promise of marriage when he came of age for Section 2 of the Infants Relief Act, 1874, provides:

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

The Infants Relief Act has been held to be a statute of general application in the case of Labinjoh V. Abake(85) and has been applied to an action for breach of promise of marriage in the case of Aiyede V. Norman Williams(86) where both of the parties had entered into the agreement for marriage at the ages of 15,

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85. (1924), 5. N.L.R. 33.
86. (1960), L.L.R. 253 at P. 261.

and that the defendant had failed to fulfil his promise. It was held that the agreement was invalid for lack of capacity by both parties.

A person who had entered into a valid agreement to marry, commits a breach of promise if, without any valid reason fails to fulfil the promise. Breach may take the form of a simple refusal to go on with the arrangement or to contract another marriage, a situation which makes it impossible for him or her to fulfil the promise. Whenever such a promise of marriage has been broken, the plaintiff may bring an action. The usual remedies for breach of contracts be no order of specific performance and therefore the plaintiff is limited to the recovery of damages. Unlike in the cases of normal contracts, the courts in these claims are ready toward both the damages sought and in addition the damages for the wounded feelings. As Willes, .J. declared in Berry V. Da Costa.(87)

> "The jury are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into their consideration her injured feelings and wounded pride."

In assessing the damages or the amount to be awarded, the court will consider the duration of the engagement and the prospect of the plaintiff finding another equally attractive marriage partner. For example in Uso V. Iketubosun,(88) the parties became

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87. (1866) L.R. 331 at 333.
88. (1957) W.N.L.R. 187.

engaged when the plaintiff was 20 years old but 10 years later, the defendant, in breach of his promise, married another woman. In awarding damages to the plaintiff, the court took into consideration the plaintiff's reduced chances owing to her advanced age.

Damages may also be awarded for the cost of articles which have become useless or less useful following the cancellation of the wedding arrangement. Under this heading comes up things like wedding dresses, rings, cakes, etc. likewise the plaintiff may recover for the loss of the status of a married woman, the support and maintenance she would have had if the defendant has kept his promise.

The defendant on the other hand may not be denied of his rights of defence. In addition to the usual defences to an action for breach of contract, e.g. infancy, illegality, misrepresentation, and undue influence, a defendant may plead a special defence, that since entering into the contract, he has discovered facts concerning the plaintiff which entitled him to terminate the contract. The principle has been just stated by Phillimore, L.J., in Jefferson V. Paskell.(89)

> "On principle, it would seem that there must be some cases of mental or physical infirmity (as it is been decided that there are cases of moral infirmity) which supersing after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her refusing to marry".

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89. (1916) 1 K.B. 57 at P. 70.

For the defendant to succeed with this defence, he must prove to the satisfaction of the court that the plaintiff is suffering from such a moral, physical or mental infirmity which makes him or her to be unfit for marriage.

The general rule in English Law is that once a gift has been made, it may not be recovered by the donor except on the ground of fraud or undue influence. To this rule, however, an exception is made in the case of gifts made in contemplation of marriage. When a contrary, the donor may recover. If however, the donor himself is responsible for the termination of the engagement he cannot recover.(90) Thus a woman who broke her engagement has been held liable to return the ring given her by her ance.(91) If the donor broke the engagement, then the lady can keep the ring.(92) Gifts made to the couple by third parties are also returnable unless there is an intention to the contrary.(93)

2.9 LEGAL CHARACTERISTICS OF MARRIAGE IN NIGERIA

Marriage is an agreement by which a man and a woman (or their representatives, or families in the case of Islamic and Customary Laws, or the parties in the case

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90. This is also the majority view of Maliki Law.
91. Jacobs V. Davis (1917) 2 K.B. 532
92. Cohen V. Seller (1926) 1 K.B. 536
93. Jeffreys V. Luck (1922), 153 L.J.J. 139

of English Law) enter into a certain relationship with each other and which creates and imposes mutual rights and duties. Looking at it from this point of view, marriage is clearly a contract. It present similar problems to other contracts; for example, of form and capacity; and like other contracts it may be void or voidable. But it is, of course, quite unlike any commercial contract and consequently it is sui generis in many respects. For example, the grounds on which a marriage may be void or voidable are for the most part completely different from those on which contracts may be void or voidable; and a contract of marriage cannot be discharged by agreement, frustration or breach. Apart from death, it can be terminated by divorce or decree of dissolution by a court.

Matrimonial Laws of Nigeria have recognised two systems of marriages, polygamous and monogamous marriage. Nigeria is the same as in England. It is the marriage which Lord Penzance described in Hyde V. Hyde(94) as "..... the Voluntary union for life of one man and woman to the exclusion of all others." There are three aspects of this definition. First, the marriage must be voluntary. Thus there must be free consent of both parties to the union. It can be annulled if there was no true consent on the part of one of the parties.

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94. Hyde V. Hyde (1948) 1 A.H.E.R 362

Secondly, it must be for life. This does not mean that by English Law marriage is indissoluable. What is required here is that, at the time of contracting the marriage, is for life, unless it is previously determined by a decree or some other acts of dissolution. Thirdly, it must be monoganous, that is, it must be a union of one man and one woman. Neither spouse may contract another marriage so long as the original union subsists.

While on the other hand, a polyganous marriage may be defined as a voluntary union for life of one man with one or several wives. Its essential characteristics is the capacity of the man to take as many wives as he pleases. The limit to the number of wives a man may marry under customary Law is based mainly on economic grounds. A wealthy man of influence in the society and who can afford it may have four, five, six or more wives; especially kings or chiefs have a large number of wives.(95) Although marriage under Islamic Law is polyganous, yet it is an injunction of the Holy Qur'an that a man is not allowed to have more than four wives.(96) The character and incident of the system are governed by Islamic Law. While its character and incidents under customary law is governed by customary law. Unlike Islamic, whose Law covers and bind every person who professe the religion of Islam customary Law has no

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95. Nwogugu, Family Law in Nigeria, H.E.B. 1974 P. XXIII.

96. Qur'an 4.

uniform of application, it has no uniform system prevailing throughout Nigeria. The term customary Law, therefore, covers a multitude of systems of law which differ from one locality to another.

3.7 CONSTITUENTS OF MARRIAGE CONTRAT UNDER ISLAMIC LAW:

Marriage is essentially a contract under Islamic Law between competent contracting parties which rest for its validity on the arkans (Pillars) or essential consituents without which there can be no valid marriage. As to what constitutes those Pillars Muslim jurists differ. On some Pillars, they agreed and differ on others. Nevertheless, the followings are necessary in order to contract a valid marriage.

(i) Offer and acceptance

(ii) Marriage guardian (under Maliki Law)

(iii) Presence of two witnesses (under Hanafi Law)

(iv) Sadaq (dowry) which is essential to the validity of the marriage, although it is not a condition for the validity of the contract itself.

The detail discussion of the above elements goes like this:-

3.7.1 OFFER AND ACCEPTANCE

(a) Offer (Ijab): In theory there is no hard and fast rule about who makes the offer. It may be made by either party, although naturally the

(b) Acceptance (Qabul): The acceptance which is also a pronouncement of consent of the proposal must be express, or it can also be made by kinay at - (implied, e.g. "I have accepted D in marriage to me or to H" in the case of representation. It is also necessary that the acceptance must agree with the terms of the offer, e.g., where the offer contains a term stipulating the amount of dower, the dower must also be accepted.

(c) MAJLIS

It is a condition of validity that, the agreement between the contracting parties must be reached in the same majlis (session). If an offer is made and either of the parties rises from the session before acceptance, there would be no valid contract. A proposal made at one meeting and acceptance made at another, would not constitute a valid marriage. "If, for instance, one of the bride's guardian says: "I have married my daughter D to you or H" and the bridegroon or his representative keeps silent until the session had broken, and at a subsequent session or the two meet subsequently at another place and the bridegroom or his representative says: "I have accepted the offer of the marriage of your daughter to me or H". Such acceptance is void. This is agreed by all the schools.

letter and to the consent of the person to whom it is addressed. The contents of the letter must be made known to the witnesses and the proposal should not be expressed in the imperative mood. In the case of dumb persons declaration and the acceptance may be expressed by intelligence signs, provided the witnesses present would be able to understand the signs.

(d) LANGUAGE:

Offer and acceptance can be made in any language understood by the witnesses those present at majlis. It should denote clearly the purpose. Whether the offer and the acceptance is made orally, or through writing a letter, the language used should show explicitly the intention to establish marriage relationship from the moment of the acceptance and should be permanent for life of either party unless necessity arises for repudiation. The language should by no means imply marriages at a future time or for a fixed period or on the happening of something in future. Temporary marriage and marriage for mut'a enjoyment are null and void agreed by all Sunni Schools, but valid to Shi'as.

(e) CONSENT:

The contract of marriage in Islamic Law is essentially based on the consent of the contracting parties.

There must be a meeting of the mind - (consensus ad idem).

Considered juristically, marriage under Islamic Law, is a bilateral contract, as stated in the Holy Qur'an.

> "And how could ye take it when you have gone in unto each other, and they have been taken from you a solemn covenant."(98)

The contract is based on the mutual consent of the contracting parties possessing legal capacity. The presence of sufficient witnesses is required by some jurists, for the validity of the marriage, the publicity of the marriage is also laudable.(99) Islamic Law deserves the gratitude of humanity for securing rights to woman in a sincerely human spirit, which after fourteen centuries, were incorporated in the convention relating to the formation of marriage and adopted by the United Nations - General Assembly on December 14, 1961. The substantive provisions are reproduced here below, and should interest those concerned with comparative law and sociology.

ARTICLE I

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to

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98. Qur'an 4; 21

99. This is based on a Prophetic tradition related by Aisha and Cited in Jani'al Tirmidhi 9:6.

solemnise the marriage and of witnesses as prescribed by Law.

ARTICLE II

State parties to the present connection should take legislative notion to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age for specific reasons, in the interest of the intending spouses.

ARTICLE III

All marriages shall be registered in an appropriate official registry by the competent authority.(100) From the legal point of view, marriage is essentially a contract and therefore governed by the rules of simple contract. In theory as well as in practice, marriage may be contracted at any time and in any place, whether in a mosque, house, office, etc. In Law, nor religious ceremony is necessary, nor the presence of any official or religious celebrant. But in practice social celebration, which vary in different areas and, some religious features usually accompany Islamic Wedding.

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100. As a result of verse 282, chapter 2, the Khaliph, notably, Harun al-Rashid insisted on all Muslims and non Muslims to register their Marriages before a Khadi (Judge).

(f) WHO CAN GIVE CONSENT

The consent must be given by the parties thenselves or an agent who can lawfully give consent or in the case of a minor by a guardian who is competent to bind the minor. A woman who is an adult and is of sound mind, may be married by virtue of her own consent although the contract may not have been made or acceded to by her guardian. No one, not even the father has the right to contract an adult sane woman in marriage without her permission. The consent of the father of an adult woman cannot take the place of her own consent. If the consent of bride is not formally asked for before the ceremony, the marriage would not be valid. Giving away in marriage is not sufficient, it must be proved that the woman herself consented to the marriage and there was performance of the ceremony. The Holy Prophet (S.A.W.) is reported to have said:

> "A previous married woman shall not be married till she gives consent nor a virgin be married till her consent is sought." In another tradition He was reported to have said." A grown up girl shall be asked permission about herself. If she is silent, it is her permission; and if she declines, there shall be no compulsion on her.

Ibn Abbas reported that the Messenger of Allah (SAW) said

> "A previously married woman is more a guardian for herself than her guardians, and a virgin should be asked permission about herself; and her permission is her silence. In a narration, He said, "A previously married woman having consummation has got greater right to herself than her guardian, and a virgin shall be asked

of her consent; and her permission is her silence."(101)

A contract of marriage made under compulsion with any intention of making it, is valid, according to Hanafi school, while in the other schools it is void. Also according to the authors of Fatawa-i-Alangiri and Radd-ul-Mukhtar such marriages are valid. The Prophet (S.A.W.) is reported to have said, "There are three things which whether done in joke or earnest shall be considered as serious and effectual, one marriage; the second divorce, and the third taking back."

3.7.2 PROCLAMATION OF MARRIAGE

Marriage by itself is a proclamation among the public, to the effect that two persons have united for procreation and legalising of children and that others have got no right to interfere in the conjugal relations of the married couple. The greater is its publicity and proclamation, the greater is its merit. If, however, there are no proclamation and no witnesses, it is nothing but secret sexual relations amounting to fornication, even though there is mutual consent. The Holy Qur'an therefore says: "Taking them in marriage, nor fornicating, nor taking them for paramours in secret."(102)

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101. Fazlul Kareem, Al Hadis , Vol.II, PP.647-48, Lahore.
102. Qur'an 5;6.

For the purpose of publicity it is recommended by Prophet (S.A.W.) after finalizing the marriage contract drums be beaten or guns be fired in the air, or cries of rejoicing be given. The difference between the Lawful and Unlawful relations is the publicity and declaration. Walima (marriage feast) is also recommended by the Prophet (S.A.W.) as it is a sign of publicity and declaration of the marriage. The Prophet (S.A.W.) made a Walima on each of the occasion of his marriage. Once he slaughtered a goat and on another occasion he made a feast with two "muds" (handsful) of barley, to guide the Muslims to act according to their financial ability.(103)

The contract of marriage in Islamic Law may be summarized thus: Marriage is a bilateral contract based on the free consent of the two contracting parties. The parents certainly aid by their counsel and their experience in searching or selecting the companion of life for their child, yet it is the couple who have the last say in their matter. In this respect, there is no difference between man and woman in so far as the Law is concerned. Illegal practices may exist in varying degree from place to place and class to class; but the Law does not recognise the customs which contravenes its provisions.(104)

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103. Sahih al Bukhari
104. Hamidullah, Introduction of Islam, P. 165

3.7.3 CAPACITY OF THE PARTIES:

As a general rule, capacity to enter into a valid contract of marriage rests on the same basis on the capacity to enter into any other civil contracts. There are certain conditions which are requisite for the validity of any civil contract and are also capabale to the contract of marriage. These are:

(a) Absence of Legal Impediment:- The parties to the contract must not be barred from entering into such a contract by reasons of legal impediment arising wither from relationship or other legal impediments. Thus the parties are disqualified if they are related through consanquinity, affinity or fosterage which are permanent impediments. Also they have to be free from the temporary impediments, especially the man who is mostly affected by the prohibitions.

(b) Sanity:- The parties to the contract must attain the age of discernment and must not be persons of unsound mind (majnun) or (non composementis). Because it is one of the essential features of a civil contract that there must be a consensus of the mind and this

can only be achieved if the parties understand what they are talking about."(105)

(c) Majority:- It is a further condition of validity that the parties must be adult and not minor. A minor is not competent to enter into contractual obligation. An adult male who is of sound mind can contract a marriage according to all schools of law. But with respect to a female who is adult and of sound mind, there is a difference of opinions. According to Hanafi Law, she is competent to enter into marriage contract without the least interference from her guardian or any other person, except where the husband is not equal to her. But according to Maliki, Shafi'i, Hanbali and Dauda al-Zahiri she lacks the capacity. She has to do it through her marriage guardian. As minor as not competent to enter into contractual obligations whether for himself or on behalf of someone else. He is in Law, (Mahjur Alaihi) - interdicted.(106) Generally speaking, his contractual transactions are classified into three categories, viz;

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105. Al-Dasuqi Supra P. 230
106. Ibid.

(i) Contractual transactions which are necessarily advantageous to him are valid and enforceable, such as contrac for necessities or of pious nature;

(ii) Contractual transactions which may or may not necessarily be advantageous to him. Such transactions are dependent on the consent of his guardian.

Islamic Law, therefore, makes a distinction between a contract of a minor possessed of understanding, and one made by a child who does not possess understanding. A marriage contracted by a minor who has not arrived at the age of discretion, or who does not possess understanding, or who cannot comprehend the consequences of the act, is a nullity. If the minor is possessed of understanding then a contract of marriage entered into by her is dependent on the consent of her guardian, according to Hanafi who allows a woman to enter into such a contract.(107) While under Maliki and Shafi'i schools she is under the power of (Ijbar) i.e., the power of her guardian who exercises that power.

As majority is attained on puberty, a woman is free to marry after attaining puberty, even though

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107. Ameer Ali, Supra P. 279.

she is under 15 years. According to Hanafi Law after attaining puberty she can select a husband for herself without reference to the wishes of her father or guardian, because no guardian can force an adult woman whether virgin or not into marriage. While under other schools she has to be represented by her marriage guardian (wali). A contract of marriage made by a person of unsound mind or by one who has not attained puberty is not valid, and the marriage of such person can be contracted only by the guradians.

3.7.4 STIPULATIONS:

The language used for offer and acceptance while contracting marriage is normally simple and concise. It is the words denoting a marriage according to Islamic Law. By virtue of this, the spouses have rights and obligations towards each other. Inspite of that sometime one party or both include certain conditions in the marriage contract. These conditions must be legal, reasonable and not opposed to the spirit of Islamic Law. The parties could modify or rescind these conditions at anytime they like. In cases where illegal and unreasonable conditions are attached to a marriage, it will be treated as invalid.

All jurists agree that contracts with illegal stipulations sometime may invalidate the contract. The example of such contracts are:-

(i) A marriage for temporary period i.e., (mut'a)

(ii) Nikah al-Sigar i.e., exchange of sisters without paying sadaq to each; making each one as dower for another.

(iii) Nikah al-Tahleel i.e., to marry a triply divorced woman on condition to make her lawful for her former husband who divorced her three times. The Prophet (S.A.W.) is reported to have said a marriage with such a stipulation makes the bride as a borrowed male goat, may God curse him and curse that former husband for whom such a woman is falsely presumed to be lawful.(108)

(iv) The stipulation that the husband should divorce his existing wife.

So all these contracts of marriages enumerated above and alike are invalid because of the stipulations, and the contracts should be invalidated whether before or after consummation.

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108. Sahih al Bukhari.

Stipulations which repeat or affirms the normal ingredients of a marriage contract such as that the husband should pay the dowry or that he should maintain the wife are valid. But stipulations contrary to the nature and object of the contract such as there should be no mutual rights of inheritance between the two spouses, or that the wife has to maintain herslef, or that the husband is to restrain from having sexual intercourse with her such of these stipulations invalidate the marriage contract before consummation, but after consummation, the stipulation are to be considered as cancelled and the contract of the marriage should stand valid. Stipulation which are not contrary to the nature and object of the marriage such as not to marry another wife, or not to take her out of her family's house or out of her family's locality is valid, but such stipulation is to be discouraged and they are not liked. But once they are included in the marriage contract and accepted, they are enforceable in Law according to Ahmad Ibn Hanbal, because he says that such stipulation are of some benefits to the wife and they are in order and should be fulfilled. He said this is because of verse 1.5 "O you who believe fulfil all obligations." He has also quoted a Prophet tradition, saying "The best entitled to fulfilment of

all conditions that you fulfil, are the conditions by which sexual union is legalized."(109) But the other jurists disagreed with Ibn Hanbal, and quoted their authority the Prophetic tradition, saying: "Muslims should comply with the conditions they have undertaken unless the conditions turn the unlawful as lawful and vice versa. And therefore, according to them such conditions are void by themselves but the contract itself is valid."(110)

All what is said under this heading is subject to the approval of marriage guardian known as wali under Islamic Law. Before discussion the age and consent of the contracting parties under the English and customary law systems, I would like to discuss the institution of wali (marriage guardian) under Islamic Law that gives us a chance of comparing the age, consent and capacity of the contracting parties under the three systems of law and to see the role to be played by the marriage guardian under Islamic Law and the effect of giving consent or non giving consent of parents under the English and Customary systems of marriage.

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109. Abdurrahman al-Jazuriyyi Figh ala Madhahib al arba'a Vol.IV, P. 88. See also Dasuqi Vol. III P. 238.

110. Ibn Rushd, Bidayat al Mujtahid, Vol.II, P.59

3.8 MARRIAGE GUARDIANSHIP

Wali from the Arabic root word (wala) which means to be near, and waiiyya is to govern, to rule and to protect some one who is unable to do so independently. In the Qur'anic concept, wali signifies protector, benefactor, companion, friend and is applied also to near relatives. When the tern wali is used in marriage it means the person who is authorized by law to make a valid contract of marriage of a minor or person of unsound mind, who lacks the capacity of entering into contractual transaction.

Guardians therefore, may be natural, legal or contractual. It is natural when there is parental relationship between the guardian and his ward; it is contractual when the guardianship is by appointment, e.g., the wali (executor) appointed by the father, and it is legal where the appointment is by the court of law.

Marriage guardianship has been defined as "the legal authority invested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently. It is the authority of a father or nearest male relatives over minors, insane, or inexperienced

persons who need protection and guardianship.(111)

3.8.1 GUARDIANSHIP OF MARRIAGE IN ISLAMIC LAW

The purpose of legislating on the subject of guardianship seem to check the unlimited powers of irresponsible family heads. The law as generally stated, is that there can be no valid contract of marriage without the guardian. This is following the authorities from the Holy Qur'an and the traditions of the Prophet (S.A.W.).

(a) QUR'AN:

(i) "Marry (wali) those among you who are single or the virtuous ones among your slaves male or female. If they are in poverty, God will give them means out of His Grace. For God encompasses all and He knows all things."(112)

(ii) "When you divorce women and they fulfil the term of their idda don't (wali) prevent them from marrying their (new) husbands, when they have agreed among themselves according to what is honourable."(113)

(iii) "....Nor marry your girls to unbelievers until they believe....."(114)

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111. CF. Shorter Ency. of Islam P. 447
112. Qur'an 24:32.
113. Qur'an 2:232
114. Qur'an 2:221

(b) PROPHETIC TRADITIONS:

(i) A'isha, related that the Prophet (S.A.W.) said; "whoever amongst women marries without a marriage guardian, such a marriage is batil (void) if the marriage is consummated she will be entitled to a dower so as to legalised the sexual intercourse which had taken place between them. If a marriage guardian refuses to act then the Muslim ruler (who normally appoints a judge) is guardian of him who lacks one."(115)

(ii) Abu Musa narrated that the Prophet (S.A.W.) said: "There shall be no valid marriage without a marriage guardian."(116)

(iii) Abdullahi Ibn Baridah narrated on the authority of his father that a young woman came to the Prophet (S.A.W.) and said that, "my father has married me to his nephew in order to raise his status." The Prophet (S.A.W.), gave the option of accepting or rejecting. She then said, "I now approve the action

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115. Reported by Ahmed, Abu Daud, Tirmi dhi & Ibn Majah
116. Reported by Ahmed, Abu Daud and Ibn Majah.

of my father but I want women to know that fathers have no authority over their matters."(117)

(iv) It is narrated by Ibn Abbas that the Prophet (S.A.W.) is reported to have said:

> "The Thayyiba (Matron) is the better judge of her own interest than her marriage guardian. But the virgin girl has to be consulted and her silence signifies assent." Reported in Sahih Muslim, Abu Daud, Tirmidhi and Ibn Majah.

3.8.2 VIEWS OF DIFFERENT SCHOOLS:

According to all schools of jurisprudence, a woman who is adult and of sound mind has the full capacity to deal with her property and to enter into any kind of contract either for herself, or as an agent for somebody else without the least interference from anybody, be it her father, guardian or husband. But They differed as to whether she has full capacity to contract herself in marriage or to act for another in his or her marriage.(118)

(a) According to Maliki, Shafi'i and Hanbali schools, a woman can, by no means contract herself in marriage to a man without the participation of her marriage guardian neither is she competent to contract her daughter nor ward, not to act as a matrimonial agent for anyone so as to enter into a contract of marriage on behalf of her constituent.

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117. Reported by Ibn Majah
118. Ibn Rush (Bidayak-al-Mujtahid) Vol.II PP. 8-9.

Because, they argued, the end proposed in marriage is the acquisition of those benefits which it produces such as procreation, and if the performance of this contract were in any respect committed to woman its end might be defeated, they being of weak reason and open to flattery and deceit...(119)

(b) According to Hanafi school, every person who is (Sui juris) whether male or female, maiden or matron, is competent to enter into a marriage contract on his or her behalf or on behalf of another person. This school argued, especially in the case of the adult woman, that in marrying, the woman has performed an act affecting herself only and to this, she is fully competent, if she is sane, adult and capable of distinguishing good from evil and since in law, she is capacitated to act for herself in all matters of property, likewise she can be allowed to choose a husband for herself. But the guardian reserves the right to dissolve the marriage on the ground of irregularity, inadequacy of the dower or in the case where the bride too is not equal to the woman (Kafa'a).(120)

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119. Al-Maghinani, (Hedaya) Tran. by Hamilton F. Delhi, 1979 P. 38.

120. Ibn Abdin, Raddal Mukhtar Vo. III P.66 (Cairo).

The guardian's intervention is required to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar importance and guard her against being misled by unscrupulous people, or from marrying a person morally or socially not equal to her.

3.8.3 CONDITIONS OF MARRIAGE GUARDIAN

It is generally accepted by all the majority of jurists that marriage guardianship is committed to the agnatic relations of the ward but the Hanafi's accept females and cognates as well. Other conditions include:

(a) Freedom

(b) Adult. He must not be a minor

(c) Sane

Authority to contract others in marriage is not vested in a slave, an infant, or a lunatic, because such persons being considered in Law as incapable of acting for themselves, are incompetent to exercise any authority over others, however, this authority is established in guardians and others out of tenderness to persons who from their situations require attention and care such as infants and lunatics; but this would not be manifested

by committing the execution of marriage, on their behalf, to persons of the above descriptions.(121)

(d) Muslims:- A non-Muslim cannot be vested with this authority with respect to a Muslim male or female. For the Qur'an says:

> "....And never will God grant to the unbelievers a way (to triumph) over the believers."

But, there is an exception to this rule, that in the case of non-Muslim ward her non-Muslim father or guardian, provided that he follows the same religion as that of his daughter, is acceptable, because the warding of the Qur'an says:-

> ".....And a non-Muslims may exercise authority over non-Muslims."(122)

(e) Male:- According to Maliki, Shafi'i, Hanbali and Daud al-Zahiri, the marriage guardian must be a male, for such an authority to contract themselves or others in marriage is not vested in a female. While according to Hanafi school, he allows both male and female to contract himself or herself in marriage.

(f) Not Muhrim: - i.e, not engaged upon the ritual practice of Hajj (pilgrimage) or Umra (lesser

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121. Al-Marginani (Supra) P. 38
122. Ibid.

Hajj). This is in accordance with Maliki, Shafi'i and Hanbali schools of jurisprudence who held the view that such a person is prohibited from either contracting marriage for himself or on behalf of some one else. But he is allowed under Hanafi school.

3.8.4 CLASSES OF MARRIAGE GUARDIANS

Marriage Guardians are of two types:

(i) Those who may impose their power regardless of the ward's wishes, they are known as well mujbir. These are normally the nearest male agnate relatives in whose absence a community official may assume the responsibility. Whether guardianship is considered as a right conferred on or as duty assigned to the guardian, the fact remains that it is ascribed by law and neither party can terminate it unilaterally, so long as the condition calling for it's existence is qualified.

(ii) Those guardians (Wakils), who can only act as legal representatives (Wakil) at the making of her marriage contract within the limits of authority delegated to him by the ward; and these are known as walis not mujbir

3.8.4 (i) WALI MUJBIR

As to who is wali mujbir, different views have been expressed by different schools of law.

(i) Maliki Law - According to Maliki Law, it is the father or his executor who has the power of ijbar. Power of Ijbar under this Law has been restricted to the father only. The executor appointed by the father would also exercise the power. The appointment may be by will or verbally authorising him to do so. Such as where he said, "I authorised you to marry my daughter D.to H., or to who so ever you wish." The executor cannot impose his powers unless the father has pointed out to him the husband and whether the marriage may take place before or after puberty. The father can not use his power in giving out his daughter to a man with incurable disease such as leprosy, insanity, impotence, enuct etc. But he has the right to give her away to a man not equal to her, to a blind or with less than the proper dower. Moreover the executor cannot give that daughter in marriage unless with mahr mithly.(123)

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123. Al-Adawi Vol. 11, P. 35.

Imam Maliki argued for this rule of vesting the right of Ijbar in the father alone that this is a power, the exercise of which does not appertain to any of the relatives except the father; that the power over freemen is established out of necessity; but in the present instance no such necessity exists as infants are not subject to any canal appetite. Yet it is vested in the father on the authority of the secret texts contrary to what analogy would suggest. The father's father not being the same as the father is not to be included with him.(124)

According to Maliki the father or his executor can exercise the power of Ijbar in the case of his minor daughters whether virgin or not, his adult virgin daughters and his insane daughters even after giving birth; he will also exercise his powers to marry his young son, if there is some benefit in it. Therefore, the father under Maliki Law may impose his power on his following daughters:

(a) His young virgin daughter

(b) His young daughter who has lost her virginity

(c) His adult virgin daughter until she became (anisa)

(d) His adult thayyib daughter who lost her virginity outside wedlock.

(e) His insane daughter whether adult or young; and

(f) His young son.

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124. Al-Marghinani, Supra.

In the case of his adult daughter who lost her virginity through a marriage even invalid his power lapses.(125)

(ii) Hanafi Law - In Hanafi Law, the power of Ijbar can be exercised only to minor daughters whether virgin or not. Where, therefore, a virgin daughter has attained the age of puberty the power of exercising the matrimonial constraint on her lapses. According to Hanafi school, the power of Ijbar has been restricted to father and the agnatic relations in order of priority. All guardians are possessed of the power of Ijbar upon minors; minor boy or a girl, whether the minor girl is a virgin or not. If the minor has been given in marriage by a guardian who is not the father or the grandfather, the minor has the option, on attaining the age of puberty of repudiating the marriage. This is known as the doctrine of Khiyar al-Bulugh(option or puberty).(126) Ibn Abbas reported that a virgin grown-up girl came to the Prophet (S. A. W.) and narrated that, "Her father had given her in marriage, which was disliking to her. The Prophet (S.A.W.) gave

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125. Al-Dasuqi (Hashiyat at Dasuqi), Vol.II P. 222-223
126. Muhammad Ibn Farruz (Dur-al-Hukkam) P. 337

her option." (Reported by Abu Daud) But this tradition shows that even if the father gives away his daughter in marriage against her wish, while she is of age, the marriage can be repudiated if the girl so desires, also in the case of minor too, if, on coming of age, she finds the match unsuitable.(127) However, her right of option lapses by lapse of time, or by accepting the dower, or if she had allowed the marriage to be consummated.

(iii) Shafi'i Law - Shafi'i maintained that the power of Ijbar must belong to the father and the father's father only, but not the executor or other agnate relations; because the father's father is a father in the absence of the father, and that entrusting the power of contracting marriage to any other than the two would be oppressive upon the child since it is to be supposed that no others are equally interested in its welfare or happiness; on which principle it is that the more distant kindred are not entrusted with the property of infant, a matter of less importance than their person.(128) Shafi'i restricts the right of ijbar in case of virgin daughters whether adult or minors. He extends the right to the mad daughters, but not non-virgin daughters even if they are minors.

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127. Muhammad Ali (The religion of Islam, 1973, Lahore P. 522.
128. Al-Marghinani (Hedaya) Trans. By Hamilton, 1979, N. Delhi P. 36.

(iv) Hanbali Law - The Hanbali's agree with the Maliki in restricting the power of ijbar to the father alone.(129) Also the school restricts the power to be exercised on minors whether virgin or not.

3.8.4 (ii) RIGHT OF IJBAR ENDS WITH PUBERTY

The power which Islamic Law vests in Wali Mujbir, whether he is the father, grandfather or other wali's or imposing the status of marriage on minor children terminates practically with the attainment of puberty.

Puberty is presumed on the completion of the fifteenth year, according to most of the schools, unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and (sui juris) possessed of the capacity to enter into legal transactions. After the age of fifteen every contract of marriage entered into on behalf of a minor boy or a girl is dependent upon his or her consent; and among the Hanafi's and shi'ahs, children of both sexes on attaining maturity are free to contract marriages without the consent of their guardians.

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129. Ibn Abidin (Raddal Mukhtar), Cairo, 1966, Vol.II P. 56.

All the schools of jurisprudence agreed upon the capacity of a male child to contract himself in marriage after he has attained age of puberty, but there exist considerable differences of opinion as regards the capacity of female children.

The Hanafi's and Shi'ah'so hold that the right of ijbar in the case of males; as in that of females continues until they have attained the age of puberty. Maliki's and Shafi'is are of the opinion that the exceptional right of ijbar, in the case of females continues to enforce until they are married, and consequently, emancipated from paternal control.(130)

3.8.4 (iii) ABSENCE OF WALI MUJBIR

If the marriage of one of the above mentioned daughters is concluded by anyone other than the father or his executor, it will be void, even if the father afterwards agreed and even after giving birth to children, according to Maliki Law. The same rule applies if the father was absent in a near place where it is possible to contact him, in condition that the father was maintaining his daughter.(131) On the other hand under Hanafi Law

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130. Abdur Rahman, al-Jaziri (Fiqh-ala-Madhahib-al-arba'a), Vol. IV, PP. 26-27.

131. Ameer Ali(Muhammadan Law) Vol.II, Lahore, 1976 PP. 210-211.

if later on the father gave his consent, the marriage becomes valid.

3.8.5 WALI NOT MUJBIR

The wali not mujbir is the representative of the woman in making her marriage contract with her express consent. Since this guardianship (wali) is committed to several persons, there is bound to be a conflict in the order of priority, This being the case, the schools have different views stated below:

(i) Hanafi Law: It is stated that agnatic relations take precedence over cognates, and among the agnates the order of priority is as follows:

(i) The woman's son and his descendants even if the son were a product of zina.

(ii) the father, and the father's father, how high soever.

(iii) brothers germane and consanguine and their sons with the germanes taking precedence over the consanguines.

(iv) paternal uncle's germane and consanguine and their descendants, with the germanes taking precedence over the consanguine.

The same rule applies to the corresponding females relations and cognates except that the mother of a bride

takes precedence over her daughter.(132)

Where as remoter marriage guardian gives a ward in marriage it is suspended upon the approval of the nearer marriage guardian. But if the nearer guardian is absent and it is not easy to communicate with him, and it is feared that if his arrival were to be awaited, the arrangement will lapse, the remoter marriage guardian will act, and his action will need no ratification by the nearer guardian when he arrives.(133)

(ii) Maliki Law: In Maliki Law the order of priority agrees with that of Hanafi. That is in the absence of wali mujbir, then the agnates in the order mentioned under Hanafi school. According to Ibn Rushd a Maliki jurist, he says Maliki personally gives priority to the father over the son. Also in the case of the walad-al-zina, (the illegitimate son) his guardianship for the marriage of the mother is only valid where the husband was not the mother's partner in the illicit sex relations by which the son was begotten. In the case of the father, he must not only be the natural father, but also legitimate father. Thus if he was the natural father only his waliyat is not acceptable.(134)

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132. Adawi (al-Mershiyyi) Vol.II, P. 32
133. Abdur Rahman al-Jazuriy,(Figh-ala-Madhahib al arba'a) Vol. IV, PP. 26-27.
134. Ibid. PP. 40-41.

(iii) Shafi'i Law: The rule of priority in this school is the same as the other two schools except that, he does not approve of the son and his descendants as being wali (guardian) priority to act as a guardian is so strict that in no case can a remoter guardian participate in a marriage when a nearer guardian is alive. The Shafi'is observe that it is necessary to follow the order of priority, and the right does not devolve to the person next in the order, unless the first person whose turn it was, was incapacitated through e.g., insanity, minority, difference of religion, or being engaged in the rituals of pilgrimage; or being an interdicted person otherwise the order must be strictly followed. Therefore, they argued, if the nearer guardian is absent to a far distant place which would require another guardian to act, such authority must devolve to the political ruler, because this authority is vested in the first guardian as a positive right and cannot be annulled by the absence of the party, as the law does not admit absence as destructive of right. Hence if the absent guardian were to contract the marriage of the minor on the spot where he may, it is lawful. Moreover, a relation of more distant degree is not vested with the authority in the existence of a nearer relative,

since the more distant is precluded by the nearer.[135]

(iv) Hanbali Law: The Hanbali's agree with the Shaf'is in so far as the rule of priority is concerned. On the other hand, they also agree with Malikis that where the wali mujbir refused to give his ward in marriage for no just cause the political ruler will step in and act in accordance to the interest of the ward."[136]

It is worth-mentioning here that, Maliki, Shafi'i and Hanbali schools, agree that, failing the natural guardians, that is the agnatic male relations of the ward, the guardianship devolves on the political - ruler which may well mean the Qadi (judge). After him then the responsibility devolves among the Muslim community to act as her marriage guardian.

3.8.5 THE LEGAL ASPECT OF THE INSTITUTION OF WALI IN NIGERIA.

In Northern States the people are predominantly Muslims and they follow the traditional Maliki Law. Throughout the Northern States, a father is regarded as entitled to conclude marriage on behalf of his minor sons, or his virgin daughters of any age, at his

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135. Sayyid Sabiq (Fiqh-al-Sunnah) Vol. II, Beirut, 1973, P. 134-135.

136. Abdur Rahman al Jaziriy, (Fiqh ala-Madhahib al-arba'a) Vol. IV, P.36.

unilateral discretion. Although frequently the mother on whom most of the work involved will fall. The pure Maliki Law, permits this right to the father alone or his executor, unless the virgin daughter has been expressly emancipated from tutalage, or has reached a comparatively advanced age. No any other person whether a brother, uncle or father's father has such right in the absence of the father and who did not appoint an executor. But in Potiskum in Borno State, at least, this right is regarded as passing to, e.g. a brother, or uncle where the father is dead. And although this is contrary to the pure Maliki Law, except as the fathers executor (wasiyyi), it seems probable that it would also, in practice, be recognised elsewhere.

In an unreported case decided by the Upper Area Court Kano, where the power of Ijbar was exercised by the uncle of the girl i.e., the senior brother of her father, the facts of the case are as follows:
MAIRO BABA NASIDI VS. ALHAJI.(137)

In this case, the plaintiff, Mairo Baba Nasidi is fourteen year old girl who is in form I W.T.C. Bajoga, Bauchi State, The senior brother of the girl's father went to the Principal of the school and requested for her transfer to Queen Amina College Kaduna. The Principal agreed and caused a letter of transfer to the

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137. Sharia Law Reports, Centre for Islamic Legal Studies, Vol.I P. 38.

uncle of the girl. Instead of the uncle to take her to Queen Amina College, he married her off in February 1982 to one Alhaji Sani a business man based in Kano, whose age was about seventy. Mairo did not want the marriage as such she refused to go to Alhaji Sani's house, instead she remained throughout with her mother. There was no cohabitation since the marriage. The uncle chained Mairo's hand and foot and beat her up.

Mairo with the help of her mother took the matter to court where she narrated the matter to the court. The lower court upheld the marriage of Alhaji Sani, but on appeal to Sharia Court of Appeal, Kano, it was held, that the uncle was wrong. And then the husband, Alhaji Sani, appeared before the court, and divorced the girl.

Whatever had been the merits for the doctrine of ijbar in the past, certainly it would not stand the test of the modern age if applied to the present day girls where there is freedom of movement unlike in the past where the girls were kept under the full control of their parents. This is because girls of nowadays are allowed to obtain western education where they meet their suitors either in schools, offices and other social places. And because of this the parents usually consult their daughters before marriage.

In Alhaji Isa Bida Vs. Baiwa, daughter of Alhaji Isa Bida, Case NO. SCA/NWS/CV/47/70.(138) Where Baiwa

138. Sharia Law Reports, Centre for Islamic Legal Studies, Vol. I P. 85.

lodged a complaints to the Upper Area Court, Minna, on the ground that her father intended to give her for marriage to the son of his younger brother, later, he dropped that idea and informed her that he was going for Hajj (Pilgrimage). He then authorised her (Baiwa) to bring somebody else for marriage of her own choice.

On this occasion, she saw Mamman and fell in love with him, proposing to marry him, For this, she informed her father who, at first agreed with the choice. But later on, he objected to the matter and asked her to bring another man. The girl had already made up her mind to marry Mamman, but her father changed his mind and objected her choice to marry Mamman. Baiwa was mature and so she was in need of getting married, but her father refused to wed her to the man of her own choice; while at the beginning he was the one who authorised her to bring anyone of her choice.

In its investigation the court found that Alhaji Isa had actually authorised his daughter to bring any man of her choice and that he would give her in marriage to the person. This is because Baiwa's mother, Hajiya Gogo refused to allow him to give Baiwa in marriage to Dan'Iya the son of his younger brother. Alhaji stated that in his investigation he discovered that Mamman, his mother and his brother were all suffering from leprosy and that was why he refused to

wed her to Mannan. The court summoned Mannan, his mother and his brother to appear before it, where they were examined and were found healthy and free from leprosy, The examination took place before the court and in the presence of Alhaji Isa. The court informed him that Mamman was free from the disease of leprosy and therefore he had no valid reason why he would not allow Mamman to marry his daughter. Alhaji insisted that as long as the daughter belongs to him, he would not consent to Mamman to marry her, but that his daughter could propose another husband. The daughter stated that, since her father authorised her to bring her own choice, which she did, and since the person of her own choice was physically well, she therefore loved nobody to marry, other than Mamman.

The court passed its judgement ordering Alhaji Isa to wed Baiwa to Mamman. The court stated that since he authorised his daughter to bring the man of her choice, and since the man is found to be free from leprosy, contrary to his allegation, he had no valid reason to object to her choice.

Alhaji Isa was not satisfied with the decision of the court (UAC) and appealed to Shari'a Court of Appeal, Sokoto on the ground that, his daughter was a girl who had no marriage experience and that he was her father, (Wali mujbir).

The court held as follows:

1. We have seen in Alhaji Isa's statement given at the U.A.C., that he admitted that he himself permitted his daughter Baiwa who is a girl without marriage experience to bring any one of her choice so that he will wed her to him and that she brought Mannan. This statement of Alhaji Isa amount to his giving his nature daughter the capacity to conclude her marriage and allowed her to manage her affairs, she should not be married except to someone of her own choice. Her father had no right to force her to marry somebody else. This issue is contained in Jawahir ul-Ikhlil, a commentary on Mukhtasar Volume I, Page 280. Therefore, if a father considers his daughter mature enough to manage her affairs and allowed her to find a husband for herself, his power of Ijbar is said to be transferred to the girl.

3.9 ESSENTIAL ELEMENTS OF CUSTOMARY LAW MARRIAGE

The essential requirements of a valid customary law marriage reflect the African conception of marriage as not just a union between a man and a woman, but as an alliance between two families, effected through the union of the spouses. The passage of time has not changed this conception. This, has been reaffirmed in a Ghananian case Yaotey Vs. Guayo[139] where Ollenu

139. 1(1961) G.L.R. 573 at 579; See also, Recareat by Clara Sackitey (1962) 1 G.L.R. 180.

J. restated that, "Now one peculiar characteristic of our system of marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of 'this man' and 'this woman':

> "It is a union of the family of 'this man' and the family of 'this woman!"

The characterization of customary marriage as an alliance between the two families of the spouses is accepted by almost all writers.(140) However, Allott has expressed the view that alliance" may not be the correct word in this context since the two families have very little contact except when a divorce is in question.(141) The considerable role of the family may be explained by the fact that the proposed union will affect not only the spouses directly concerned but also their respective families; they have a duty and an interest to ensure that the marriage takes place in the most favourable condition. The predominant role of the family which is manifest in the making of an engagement, is further evident in the making of the marriage itself which will be discussed under the following headings, "capacity, consent and dowry."(142)

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140. E.G. Kasunu and Salacuse P. 73; Obi, 156
141. Essays in African Law P. 229
142. Dowery is treated as a separate chapter.

In Indonesia and Malaysia, they adopted Shafi'i school, that the guardian should conclude the contract after the consent of the bride.

3.9.1 CAPACITY - The parties to a customary law must possess the capacity under the Law to marry each other. Most systems of customary Law in Nigeria do not prescribe any age for the Solomnization of Customary Law Marriage. Traditionally parents of a female child can always promise a grown up man that their daughter would marry him or his infant son. This promise may take place when the girl is still in utero, but no valid marriage under customary law can take place until the parties have attained puberty. The failure of the law to prescribe a minimum age for the customary marriage has to a large extent encouraged a high incidence of child marriage with:

> All its attendance evils. Although a boy and girl are biologically capable of living together as husband and wife once they have attain the age of puberty; society with the help of modern sciences is coming to realize that child bearing and familial responsibilities at such an age may not be advantageous.

With this fact and others in mind, attempts have been made in some parts of the country, to peg the minimum age for customary law marriages by legislation

In 1956 the former Eastern Nigerian government passed

the Law of Marriable Age.(143) Section 3(1) of the law provides that, "A marriage between or in respect of persons either of who is under the age of sixteen shall be void". There are also other declaration in some parts of former Northern Nigeria established a minimum age of marriage, but they are approximately the same as the normal age of sixteen puberty. The following ages for girls have been prescribed for the respective areas: Biu Native Authority in Borno State fourteen years;(144) Idoma in Benue State, twelve years;(145) Tiv also in Benue State, age of puberty;(146) and Borgu in Kwara State, thirteen year's. In Borgu and Idoma a penalty has been provided for who ever respectively whether he is the father or guardian of the child he will pay a fine of ₦100 or imprisonment for 6 months or both. In Western Nigeria, the only legislation as to age is that contained in Section 7 of the Marriage adoptive Bye-Laws of 1958, that the court should take into consideration on a petition for divorce the fact that the parties were betrothed under marriageable age.

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143. No.22 of 1956, See also Cap. 6 of Laws of Eastern Nigeria, 1963.

144. N.A.L.N. 9 of 1964.

145. N.A.L.N. 63 of 1959

146. N.A.L.N. 149 of 1955

Capacity to marry concerns not only with the ages of the contracting parties, but also their capacity to inter-marry. Most customary Laws in Nigeria have rules prohibiting marriages between certain persons. In principle, one cannot marry either within his paternal or maternal line. Thus, there is a prohibition of marriage between brother and sister, parent and child, uncle and niece, aunt and nephew and some cases even cousins are prohibited from inter marrying.(147) It may be said here that, the aim of customary marriage being the creation of an alliance between two families, a marriage between relatives would defeat the object. This role of exogamy which enjoins persons to seek their spouses outside their own family groups, is accepted by most of the tribes of Nigeria, though with varying degrees of prohibitions. The rationale for the rule may be the fear of committing incest by marrying a blood-relation.(148)

3.9.2 CONSENT

Traditionally in most areas the consent of the intended spouses was not necessary to establish a valid marriage under customary law. Marriages were, and in some cases still are, contracted by the parents without consulting their children (both males and females).

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147. This is so with Idoma, Tive, Bachama etc.

148. Most of these prohibited degrees of relationship is the same with the prohibitions under Islamic Law.

In most cases such forced marriages never last especially nowadays when most of the girls became educated. In view of this, according to the research conducted on this, the rule appears to have under gone modification in many parts of Nigeria. An investigation of Ibo and Igbirra customary laws indicated that at present valid customary marriage cannot take place without the consent of the intended spouses.(149) But it is not clear as to where a girl is forced into marriage without her consent can be interpreted by courts to mean detaining her against her will which is perishable under Section and of penal code and criminal code Act respectively. But still despite this fact we may find in some other area forced marriages are still prevailing.(150) In the areas where it is still considered as disobedience to refuse to comply with the decision of the elders and parents concerning marriage matters.

Generally, in the modern trend it is for the parties to agree in advance between themselves to marry each other before communicating it to their parents who do not usually object. In some areas it has been clearly indicated in their declarations that no woman shall be

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149. Salacuse also in his book, A Selective Survey of Nigerian Family Law, 1965.

150. Bolewa in Potiskum (Borno State) and Bachama in in Gongola State; Nupe in Niger State; Ogori in Kwara State.

married unless she consent to the marriage.(151)

Traditionally, in the olden days, and still to some extent today, parents of the intended spouses played a doninant if not an all powerful role in the marriage of their children (both sons and daughters). Marriage generally is regarded as an alliance between families and as such their consent is necessary and in some cases mandatory for the celebration of a valid customary marriage. In discussion parental consent today, a distinction has to be made between a parental consent needed for a boy and a parental consent needed for a girl to contract a valid marriage under customary law. As a general rule, for a girl, parental consent is essential to her first marriage, and no valid marriage can come into existence without it, even where she has attain the age of puberty, or where she is over the age of twenty-one and therefore capable of contracting a marriage under the marriage Act without parental consent. The reasons for this rule may be that without the consent of the father or guardian of the girl, the bride-price cannot be properly paid and the formal giving a way in marriage is the responsibility of the father or the guardian. On the other hand an adult son may contract a valid marriage without the consent of his parents.

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151. Biu N.A. Declaration Sec. I (b); Borgu Declaration Sec. 2(1) (b) Tive Declaration Sec. 2(b); Borgu Declaration Sec. 2(1)(b).

His responsibility is only to inform them, if they refuse to approve he can go ahead and contract the marriage.

As a practical matter, nowadays because of the influence of Western education and lack of parental control over their daughters which lead to social mingling between boys and girls, parents are becoming more willing to allow their daughter s' choice rather than forcing them in marriage which may result in having them running away with the man of their choice.(152) Infact in certain areas, there is a growing up in the ideas that parents ought not to withhold their consent unreasonably. In some cases family members or village elders will intervene where the father refuse to give his consent and marry her to the man of her choice. The declarations of customary law of marriage in Biu, Idoma, Tiv s and Borgu provide for parental consent on the first marriage of a girl.(153) In the case of a second or subsequent marriages the father or guardian need to be informed only after the arrangement between the intended spouses have been completed. The father or guardian can raise an objection to the marriage in this case only where the husband refuses to pay the bride-price demanded, or where he may have committed adultry with

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152. According to Bachama Customary-Law Marriage.

153. Biu Declaration Sec.1(c) and 2; Idoma Declaration Sec.2(1) and 3; Tiv Declaration Sec.2(c); Borgu Declaration Sec.2(1) and 3. 16 W.R.I.N. 456 of 1958.

a wife of some relation of the prospective bride.(154)

In some states like Lagos, Oyo, Ogun, Ondo, and Bendel states where the Marriage, Divorce and Custody of Children Adoptive By-Laws of 1958(155) are in force, it is possible for a girl to marry without the parental consent; for Section 5 of the By-Laws provides:

> "When any parent or guardian of a bride refuses his or her consent to a marriage or rfuses to accept his or her own share of the dowry, the the bride if she is eighteen years of age or above, and the bridegroom jointly may institute legal proceedings in a competent court against the parent or guardian to show cause why she or he should refuse consent or to accept his or her share of the dowry; and if the court is of the opinion that no sufficient cause has been shown, it shall order that the marriage may proceed without the consent of such parent."

Similarly, customary law marriages of Birom in Plateau State and Igbirra in Kwara State seem to have been modified to allow a judicial intervention in the case where a parent of a party to the marriage refuse to give his consent. Under these two systems, the matter of the refusal may be reported to a customary or an area court of competent jurisdiction. Although the judges interviewed on this issue, indicated that they have never had such case, but they confirmed that the provision is there. They have also confirmed to me that not that there are no instances where parents refused

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154. W.R.I.N. 456 of 1958.

155. Cap. 115, 1958 Laws of the Federation of Nigeria and Lagos.

their consent, but traditionally it is a shameful act on the part of the girl to take her parent to court for refusing to allow her to marry the man of her choice.

3.10 STATUTORY MARRIAGE (MARRIAGE UNDER ENGLISH LAW):

In addition to Islamic and Customary marriages, a person desiring to marry in Nigeria has a third possibility. Marriage Under the Marriage Act. This form of marriage is by no means the most popular in Nigeria; it clearly comes after Islamic and Customary marriages. However, it is of great importance since it is the form of marriage preferred by some of the Nigerian elite. It is sometimes usual for the parties to add elements of African Custom to this received form of marriage as a concession to the demands of parents and other relatives still adhering to traditional practices.

The Marriage Act, which was enacted in 1958 a Federal Statute on family law having application throughout Nigeria brought to Nigeria the English type of marriage to enable those Nigerians who had been converted to European ways of life and to Christianity to have their marriages legalised in a way other than prescribed by Nigerian tradition. The underlying assumption was, of course, the inferiority of traditional marriage and the needs for its replacement by a system inspired by European Law.

The Christian churches objected to several features of traditional marriage and desired, as the Act later permitted, to have marriages celebrated according to christian rites. It is important to emphasize that the Act has not had, for Nigeria as a whole, a significant impact. Indeed, in the Northern areas of the country, little seems to have been heard of the legislation.

3.10.1 PRELIMINARILS TO MARRIAGE UNDER THE ACT

Marriage under the Act may be either by a Registrar's Certificate issued after due notice and publication or by a special licence granted by a State Governor.

(a) Registrar's Certificate:

Where two persons wish to marry under the authority of Registrar's Certificate, one of them must give notice to the Registrar of the district in which the marriages is to take place by filling the prescribed forms.(156) On receipt of the notice, the registrar must enter it in the marriage notice book and affix a copy of the notice on the outer door of his office or public notice on the outer door of his office or public notice board of the registrar's office, and keep it there until he grant his certificate or until three months have expired.

156. Sec.7 and 8 of Marriage Act and Form A first-schedule where the applicant is anilliterate the form is in Form B first Schedule

The Registrar may grant his certificate after the expiration of twenty-one days but before the expiration of three months, provided he is satisfied by affidavit that:

(i) One of the parties has been resident within the district for at least fifteen days previous to the issue of the certificate;

(ii) that the parties (not being widowed) are at least twenty-one years old or if either of them is a minor, that the necessary consent has been obtained in writing and attached to the affidavit;

(iii) that there is no impediment of kindred or affinity or any other lawful hindrance to the proposed marriage;

(iv) that neither of the parties to the intended marriage is already married by customary law to a third party.(157)

(b) Special Licence:

The Governor of a State may grant a special licence for a proposed marriage if he considers it proper, on his being satisfied by affidavit that there is no lawful impediment to the proposed

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157. Section 11(1) of the Marriage Act.

marriage, and that the necessary consent, if any, has been obtained. The special licence dispenses with the giving of notice and the issue of the certificate of the registrar.(158) The special licence will authorize the celebration of a marriage between the parties by a registrar or a recognized minister of a religious denomination or body.

2.12.2 PARENTAL CONSENT AND MARRIAGE AGE:

(i) CONSENT OF PARENTS:

Section 3 (1) (d) of the Matrimonial Causes Degree provides that the voluntary consent of the contracting parties is essential in a statutory marriage; the absence of which renders the agreement null and void. The Registrar to whom the parties have given the notice of their intention to marry must be satisfied that each of the contracting parties is twenty-one years or above or if he or she is under that age, has obtained the written consent of the father. But if the father is dead or of unsound mind or absent from Nigeria, the mother may give the necessary consent. Where both parents are dead or are of unsound mind or absent from Nigeria, the guardian of the minor can give the consent.(159)

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159. Section 18 of the Marriage Act.

statutory definition of marriageable age, reference has to be made to English Common Law rule on the subject. The Law provide that a valid marriage may be contracted if the parties attain the age of puberty-fourteen years in the case of boys and twelve in the case of girls.(162)

3.10.3 CAVEAT:

Any person whose consent is required for marriage, or who knows of any just cause why a marriage should not take place, may register his objection by entering a caveat against the issue of a registrars licence. The person objecting must before the issue of licence write the word "Forbidden" opposite the entry of the notice in the marriage notice book and add thereto his name, address and grounds for objecting. Once this is done the registrar may refuse to issue his certificate until the caveat is removed.(163)

The registrar is required in that case, to refer the matter to a judge of the High Court of State. If he comes to the conclusion that no legal ground has been disclosed in the caveat, he removes the caveat without calling the parties. If, on the other hand, the is a legal ground, he can summon the parties and the caveator. The caveator must then show cause why a marriage certificate should not be issued. The judge deals summarily

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162. Agbo V. Udo (1947), 18 N.I.R. 152
163. Harrod V. Harrod (1854) 1 K & J. 4, 69 ER 344

with the case subject to a right of appeal to the supreme court.(164)

3.10.4 CELEBRATION OF MARRIAGE:

A marriage under the Act may be celebrated either in a place of worship or at a marriage registry or in a place specified in a Governor's Licence.

(i) MARRIAGE IN A LICENCED PLACE OF WORSHIP:

A marriage may be celebrated in a licenced place of worship by a recognised minister of the church, denomination, or body to which it belongs and in accordance with the rite and usages of marriage of the church.(165) The marriage must be celebrated between the hours of 8.a.m. and 6.p.m. in the presence of at least two witnesses, in addition to the officiating minister. After the ceremony, a marriage certificate must be signed in duplicate by the officiating minister, the parties and two or more witness to the marriage One Certificate is given to the couple and the other is sent to the registrar of marriages in the district where the marriage is to take place.(166)

(ii) MARRIAGE IN A REGISTRAR'S OFFICE:

The parties may be married by a registrar of marriages. The registrar asks then

164. Section 14 (1)
165. Section 15
166. Section 21.

whether they have come before him for the purpose of being married by him. On obtaining an alternative answer, he pronounces them married, informing them that their marriage may be dissolved only by a court of Law; that if either of them contract another marriage during the subsistance of the present marriage would amount to committing an offence of bigamy and would be liable to punishment. The ceremony at the registry must take place between the hours of 10.a.m. and 4.p.m.(167) With open doors and in the presence of two witnesses, beside the registrar. The marriage certificate must be signed in duplicate by the registrar, the couple and the witnesses; a copy is given to the parties and another is kept by the registrar.(168)

3.10.5 PROOF OF MARRIAGE:

In this part of the chapter, it is intended to discuss witnesses to marriage contract. All the three systems of marriage under discussion agree that marriage is a simple contract like any other civil contracts. And, as a contract, there is a provision requiring witnesses; before whom the contract will be concluded. Under both Islamic and statutory marriages, witnesses are essential to the validity of the marriage. But

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167. Section 26.
168. Section 27.

unlike the other systems of marriage in the customary law marriage, it is very difficult to say that witnesses are essential. This is because in the former two systems there is what is known as offer and acceptance either between the parties themselves or their representatives. What is meant by 'offer' and acceptance here is verbal offer and acceptance which cannot be found in the customary Law marriage. People who are present at the time when this verbal offer and acceptance is made would be regarded as witnesses to the marriage and they can be called upon to come and testify to the proof of existence of the marriage between the parties when ever the need arises.

On the other hand, the celebration of marriage under customary law is entirely organized and supervised by the families of the spouses. These ceremonies vary from one ethnic group to the other. It used to take a long time before a customary marriage to complete its ceremony. Because of its lengthy nature, it is very difficult to say at what point in the ceremony do the parties become married. And it is because of this one would not say whether there is or no need to have witnesses at a particular point of the ceremony.

As an illustration of the lengthy nature of a customary marriage the following account of the Bachana (Gongola) marriage ceremony is offered. A prospective husband under Bachana customary Law marriage has to give

the following series of payments before a marriage is accepted as legal and legitimate.

(i) ta kul kwane (lit. money for hearing the month). The essence of this payment is to show an appreciation for the girls granting the Njo-tufe (the representative of the husband).

(ii) tasu gyelto (Money for the ring). By the payment of this money the engagement has been completed. This is somewhat like English 'engagement ring'.

(iii) ta Kuzoto (Money for mat) this sum of money is to be used in buying a white mat and other bedding.

(iv) ta da Bato Ka nuwoto or Sheda bato ka nuwoto This is the money to be paid to father (Bato) and mother Nuwoto). After this last payment, then the payment of bride-price would come and complete the ceremony. This is called ta dun ha meaning the settlement of the last payment. After this the woman would be taken to her husbands house. As can be seen in this case the ceremony is very lengthy and involves a variety of acts and payments. Any one of which is essential to the validity of the marriage. So, if one would ask, at what point of payment

can we say that the parties are married.(169)

It is now clear from the above that the Customary Law marriage does not require witnesses as one of its essentials of validity of a marriage. Although sometimes courts are trying to infer that in proving the existence or non-existence of a customary marriage, the people who took part in the marriage may be called upon as a proof of the legality of the marriage. In Adepeju V. Adereti,(170) Quashief-Idun C.J. (as he then was) Said:

> "I would here stress that it is very important that Native Customary Marriage should be properly proved when it becomes an issue in any case. The best proof must come from a person who witnessed the marriage ceremony or took part in it or from the parent of the woman to whom dowry was paid or who gave the woman away for marriage."

On the other hand, under English Statutory Marriage, when the parties to an intended marriage satisfy the required conditions, a certificate by the Registrar or a special licence by the Governor is issued authorising the celebration of the marriage in one of the two ways.

(1) Marriage in a licensed place of worship or

(2) In a Registrar's Office.

Under both cases, the marriage is essentially marriage Per verba de Praesenti, that is a declaration by the parties in the presence of at least two witnesses, that

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169. Section 28.

170. Generally, See. Kasunu and Salacuse (Supra) P. 81.

they accept each other as husband and wife. So the requirement of having two witnesses under Islamic Law is as the same as two witnesses under the Statutory marriage. The two marriages shares this question of two witnesses in common.

3.10.6 REGISTRATION OF MARRIAGES:

As we have seen above, there is no principle either of Islamic or customary Law of marriage that requires the recording of the two marriages. Attempts are now being made to introduce a system of a registration after the celebration of the marriages. In the former Eastern Nigeria, the Local Government Law(171) Authorised Local Authorities to make By-Laws for the registration of Customary Law marriages within their jurisdiction. In the former Western Nigeria including Lagos and Mid-West; the applicable Law is the Registration of Marriages Adoptive By-Laws 1956,(172) and in the former Northern Nigeria, the Native Authority Law (173) Authorised Native Authorities to provide for the registration of marriages within their areas of jurisdiction. Some of the By-Laws made in this respect prescribe sanctions for non registration.(174) But the unfortunate

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171. (1961) W.N.I.R., 173 at 175
172.
173.
174.

situation about this is that non of the By-Laws is effective in their areas. Some of the By-Laws do not make it compulsary to register the marriages, or even where the compulsion is existing the authorities in question are not willing to enforce it. Generally one may review the whole thing as only a method designed for the Native Authorities to collect revenues. In other words, the purpose of the registration is more of revenue generation rather than the question of proof of marriage.

In conclusion, attempt has been made to show that the three operative institutions of marriage in Nigeria have certain things in common:-

(1) All the systems agree that marriage is a civil contract like any other civil contracts.

(2) The systems also share some of the essential elements for its validity. For instance, we may see that in the Islamic and Statutory systems of marriage, there is this requirement of verbal offer and acceptance whether between the parties themselves or their respective representatives. Although under customary Law system of marriage there is no such verbal offer and acceptance but the offer and acceptance is there implied through their respective customs and usages.

(3) On the question of witnesses, the Islamic and Statutory systems of marriages clearly indicated the requirement of at least the presence of two witnesses at the time of contracting the marriages. On the other hand, in most of the Customary marriages studied, there is one thing in common among them, and that is giving marriage feast according to their custom, which is equivalent to (walima) and (marriage party) in Islamic and Statutory marriages. These are to publicise that two people have been joined together as husband and wife. This may be viewed as evidence of the marriage contract or ceremony witnessed by the people who attended the feast and who may be called upon to establish proof of the marriage, otherwise there is no any other way as to strictly prove the existence of a customary law marriage. In the case of Statutory marriage there is a compulsory and reliable system of registration which constitutes evidence of any marriage. Therefore, it is hoped that an efficient and compulsory system for registration of customary law marriages will eventually be devised.

Under Islamic Laws, however, beside the requirement of witnesses either at the time of the contract or after the contract before consummation, marriage feast

(walima) is recommended by the Prophet (S.A.W.) for the occasion, as it is a sign of publicity and declaration of the marriage. The Prophet (S.A.W.) on the occasion of the marriage of his daughter Fatima to Ali Bin Abi Talib stressed this point saying: "Whoever is married to a new wife, he has to give feast (walima." Majority of Muslin jurists hold that it is Sunnah, while a few hold that it is Mustahab (commendable), and a few others hold it to be wajib (obligatory). This feast should be invariably be given by the husband as is seen in the traditions.

Chapter Four

SADAQ (DOWRY) OR BRIDE-PRICE AS ONE OF THE MOST DISTINCTIVE FEATURE OF NIGERIAN MARRIAGE

In the preceeding chapter, essentials of the marriage contract were explained. Among these essentials were the parties to the marriage contract (i.e the spouses) and the conditions governing their rights to enter into the contract of the marriage (i.e to be free from any legal impediment). The formula , (i.e the offer and the acceptance) together with the rights and duties of Wali (i.e marriage guardian) was also discussed and the witnesses to the actual taking place of the marriage. Under Islamic Law once these essentials are satisfied, the parties to the contract become husband and wife. Each of them will then have rights and obligations towards the other. Over and above that, the Almighty God has certain rights upon both of them. But under customary marriage, the essentials will not be complete and the parties may not be regarded as married without the payment of bride-price. The absence of non payment of dowry (Sadaq) under Islamic Law will not affect the validity of the marriage contract but it does under Customary Law which regards the payment of dowry as part of the essentials of the contract.

Though it may be said that the institution of dowry (sadaq) or bride-price, which in one form or the other is characteristic of marriages in a great majority of Nigerian tribes, is not a peculiarly Nigerian institution;

it is indeed a feature of the social system of the people of the world in general.

Firstly, this chapter, will discuss the institution of dowry (sadaq) which under Islamic Law, is both the rights of Almighty God as well as the wife and the rules governing its payment, eligibility and the refund of it in certain cases. Secondly, this chapter will discuss the institution of bride-price as one of the essential elements of a marriage contract under Customary Law. Sadaq or bride-price is a distinctive feature of the Islamic and Customary Law marriages only, as such institution cannot be found under English or Statutory marriages. The English dowry, and the French dowry are widely used as equivalent to bride-price, but with little regard for their proper meaning. The dowry according to English marriage is the property brought by the wife (or possibly given) to the husband; while in the cases of Islamic and Customary marriage it is property given to the wife or her family by the husband or his family.

It is also pertinent under this chapter to discuss the rights and obligations binding the spouses by virtue of their having gone through the formal requirements of a valid marriage and are now united by the marital tie.

Much consideration is given to the question of the terms to be used to denote that transfer of property by or on behalf of the bride groom to the woman or her parents which is generally an essential part of the procedure for

the formation of a marriage in Nigeria. The only term used in Islamic law is sadaq, though some people call it mahar, but again this is a Hebrew word referring to the transfer of the property from the man to the woman or her family. But the term under customary law has so many meanings, as there are many ethnic groups in Nigeria who give dowry diverse interpretations. Similary, the terms like marriage-cattle, marriage-wealth or bride-wealth or as some other people call it marriage consideration is not applicable to other tribes whose custom is different from the other. The conclusion here drawn is that any term which may be used will be a mere label rather than any accurate description and that, on the whole, it is best to adhere to the old - established term 'bride-price', with caution to the effect that it is to be interpreted in a neutral sense i.e as conveying no suggestion that a mercenary element of sale and purchase is necessarily inherent in the transaction.

4.1 Sadaq (Dowry) Under Islamic Law

In order to constitute a valid marriage, Islamic Law requires that the husband should donate to the wife a legal property capable of constituting a valid transaction and which would be for the exclusive use of the wife. The principle of dowry is not peculiar to Islamic Law. It originated in the ancient times. Two

basic types of dowry have been practised. The first type is that which is paid by the groom or his family to the bride or her family. It normally consists of money, property or animals. It may also sometime consists of services rendered by the groom to the family of the bride. Further, a wife could have been acquired by means of exchange when a man agreed to exchange his daughter or ward for another's. The second basic type of dowry is that which is rendered by the bride or her family to the groom or his family. This was common in some ancient societies and is still so in some modern ones.

The fact that marriage has been for so long accompanied by a "bride price" or "groom price" is interesting. The origin of the 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 the bride groom's family, the acquisition of a wife meant the addition of a pair of working hands in exchange of the amount paid over to the bride's family.1

Beside this economic factor, there is also a procreative one, which is not entirely free from economic considerations.

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1. Patai Raphael; Sex & Family in the Bible and the Middle East, New York, 1984 p.56

The bride price is likely to be stipulated in a patrillineal system where a new union "holds out the promise of increasing the number and strength of the bride grooms family..." No comparable advantage occurs to the mother's family. The father not only loses a daughter but also all her future progeny. He should therefore, receive some material compensation for his losses. Sometimes the payment of a large bride price may be the expression of the love of the bride groom for his bride."[2]

There are situations where the bride's family pays a marriage portion to the groom or his family. This is common in monogamous societies, where the sex ratio is low, where a large number of females never marry, and, finally, where married women lead an indolent life. In such societies, the marriage portion frequently became a purchase sum by which a father buys a husband for his daughter.[3] This is true of modern as well as ancient societies. Some of the rules governing the dowry in the ancient times are briefly discussed here:

(a) The Jewish Law: In the Jewish Law, it was necessary to specify the total debt prior to the contract of marriage, any marriage contracted without a consideration is invalid.[4]

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2. Patai Supra, p.57

3. Wesmark A.A. (The History of Human Marriage) New York, 5 edition, 1922, p.183

4. Ameer Ali, (Muhammadan Law) Vol.II, p.391, Lahore 1973

(b) The Hebrew Law: Among the Hebrews, the dower settled on the wife was never made over to her for her exclusive use and enjoyment; she acquire, in fact, no right over it until the marriage was dissolved, either by the death of the husband or by divorce, in which case the dower was made over to her in order to enjoy or to dispose of, according to her own desire.5

(c) The Roman Law: The mahar of the Islamic system is similar in all its legal incidents to the donation proper nupitias of the Romans. It is settlement in favour of the wife, made prior to the completion of the marriage contract in consideration of marriage. But there is still this essential difference between the Roman donatio propter nupitias and the mahar of Islamic Law, that is the former is purely voluntary on the part of the husband, while the latter is absolutely obligatory.

(d) Pre-Islamic Arabia:- In pre-Islamic Arabia, dower which was called mahar was paid by the husband to the wife's father or any marriage guardian in consideration of the marriage contract and only when a mahar has been paid did a proper legal relationship arise. A marriage without a mahar was regarded as shameful and looked upon as concubinnage. At that time, the bride received nothing from the dower. But this does not mean that she was totally excluded from receiving anything from the bridegroom in consideration of the marriage. In fact, what was given at the betrothal called sadaq was given to her because by the act of the betrothal they have become friends and she was a sadiqat to him.6

Concept of Dower

The concept of dowry under Islamic Law differs in two important features from the rules of dower under the Hebrew Law. In the first place Islamic Law does not consider a marriage without a dower as invalid, unless

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5. Ameer Ali, Supra, p.391

6. Gibb and Kramers, (Shorter Encyclopedia of Islam) pp.314-315 London 1961

it was made a term in the contract that, there should be no payment of dowry in which case the contract is invalid according to some authorities and others said an illegal term which does not destroy the object of the contract can only be expunged and the contract is left unaffected, in which case, the law presumes that the proper dower, mahar almithli, is payable.[7] Secondly, Islamic Law recognises that the wife acquires an immediate right over the dower, or that portion of it which is "exible" in its nature.

The term "dower" or"dowry" in Arabic differs with dowry in the English term of it. The term mahar in Arabic means the property which is due from the husband to the wife in consideration of the marriage, while the English meaning of dowry which is probably the same with that of Athenians and the Romans and the French dot, is the property the woman brings with her to the husband's house, which is analogous to the jahaz in Islamic Law.

4.2 Definition:

Mahar under Islamic Law signifies the property due to the wife from the husband as an obligation imposed on him as a mark of respect to the wife. This is made abundantly clear by the author of Hedaya when he says:

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7. Ibn. Abdin (Raddal Mukhtar) Vol.III p.137 Cairo 1966

> The payment of dowry is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and for the same reason, marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower.

Baillie:

> ... the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself. Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman.

Mahmood J.

> defines dower as follows: "dower, under Muhammadan Law, as a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the Law confers the right of dower upon the wife.8

Islam makes provisions that it is obligatory on the husband to give to the wife upon marriage the dowry as has been agreed upon before or at the time of concluding the contract of marriage, or, if it has not been fixed, the parties should fix it later on, after the marriage contract. A stipulation on the part of the wife before marriage to abandon all her rights to dower is invalid and in operative under Islamic Law, and should such a stipulation have been entered into, the wife would, nevertheless, be

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8. Abdulkadir V. Salima, (1886), 8 All 149

entitled to the proper dower (mahar al-mithli). But on the other hand, she can, if she chooses after marriage, discharge the husband from his liability for the dower-debt, or return to him anything she may have received from him in satisfaction of his liability.

Islam insists that dower should be paid to the wife herself, and made it to be her exclusive property, and no other person has any right of claim in it. Whatever she gives out from it must be with her consent. The requirements of the mahar for the woman is in the nature of a gift for which reason the Qur'an calls it (nihla), or present. This gift was required of the man to enable her to buy some funiture (jahaza) with which she would come to the husband'd house. The Qur'an, therefore enjoins bridal gift for a legal marriage;

> And give women their dowries as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.9

It is clear from this verse that the mahar should be a free and voluntary gift unaccompanied by any consideration. It is also inferred that she can, of her own volition, after property in the mahar has been vested in her, without any duress or deceit, give the whole or any part of it to the the husband or any other person. But where a woman gives it out of gimidity, or fear or deciet, it is not lawful to accent it. The Qu'ran thus says:-

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9. [illegible] 4.4

> But if you decide to take wife in place of another even if you have given the former a whole treasure for dower, take not the least bit out of it back; would you take it by slander and a manifest wrong? And how could you take it when you have gone in unto each other and they have taken from you a solemn covenant.10

And yet another verse, reads:

> And lawful for you all women besides these, provided that you seek them with your property, taking them in marriage not commiting fornication. Seeing that you derive benefit from them, give them their dowers (at least) as prescribed; but if after a dower is prescribed you agree mutually (to vary it), there is no blame on you as God is ALL knowing ALL wise.11

In the case of a Muslim marrying a Christian or a Jewish woman (ahlal Kitab), the Qur'anic injunction on the question of dowry is:

> ("Lawful unto you in marriage) Are (not only) chaste women who are believers, but chaste women among the people of the Book revealed before your time, when you give them their due dowers, and desire chastify, not lewdness, nor secret in trigues.12

Islam is not exclusive, Social intercourse, including inter-marriage, is permitted with the people of the book. A Muslim man may marry a woman from their ranks on the same terms as he would marry a Muslim woman; i.e he must give her an economic and moral status, and must not be actuated merely by motives of lust or physical desire. A Muslim woman on the other hand is prohibited to marry a non-Muslim man, because her Muslim status would be affected; the wife ordinarily takes the nationality as

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10. Qur'an 4:20-21
11. Qur'an 4:24
12. Qur'an 5:6

status given by her husband's law. A non-Muslim woman marrying a Muslim man would be expected eventually to accept Islam. Any man or woman or any race or faith, may, on accepting Islam, freely marry any Muslim woman or man, provided it be from motives of purity and chastity and not of lewdness.

Although dower is essential and is a condition, but is not necessary to be mentioned in the marriage contract. In the meantime that contract will be void if it includes a stipulation that there will be no payment of dower. But if the parties just refrein from mentioning anything about sadaq there will be no harm. This sort of contract is known as "Nikah al-Ta weed", on which the Qur'an says: "There is no blame on you if you divorce women before you have touched them, or appointed for them a dower."[13] There are numerous traditions of the Prophet (SAW) concerning the necessity of the payment of dower and all Muslim jurists have agreed that marriage without sadaq is unlawful.

4.3 Nature of Sadaq

Dower is analogous to a sale price, that is it comprises the same fundamental conditions as those attached to a sale. When a woman marries, she sells a part of her person. As in any other bargain and sale, only useful and ritually clean objects may be given in dower e.g the article must be pure, useful, capable of delivery, capable

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13. Qur'an 2:23

of ascertainment; neither may it consists of wince (even in case of the bride being a dhimiyyah); nor of a run-away slave; nor of fruits liable to perish; etc. A dower may consists of money, camels, etc, or a certain piece of land, or buildings, but not the trees on a certain piece of land, even though described. If the woman be accustomed to a sedentary life the dower may properly consists of furniture of medium quality, such as is common among women of her position, but if she be a nomad, the dower ought be camels, sheep , etc, of medium quality.

With regard to the goods consisting the dower, which are subsequently found to be bad or defective, the wife has the option whether to keep them as they are, or to return them and claim the equivalent value, or to demand that they shall be replaced by other goods of the same kind.

Dower, payable to a wife is in the nature of an unsecured debt. The wife stands in respect of her dower in the same position as any other unsecured creditors and she can obtain a decree against the asset of the husband like any other creditors. But it has no priority over mortgage debts. Islamic Law under schools of jurisprudence, recognises what is known as the widow's lien for unpaid dower. If a widow obtains possession of the property of her husband she is entitled to retain it. The heirs or creditors cannot dispossess her till her dower is satisfied.

The Islamic concept of dower has no reference, the price that under some system of law was paid to the father or guardian of the bride when she was given in marriage. On the other hand, it is considered a debt with consideration (for submission of her person by the wife). The result is that dower is purely in the nature of a marriage settlement and is for consideration. The best general observation on this point is that given by Lord Parker of Wadding in Hamira Bibi v. Zubaida Bibi.[14]

> Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted, the Law declares that it must be adjourned on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the Law allows its division into two parts, one of which is called "prompt", payable before the wife can be called upon to enter the conjugal domicile; the other "deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce. But the dower ranks as a debt, and the wife is entitled, along with the other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditors...

The nature of the right of sadaq to the woman is in the form of contract by the husband and as such has preference to requests and inheritance. Mahmood J. in Abdulkadir V. Salima[15] observes that;

> Under Islamic Law the right of cohabitation comes into existence at the same time and by reason of the same incident of Law as the right of dower. Thus the latter may modify and affect the former cannot be doubted; how it affects and modifies it, is the main subject of this reference. Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid

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14. (1916) 43 I.A. 294
15. (1886) 8 All 149

> or delivered to the wife in consideration of the marriage, and even where dower is not expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as n necessary eff ct of marriage...

4.4 Object of Sadaq

Islam insists that dower should be paid to the wife herself, unlike under other legal systems where the dower should be paid to the father or guardian of the wife. It sought to make dower into a real settlement in favour of the wife, a provision for the rainy day, and socially, it becomes an effective check on the capricious or arbituary exercise by the husband of his almost unlimited power of divorce. Thus, a husband thinks twice before divorcing his wife when he knows that upon divorce, the whole of the dower would be payable immediately.

4.5 Classification of Sadaq

According to Islamic Law, sadaq is payable whether it has been fixed and agreed upon or not, or even where the contract has been entered into with a clear condition that there should be no payment of dower. Because of this, dower has to be divided into two kinds. Viz, specified (Mu'ajjal) or unspecified (Muwajjal)

(i) Specific Dower (Mahr-al-Musamma): This is the dower expressly agreed upon by the parties before or at the time of concluding the marriage or after the marriage contract. If the groom is minor his father or guardian may settle the amount of the dower on behalf of the minor, and the minor becomes binding

by the contract. Where the amount has been specified, the husband will be compelled to pay the whole of it however excessive it may seem to the court having regard to the husband's means.

(ii) Maximum and Minimum Amount of Dower

Generally speaking, the Law does not fix any limit to the maximum amount of dower that is payable to the bride, because people differ in their financial circumstances and means, and each locality has its own custom and usages. It is therefore left to each individual to give what he is capable of giving as the dower commensurate to his means and social status. None of the texts has prescribed the amount payable as dower except that they all insist that it should be something of legal value (mal). Anything over or anything which may be reduced into possession, either at present or in future. Anything in fact which comes within the meaning of mal, and has a legal value, may be a subject matter of mahar.

Manafi'a, (profits accruing from land, investment business, industry), and debts owing to the husband from other people are property subjects of dower. But if a freeman were to marry on the stipulation that he would render his own services to his wife in lieu of dower, although the marriage would be valid, the woman would be entitled to her sadaq al-mithli, (proper) dower.[16] But if something is assigned by way of dower which is not in existence at the time, either substantially, or as a

16. Alamgiri, (Fatawai Alamgiri), Vol. p.426

creation of the Law, such assignment is not valid. So, also where the thing assigned is prohibited by Law, e.g Pig, wine or other illegal objects. An iron of ring, a measure of dates, or services such as the husband to teach the wife some verses from the Holy Qur'an were considered by the Prophet (SAW) as adequate dower, so also other jurist agreed on this.

However, the Hanafi and the Maliki schools fixed ten dirham and three dirhams respectively as the minimum amount of dower. It has been suggested that, three dirhams was the dower which the Arab husbands, prior to Islam, used to give their wives as dower besides flocks of sheep etc. It is also the lower amount (nasah), for the theft of which the penalty of amputation was inflicted.

The other Sunni jurists and Shi'ite Law, fixed no minimum of sadaq, they said, there is not limit either to the maximum or minimum of dower, it being a matter of contract between husband and wife; so long as the article given or assigned by way of dower possesses any definite value, the assignment is considered valid. They relied on the prohetic traditons among which are:

A hadith narrated by Amr Ibn Rabia suggested that a woman married for a dower of a pair of shoes, where upon the Prophet (SAW) asked her whether she had agreed to take the pair of the shoes as her dower, and she answered in the affirmative, and the Prophet approved it.[17]

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17. al-Bukhari, (Sahih al Bukhari), Vol.VII, p.16

In another tradition reported by Sahl bin Sa'ad that a woman come to the Prophet (SAW) and said; 'O Messenger of Allah! I offer myself to you". She then kept standing for a long time. A man got up and said; "O Messenger of Allah!, if you have no desire for her, marry her to me." The Prophet asked; "Have you got with you anything which we may give to her as sadaq?". The man said; "I have got nothing but this trouser of mine". The Prophet said; "Seek, though it be a ring of iron". Then searched but did find nothing. The Prophet asked; "Have you any portion of the Qur'an with you?" "Yes" said he, "Such and such a verse," the Prophet said; "I give her in marriage to you for what is with you from the Qur'an".[18]

Anas reported that Abu Talhah married Ummu Sulaiman and the dower between them was Islam. Ummu Sulaiman accepted Islam before Abu Talhah who afterwards sought her in marriage, and she said:

> By God, you are not the type of person whose offer should be rejected, but you are an unbeliever and I am a Muslim. It is not lawful for me to marry you; but if you accept Islam that would be my dower and I would not demand anything else from you.19

So he accepted Islam and married her. Narrated by Nasa'i. All jurist agree that there is no limit to maximum sadaq, because of the following Qur'anic verse reads: "Even if you have given a whole treasure for dower take not the least of it back".[20]

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18. al - Bukhari, (Supra), 16
19. Sayid Sabiq, (Figha al Sunna), Beirut, Vol.II, p.156
20. Qur'an 4:20

However the question of accepting services as sadaq is disputable. According to Maliki it is reprehensible, and some of his jurists allow it, and Shafi's agreed with them, Abu Hanifa rejected it and followed by a Maliki jurists Ibn Qasim. It was argued, the fact, that, the Prophet (SAW) allowed the teaching of the Qur'an as mahar, was peculiar to him alone, and it does not mean a principle to be followed,[21] The other reason for the dispute is the wording of the Qur'an that: "I intend to wed one of these my daughters to you, on condition that you serve me for eight years..."[22] By this verse, services for eight years by the husband was accepted in lieu of the dower. This verse related something which happened before the advent of Islam. So the reason for the dispute of the jurists was whether Muslims were bound by the Laws prior to the advent of Islam or not.

(iii) Unspecified Dower - Mahar Al-Mithli

The obligation to pay sadaq is a legal responsibility on the part of the husband and is not dependent upon any contract between the parties, Once, there is a marriage, then there is a dower for the wife. In cases where dowry 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 her father's family and her own personal qualifications. The social position of the husband and his means are of little account. This should

21. Zargani, (Sharh al Zargani) Vol.II, p.129
22. Qur'an 4:20

be done by taking into consideration the amount of dower paid to her sisters and paternal aunts. The author of Hedaya says,

> In regulating the proper dower of a woman, attention must be paid to her equal 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 difference in all these circumstances; and in like manner it differs according to place of residence or time.23

Islam therefore safeguards the rights of a wife and attempts to ensure her an economic status consonant with her own social standing.

4.6 Payment of Dower on the Basis of time

On the basis of time of payment also dowry has been divided into two. Specified dower and unspecified dower. Specified dower may again be divided into two (i) prompt (mu'ajjal) and (ii) deferred (muwajjal). This classification is according to the time when payment has to be made.

(i) Prompt Dower (Mu'ajjal)

The word mu'ajjal, technically means that which has been hastened or given a priority in point of time" Prompt dower is normally payable immediately after the marriage, if demanded by the wife. The wife can refuse consummation of the marriage until the prompt dower is paid. In this case she does not loose her right of maintenance on the ground of disobedience. The prompt

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23. Hamilton (Hedaya) Trans, p.53, 1979 New Delhi

dower is usually one half of the stipulated sadaq, but could be more or less.

1.7 (ii) Deffered Dower (Muwajjal)

The word muwajjal, technically means to defer "or delay "; and this is the other portion of the dower which is deferred to a later date, usually to the dissolution of the marriage by either party. If she is divorced, the husband is liable to pay the whole deferred dower, and if she dies before him, then the deferred dower is payable to her heirs, and if it is the husband who died first, the deferred dower must be paid out of his estate she stands on the same footing with any other unsecured creditors.

(iii) Entitlement of Dower

Where the dower has been specified before or at the time of the marriage contract and the contract itself is valid, the dower becomes due on the following circumstances.

(a) Whole Fixed Sadaq:

The wife is entitled to the whole sadaq under three instances.

(i) Consummation: According to all schools of law, once a consummation has taken place, the wife becomes entitled to the whole fixed sadaq even if later on the marriage, is invalidated, Maliki, Shafi'i, Shia and Dauda al-Zahiri schools made it a condition that consummation mean actual sexual intefcourse.24

The Qur'an says:

> But if you decide to take one wife in place of another even if you have given the later a treasure for dower, take not the least of it back; would you take it by

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24. Ibn Rushd, (Bidayat al Mujtahid), Vol.II p.22

> slander and a manifest wrong? And how could you take it when you have gone in unto each other and they have taken from you a solemn covenant.25

Maliki added that the mere stay of the wife in the husband's house for about a year even without sexual intercourse would entitle her to her full fixed dower.[26]

(ii) Death of Either Party: By the death of either party before consummation, the wife becomes entitled to her full dower. This is agreed upon by all the Muslim jurists. If the husband dies first she will be entitled to that out of his estate and if it is the woman who dies first it has to be paid to her heirs including the husband if she is a Muslim.27

(iii) Valid Retirement: The views of Hanafi and Hambali jurists is that, where the husband retires a valid retirement with the wife, she becomes entitled to her full fixed dower.28

This is where the spouses secluded themselves in a place where they may have the chance to have sexual intercourse provided on that occasion there is no legal, moral or physical obstacle to prevent them from having sex e.g neither of them is observing the obligatory fasting; nor is either or them incapacitated through illness which would prevent actual penetration, nor is there with them a third party. This is the view of the orthodox caliphs, and so also the view of Zaid bin Abi Auf, that, where the spouses have closedthe door and lowered down their garments, the mahr becomes due, because, by that, she has surrendered herself, thereby performing her own part of the contract and would therefore be entitled to compensation.

Disagreeing with the Hanafis and Hambalis, Maliki, Shafi'i and Zahiri, argued that, the whole mahr does not become due except by sexual intercourse. However, it is the view of Maliki that, where there is cohabitation and a long duration of such valid retirement the mahr becomes due even if no sexual intercourse has taken place. It is also the view of Maliki that a marriage should not be consummated unless part of dower or, at least, the minimum of one quarter (¼) of the stipulated dower is paid. But the wife has the

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26. M.T. El-Imairi; (Personal Status in Islamic Law) p.36
27. Ibn Rushd supra, p.20
28. Ibn Abdin supra, p.120

right to wave this. This is in the case where no payment of dower is made at the time of the contract.29

(b) Half of Stipulated Dower

By the authority of the Qur'an, an unconsummated marriage terminated by divorce, where the dower was fixed at the formation of the contract, the wife is entitled to the half of what has been stipulated. The relevant verse of the Holy Qur'an on this issue is verse 237 chapter 2 read as follows: "And if you divorce them before consummation give them half of their fixed dowry, unless they remit it, or (the mans half) is remitted by him in whose hands is the marriage tie".

From this verse, it is clear that, the law declares that is such a case half of the fixed dower shall be paid to the wife. But it is open to the woman to remit the half which she is entitled to deduct and thus pay the whole.

(c) Non-Entitlement to her Fixed Sadaq

The wife will not be entitled to anything of her stipulated dower on the following occasions:

(i) If the marriage contract has been repudiated before consummation either because the contract was invalidated because of one reason or the other, or because of a defect in the bride which amounts to repudiation. But if the invalidation took place after consummation, she is entitled in lieu of that the whole fixed dower. This is because of the

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Ashal al Madarik Vol.II, pp.111-112

following tradition; "A'isha reported that the Prophet (SAW) said, a woman should not be married without the consent of her guardian. If she is married (without his consent), the contract is void. But if consummation has taken place, she is entitled to the specified dower.30

(ii) If before consummation she kills herself or her husband, she will not be entitled to anything or her fixed sadaq according to Maliki, Shafi'i and Hambali schools. But in the view of Hanafi school, she will be entitled to her full fixed sadaq. The Hanafi school makes no difference between the natural death and the death caused by the wife.

(iii) If before consummation she apostates. But if the apostation took place after the consummation, she is entitled to her full stipulated dower.31

(d) Unspecified Dowry

Where the dowry has not been specified either before or at their time of the marriage contract, the payment of the dowry which is obligatory, the contract may either be a nikan-al-tafweed, or a marriage entered into with the condition that dowry should not be paid.

(i) Nikah al Tafwid: A contract of marriage which has been entered into and no dower has been spefified at the time of the contract called Nikah al-Tafwid marriage is by proxy. This is approved by the jurists on the authority of the Holy Qur'an. There is no blame on you if you divorce women before consummation or the fixation of their dower, but bestow on them (a suitable gift). The wealthy according to his means. A gift of a reasonable amount is due from those who wish to do (sic) right thing.32

In case of Nikah-al-tafwid, she will not be entitled any of sadaq if the husband dies before consummation, but she will be entitled to mut'a and will inherit

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30. Qur'an 2:237
31. al-Mudawwamat al Kubra, Vol.II p.166
32. M.T. El-Imairi supra, p.38

the husband. This is the view of Maliki school. But according to Hanafi and Hambali, she will be entitled to the sadaq of her equals (sadaq al-mithli) and is also entitled to inheritance. Shafi'i school has these two views.33

(ii) Maharal al-Mithli - (proper dower) - All jurists agreed that in the case of Nikah al Tafwid, if the death of the husband occurs after consummation and before the fixation of the dower, the wife will be entitled to the dower of her equals i.e maharal mithli, and she will also be entitled to inheritance. Also as mentioned above, according to Hanafi and Hambali, she will be entitled to mahar al mithli if the husband dies before consummation. So in the two schools it makes no difference whether the death of the husband has taken place before or after consummation.

Mahar al mithli of a woman is regulated with reference to the social position of her father's family and her own personal qualification. Mahar al mithli, therefore, varies, in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of dower in any particular case. When, wherefore it is said that the dower of a woman, where no mahar is stipulated or specified at the time of marriage, should be the "dower of her equals; it is only intended to imply that an approximation may be by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attraction from the female relations with whom she is compared.34

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33. Qur'an 2:236
34. Ibn Rushd supra, p.27

(iii) When mut'a (Gift) of consolation is payable. In the case of Nikah-al-Tafwid, if the husband divorces the wife before consummation and the fixation of the dower, she will be entitled to a gift of consolation from the husband for the loss of consortium which she suffers through no fault or her part. All jurists agreed that the divorced woman, whose marriage was not consummated and no dower was stipulated for the marriage, is only entitled to a gift of consolation. There is however, no amount prescribed for such a gift but it is recommended that, the rich should give according to his means, and the poor according to his means.35

Maliki himself suggested that two pieces of cloth which covers the body is sufficient, while Abu Hanifa, Ahmad bin Hambali, and some Maliki and Shafi'i jurists suggested that she is entitled to half the dower of her equals.36

The right of mut'a, according to Maliki is only recommended, but the majority jurists say it is her right and it is an obligation on the part of the husband to give it to her on the authority of verse 236 chapter 2, which reads:

... But bestow on them a suitable gift. The wealthy according to his means and the poor according to his means. A gift of a reasonable amount is due from those who wish to do the right thing.

4.7 Increase or Decrease of Dower

Under Islamic Law, there is no community of goods between husband and wife. She is absolute owner of her own property and of whatever she received from the husband as dower. The terms of the settlement are agreed to before marriage, but when these have been committed, they

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35. Ibn Abdin supra, pp.581-582
36. Qur'an 2:236

may be settled subsequently, The terms of the contract may be varied at any time during the continuance of the marriage by mutual consent. The husband may at anytime after marriage increase the dower. Likewise, the wife has a right either to remit the whole dower or part of it in her husband's favour.

In the case where the husband increases the dower, it is valid in the view of Hanafi Law and enforceable where the marriage has been consummated; or with death of the husband. But if he divorces her before consummation she is only entitled to half of the originally stipulated dower, but not of the increase. According to Maliki Law, upon consummation of the marriage, effect will be given to the increased portion and if divorce takes place before consummation she is entiled to the half of the orginally stipulated dower together with half of the increased portion. But where the husband dies before consummation, and before she takes delivery of it, she is only entitled to the dower orginally stipulated. The increase portion lapses. According to Shafi'i Law, it has been treated as an ordinary gift and therefore the rule of ordinary gift applies. If she has taken possession, it is effective, and if she has not. It lapses.[37]

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37. Ibn Rush supra, p.27

4.8 Enforcement of Sadaq

The claim of the wife or widow for the unpaid portion of mahar is an unsecured debt due to her from her husband or his estate respectively. It runs relatedly with unsecured debts and is an actionable calim. During her life time, the wife can recover the debt herself from the estate of the deceased husband. If she predeceased the husband, the heirs of the wife, including the husband, become entitled to the dower if she is a Muslim.

If a husband refuses to pay prompt dower, the guardian of aminor wife has the right to refuse to allow her to be sent to the husband's house; and similarly, the wife may refuse the husband his conjugal rights, provided no consummation has taken place. The wife is, under Islamic Law entitled to refuse her-self to her husband until the prompt dower is paid; and if in such circumstances she happen to reside apart from him, the husband is bound to maintain her. The passage in the Hedaya bearing in this subject is as follows:-

> The wife has the right to deny her person to her husband or to go on a journey with him until she received the dower. Her right in the consideration is the same as that of her husband in the object of the consideration his conjugal rights over her person as in sale. She is also at liberty to resist her husband carrying her upon a

> journey until she shall have received of him for the same reason. On the other hand the husband has no power to prevent her from travelling or going out of his house and visiting her friends, until he has paid the whole eligible dower, because a husband's right to confine his wife at home is solely for the sake of securing to himself the enjoyment of her person, and his right to such enjoyment does not exist until after the payment of the return of it.38

This right of refusing herself is, however, lost on consummation. The non-payment of deferred dower by its very nature cannot confer any such right of refusal on the wife. The right to enforce payment arises only on death, divorce or the happening of a specified event.

4.1.10 The Widow's Right of Retention

Islamic Law gives to the widow, whose dower has remained unpaid, a very special right to enforce her demand. This is known as "the widow's right of retention". A widow lawfully in possession of her deceased husband's property is entitled to retain such possession until her dower debt is satisfied. Her right is not in the nature of a regular charge, mortgage or lieu; it is in essence a personal right as against heirs and creditors to enforce her rights; and it is a right to retain, not to obtain possession,

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38. Sayyid Sabiq supra, p.165

of her husband's property. Once she lo ses possession of her husband's property, she loses her special right and is in no better position than an unsecured creditor. In Hamira Bibi v. Zubaida Bibi (1916) 43 I.A. 294, it was observed by the Privy Council:

> But the dower rank as a debt, and the wife is entitled along with other creditors to have it satisfied on the death of the husband out of his estate. Her right however is no greater than an unsecured debtor except, that if she lawfully, with the express or implied consent of the husband or his other heirs obtain possession of the whole or part of his estate to satisfy her claim with the rents accruing therefrom she is entitled to retain such possession until it is satisfied. This is called the widow's lieu for dower of the Musulman law which has received recognition in the British Indian courts and at this Board.

The lieu which a Muslim widow has over the estate of her deceased husband for her unpaid dower is a purely personal right which cannot be inherited by her heirs, even though, the right to the dower itself passes to them by succession. It follows, therefore that if the widow herself dies, they cannot take the possession of the estate. The husband's estate would go back to the deceased husband's heirs. But the widow's heirs have the right to claim the unpaid amount from the husband's heirs.[39]

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39. Heday Supra p.53

4.1.11 Nikah Al Shingar

Nikah al Shigar means marriage by exchange in which a person would contract his daughter or sister in marriage to another on the condition of the other person bestowing his daughter or sister in marriage upon him, so that each of the women should be treated as dower for the other. Or as one writer has put it "al Shigar is an Arabic term which means lifting of a dog while it is passing excre ter. He said this is the reason why the same word has been applied to this undesirable form of marriage since there is a resemblance of picking up a woman without paying any dowry".[40] This kind of marriage is probibited in Islam. All Muslim jurists agreed that this kind of marriage is illegal. But they differ as to what would happen if such a marriage is contracted. According to Maliki and Shafi'i such a marriage should be annulled before and after consummation. But to Hanafis the contract is valid, they said it is only the Sadaq which is unlawful and this can be corrected by giving each woman a Sadaq al-Misly.[41]

4.1.12 Payment of Bride-Price under Customary Law

One of the most distinctive feature of Nigerian customary marriage is the requirement that payment of

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40. Doi, Supra, p.156
41. Fiqh al-Sunna Vol.II, p.15

some sort be made by the husband or his family to the wife or her family in order to establish a valid marriage. Within the wide limits of the institution as so defined there is a great diversity of custom. The payment may be in livestock, in other goods or services by the bridegroom to the bride's family or in money. Its value may be great or small. The total amount may be required on the handing-over of the bride, or it may be payable by deferred instalments. Differing (and sometimes elaborate) rules govern the repayment of bride-price in the event of death or divorce. Correlated with these differences are characteristic differences in the legal effects of the transaction (e.g in regard to the attachment of children to the father's or mother's lineage). There is, moreover, considerable difference of opinion as to the essential significance of the institution.

The payment of bride-price is one of the conditions of a valid marriage under customary Law as it is also under Islamic Law. The payment which is different from other payments which are also essential to the validity of the marriage, has been given various names such as bride-price and other gifts made by the prospective husband. Because the factors governing the refundment of bride-price are quite different from those governing the return of other gifts.

For comparis on purposes, I have selected some customary systems[42] which I consider will give the picture of what is happening in Nigerian marriages. Until recently, the payment of bride-price in form of money was not known all over the country. In the past, there was much reliance on bride-services, where the prospective husband would spend a number of years of service at his in-laws farm until the girl's parents were satisfied with the services rendered and then would yield the girl to him. Also the payments may consist of animals. But with the introduction of the currency, things have changed. The modern version of payment of bride-price now involves the payments of specific amount.

(i) Idoma

In Idoma land, the payment of pride price depends on the educational level of the girl, the higher the level of her education the bigger the bride price. These payments according to the majority of the people interviewed are as a form of compensation or the refundment of what the parents have spent on the girl's education. In some cases, the pride price paid reflects the affluence of the suitor or his family. What is presented here should be regarded as being close to the minimum amount.

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42. The system of Idoma; Bachama; Nupe; Bolawa and Ogiri.

The girl is first given about ₦50 the acceptance of which indicates she likes or accepts the man (suitor), this is referred to as Oojama (testing). Next a small gift known as (ehinenche) of about ₦120 plus some other gifts inform of towels, pomade, headties soap etc to be put on a plate or in a box and given to the girl. After this, cames what is known as the fathers pocket money Ij'Ofekpa K'ada, which is about ₦250. The mother's share comes next and it is known as Ehik'enekoyi which is about ₦200. But before the bride is finally taken to her husband's house, the sum of about ₦200 is used to be given for purchasing the matrimonial bed Ag'odo-ota. It is important to note that what ever gifts given to the girl outside does not form part of the bride price. On the whole, bride price in Idoma ranges from about ₦500 - ₦10,000 and above.

(ii) Bachama

As with the case of other systems, Bachama customary way of marriage has been polluted with the coming of civilisation and western education, but still according to the elders in some localities of the areas the people try to maintain the old custom. Currently, there are two ways of paying dowry or bride price in the Bachama communities. Some people, especially in the villages, according to my informants, prefer the old methods of payments to be married according to the old custom rather than the modern custom which involves money.

Marriage Payments: Past & Present

In the past (i.e. before the European acculturation) the prospective husband has to give the following series of payment before a marriage is accepted as legal and legitimate:-

(a) So waha ("the thing for calling attention"). This was usually a wawayito (white cloth) or a di base (the eyes of a cloth).

(b) So kul kwame ("the thing for hearing the mouth"). This is given after the girl has consented to the tidings of the nzo-tufe ("son of the path"). It used to be a white garment, Rukuto Kunge.

(c) So ngir ha (lit. "the thing for begging"). This was usually a black cloth. After the three payments preceding this are made the husband-to-be would have been set for the marriage. So the fourth payment is made to seek permission for the release of the lady to be taken as wife. When the marriage is completed the husband, his friends, and kinsmen have to go on a communal farming on the girl's father's farm abd then build a thatched but for her parents.

But with the introduction of money economy there is a slight movement to introduce some terminology suggesting the use of currency. In Bachama language, ta, which denotes money, finds its way into the Bachama terms for marriage items. Thus we have:

(a) ta kul kwame (lit. "money for hearing the mouth"). This replaced the former wawayito or dibase. Such a payment in both instances (i.e. past & present) shows an appreciation for the girl's granting the nzo-tufe audience for the negotiation.

(b) ta su gyelto ("money for the ring"). This is the engagement taken, somewhat approximating the English 'engagement ring".

(c) ta kuzoto ("money for mat"). This is usually a white mat on which the wife and husband-to-be would sit if the husband visits her. Usually the second and third payments are made at the same time.

(d) ta da Bato ka nuwoto or sheda bato ka nuwoto.

Both of these terms refer to money to be given to the father and mother of the girl. Some readers may quarrel with my using ta as a prefix here; my reason is that even though the Bachama may appear very polite or shy by not referring to such things straight in monetary terms what they actually imply is money. Furthermore, many of the parents now will not accept the previous wawayito or white garment (rukute). After all these payments which are in monetary form, are made and which are generally known as ta dum ha or shidum ha (bride - wealth) conclude the marriage contract and are accepted as legal and legitimate.

(iii) Nupe

Bride - price in Bida area in recent years is paid in cash as opposed to some few other Nupe communities where it takes the form of labour on the father-in-law's farms. Other items which form part of the pride price like clothes and beads all have definite money value. Secondly, the payment of bride price is not a single amount to be paid at once, but involves bits of money to be paid for different purposes all of which add up to be known as Ewo yawo (marriage payment).

Before the actual payment of pride price in Nupe, two payments in form of gifts have to be made first. After the parents have given their consent,

the husband will send through Ndarinna (go-between) what is known as ebi yo nini which is about 100 kolanuts for godiyagi (lesser thanks); then the next is the payment of some money and kolanuts for godiyako or dangi kama which is to be divided among the relatives of both father and mother. These two payments are meant for sealing the agreement between the two families involved. The next major payment is the sadeki (bride-price), the lion share of it goes to the mother for all the necessary purchases. After this, the next payment is Ewo ofo go (money for fixing a date for the ceremony). The next important payment is Ewo yawo go money to be paid before the bride is brought to the husbnd's house. And finally the Ewo yawo wadzun is to be paid which will signify the completion of the ceremony. These are the major payments which form the bride-price.

In the past, except in rare cases all of the payments mentioned add up to less than ₦20. Elderly informants told the writer that the money stood between ten to fourteen Naira for many years. Not until the sixties when money began to flow enmass that prices started to sky rocket. It is understood that the highest amount was fixed at fourteen Naira and it was so widely accepted that there was a popular song for it thus: Zana'de pam gutwaba naga de yawo - meaning 'he who has seven pounds is he who has a wife'. But now

adays, on the whole, the payments ranges between about ₦300 to ₦2,000 or more.

(iv) Bolewa of Fika

For a marriage to take place in the Bolewa community, it is customary to pay a dower, this according to the traditional law is to be furnished by the bride groom or his family. The Bolewa word of dowry is Gabaga bentel. Usually some goats or sheep used to be given according to the status of the girl; and some time the payment is made in cash - known as Marbi. The bride price paid will be distributed among the relatives of the girl to inform that their daughter has got a suitor and that she will soon be married to him. What is given as fixed by custom are; forty pieces of yam , three tins of oil, about six Naira and seven pieces of cloth.

(v) Ogori

At the time a marriage is negotiated among Ogori people one of the elements that must be settled is the payment of the bride wealth known as Oviyuche tabi Oviyepen. This payment is made in two stages namely, (a) preliminary payment ibue-osesere which consists of twenty yams, a tin of palm oil and a cash of two Naira. This is regarded as consent payment; (Ibue - osesere ayeka oyegben weda woke) and (b) the other payment which is the final payment consists of forty yams (Igolibore), three tins of palm oil (amoncgarawa - eta) six Naira (enaira - oponore) and seven pieces of cloth (esa igan

ufonbore) is made shortly before the transfer of the bride to her husband's house. All the two payments are not subject to bargain.

Bride-wealth payment among Ogori people is regarded as a pledge or testimony of the new relationship set up through marriage in which both partners Oforo aka owore have reciprocal rights and obligations. The legality of marriage among Ogori people depended on the handing over of a bride-wealth by the groom's father to the bride's father. The payment is regarded as the price of fostering and could thus be interpreted as a return to the father or guardian the expenses of rearing a daughter. Now adays, the stock or their equivalent in money may be produced by the bride-groom himself.

2.1 Control of Sadaq or Bride Price Rates

Generally, non of the two systems discussed, fixed the amount of bride-price, it is left for the parties or their families to negotiate. In other cases it is not subject to negotiation, the man's family is merely asked to pay what it considers fit and proper for the wife, and because of this in some of the localities, you may find some parents are demanding very exhobitant rates of bride-price for their daughter, as a result of which many young boys and girls could not marry because the boy or his parents cannot afford the payments.

Though the need for controlling bride-price rates has in recent years been more widely recognised than in the past, the problem is not a new one. Official records show that in some areas attempts were made by some authorities many years ago to introduce standardization. The limitation of Dowry Law 1956[43] regulates the amount of bride price or dowry in the three former Eastern States of Nigeria. This law fixes the amount or value of bride price in respect of customary law marriage at sixty Naira where no other expenses are made.[44] But in the case where other payments are to be made, the amount of the pride-price must not exceed fifty Naira and the other expenses must not exceed the sum of ten Naira[45] in amount or value. The law has also provided punishment for six months imprisonment for any body who pays or receives bride-price in excess of the maximum amount prescribed by the Law.[46]

The marriage, divorce and custody of children (Native by Laws Order 1958,[47] which has been adopted in parts of Lagos, Bendel, Ogun, Oyo and Ondo States, prescribes a standard bride-price of twenty Naira.[48] But the amount may, subject to the approval of the commissioner for local government in each of the states, be varied by a resolution

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43. Cap. 76 Law of Eastern Nigeria, 1963
44. Section 3(a)
45. Section 3(b)
46. Section 4(a)(b)&(c)
47. WRLN 456 of 1958
48. Schedule A.

of a Local Government Council which has adopted the By-Laws.[49]

In Northern parts of Nigeria various declarations of Native Law and Custom also established maximum amounts to be paid as dowry or bride price. Biu declaration provides in section 4(1) that, the bride price must not exceed thirty Naira. However, the Local Authority (Modification of Borno Native Law and Custom Relating to marriage) Order 1971,[50] makes a distinction between the bride-price and dowry, althout the two may be seen as the same. Section 4 of the law provides that the bride price shall not be less than two Naira which was the current value of one-quarter of a dinar (shilling of gold) but presently, the value of one quarter of dinar is ₦76.90. The dowry as stipulated in section 5 of the law consists of cash not exceeding ₦20; clothing not exceeding forty Naira in value, but the amount is increased by the community (not through any law) to about ₦200, one-hundred kolanuts, two bottles of scent, one bundle of sandal wood, one cigarette tinful of garunbal, one cigarette tinful of algama, two pieces of soap, and two bottles of vaseline.[51]

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49. Section 15
50. NESLALN 10 of 1971

51. Today, whether, because of western education or may be civilisation if we may called it as such, the Biu people are no more asking for all these things.

Section 9(1) of Borgu Declaration provides, bride-price in Borgu area consisists of money not exceeding thirty Naira including sadaki, cloths not exceeding ten including headties, and kolanuts not exceeding two-hundred. During the second Republic, it was observed that some state Houses of Assembly tried to legislate on the issue of controlling the bride-prices and currently Kano State Government has set a committee to study the ways of controlling the expenses of marriages generally. It must be noted that despite the fixing by rule of the amount of the bride price, these rules are frequently transgressed and a much higher bride price is paid.

In recent years, the problem of inflated bride price rates has in many areas become acute; and the resulting evils have become increasingly apparent, not only in the prevalence of irregular unions, but also in the tendency towards commercialisation of a transaction which was not usually the practice. These developments have had an influence both on the people's opinion and on government policy. The demand for control has become stronger and more wide-spread, and on the official side the problem has in some states, at any rate received serious attention at higher levels than was usual in the past. For example, in the last civilian government, some State Houses of Assembly have taken a very commendable step in order to control marriage expenses. The Sokoto State House of Assembly has passed a bill which is proposed

to control marriage expenses in the state.[52] Section 4 of the bill states:

> The paying of a reasonable bride - price:
>
> (1) reasonable sum of not less than the value of rubu'u dinar which is ¼ of the value of a piece of gold - to the parents of a bride which shall be delivered to her by the parents.
>
> (2) the current value of rubu'u dinar for the year 1981 is ₦6 and currently in 1988 the value is ₦19

Similar bills were proposed by Borno and Bauchi States House of Assembly, but which was not passed into law. Some of the proposals contain in Bauchi House of Assembly in section 4 that a person who is desirous of contracting a marriage under Islamic Law shall observe the principles and teaching of such law regarding such marriage.

Section 5 provides:

> (1) without prejudice to section 4 of this law a person who is desirous of contracting a marriage under Islamic Law shall not during courtship make gift of more than;
>
> a. ₦100 in cash or kind to the proposed wife if she is a girl; or
>
> b. ₦50 in cash or kind to the proposed wife if she is a woman.
>
> (2) No person who contracts a marriage after the commencement of this law present a bridal gift of more than:
>
> a. ₦500 in cash or kind if the bride is a girl; or

52. Bill No.29 of 1981

b. ₦250 in cash or kind if the bride is a woman.

Section 6 of the law provides, "Nothing in this law shall be construed to limit or purporting to limit the payment of dower stipulated at the time of marriage celebration. And in section 7, the law makes a provision of three months imprisonment or a fine of ₦500 to a person who violates its provisions.

Though section 6 of this law does not limit the amount of dower to be paid in any marriage which is incomformity with the provisions of Islamic Law, but still it is a very good attempt made by the House of Assembly for the purpose of controlling the marriage expenses. Actually what most of the state Houses of Assembly did was to limit the marriage expenses. As a result of these expenses, it is becoming more and more difficult for some people to get a wife of their choice in both muslim and non muslim communities. This is because the traditional demands on marriage expenses is too high. Because of this, it is very commendable steps taken by some of thes authorities in order to control marriage expenses so that everybody in the society will be able to marry without incurring any unreasonable financial expenses.

Under Islamic Law the only expenses a person may incur when he is getting married is payment of dower which is necessary before marriage between spouses could be valid. After dower, there is no other payment which is

obligatory on the husband recommended by Islamic Law. The dower itself is fixed as ¼ of dinar as a minimum dower. But the law does not fixed anything as maximum amount. Therefore a person can give anything legal and whatever its value to his wife as dower.

2.2 Areas of Difference

Though the institution of dowry in common to both Islamic and Customary Law marriages, yet they differ substentially in some areas. The two systems differ in the following area:-

2.2.1 Ownership of the Dowry

Under Islamic Law dowry or sadaq belongs to the woman for her exclusive use. To make dowry the exclusive right of the bride and empower her to dispose of it as she deems fit is a radical change introduced by Islam; even though some observers suggest that there must have been a pre-Islamic custom whereby dowry as a rule paid to the woman and not to her parents, so that she cannot often have been left destitute and depended on her people or clan at the event of divorce or death of the husband.[53] A part from moral effect that this change may have had on the status of women, the social consequences of it were equally inportant. Payment of Sadaq or dowry to the woman herself probably minimizes the element of self-interest and power of the guardian in his choice of a husband for

53. Stern, G.H. Marriage in Early Islam London. The Royal Asiatic Society, 1939; pp.33&37

the ward. This and other changes brought by Islam tended to remove control over their affairs from the guardians and to rest it in themselves.[54]

On the other hand under Customary Law generally without an exception, the pay-ment of dowry is to be made to parents themselves, and the woman has no say or to share it with them. In some tribes it is regarded as compensation to the family for the economic-loss suffered due to the departure of the girl. In this case, all the family is going to share the bride-price.[55] In other areas[56] the payment is to be divided into two, the larger part of it will go to the father, while the smaller will go to the mother. In this case excluding the other family members. According to the customary law of Ibos, living in and around Onitsha, the girl's father receives the amount which he will divide into four parts. Usually he will keep two-parts, give one-part to the mother of the girl and give the remaining one-part to the girl to share with the head of the family. In other places, the father keeps the entire amount. Ebira customary law demands that, the girl's father or guardian

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54. Ibid p.38

55. Idoma custom requires that the bride price be shared among the whole father's family.

56. Nupe of Bida area, Bachama of Gongola State, Angas of Plateau State and many other tribes.

shall be entitled to retain four-fifths ($\frac{4}{5}$) of the pride price. The remaining one-fifth ($\frac{1}{5}$) of it goes to the girl's mother if she was the one who raised the girl to marriageable age; but if it is another woman who raised her, one-tenth of the pride price shall go to her and one-tenth to the mother.

2.2.2 Eligibility of Sadaq (Dowry)

Under Islamic Law, a woman becomes eligible to the whole fixed sadaq after consummation of the marriage or on the death of the husband. Once a sadaq has been fixed and agreed upon by the parties, half of it becomes the woman's proporty immediately after concluding the contract even if later on, it had been terminated by divorce. The husband would only be entitled to the remaining one-half. We would see that under Islamic Law there is no way for the husband to claim a refund of his sadaq after entering into the marriage contract.

The Holy Qur'an refers to dowry as a free gift,[57] and because of this, it is not possible for the husband to claim it back even if the marriage is terminated by divorce. The Holy Qur'an, provides "even if you have given a whole treasury for dowry, take not the least of it back."[58] But if the woman decided to redeem herself from the husband becuase of one reason or the other, the

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57. Qur'an 4:4
58. Qur'an 4:20

husband is permitted to received back his sadaq[59] as compensation.

But under all the customary laws of Nigeria, a woman is not entitled or eligible to her sadaq. From the beginning, as it has been observed earlier, the bride price is received by her parents, and whenever the marriage is terminated or whenever the husband decided to divorce her, the whole of the dowry paid to her parents has to be refunded. This has cautioned some families not to accept too large a bride price on behalf of their daughthers because they believe that this increases the risk of their daughter being maltreated by their husbands since bride price must always be refunded upon divorce, a wife who is maltreated by her husband and for whom a large bride price has been paid, may be forced to continue living with her husband under this miserable condition if the amount to be refunded is beyond her or her family's means. Also whenever a woman feels that she wants to get rid of her husband or she wants to marry another, she will simply refund the dowry to the husband.

Another important point concerning the payment of bride price is that, under Islamic Law it is possible to contract a marriage without specification or fixation of sadaq and it would not affect the validity of the contract itself and this type of marriage is known as Nikah al-Tafweed

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. Qur'an 2:229

4.5 OTHER RIGHTS AND DUTIES OF SPOUSES

In any given group, be it a clan, a tribe, a club etc, each individual who is a member of the group has a status. From this status a set of duties and obligations emanates. They are incumbent upon the person in the status, and are rights due to his or her fellow members of the group. The performance and fulfillment of the duties and obligations arising from a status constitute the role which the person who is in that status has to play. The husband and wife relationship is thus a reciprocal complementary pattern in which the spouses are equal in diginity and in due respect while their roles and mutual obligations are not necessary identical. Their roles are best conceived of as attitudes and responsibilities, rather than specific work or activities.

In the preceeding pages we dealt with the philosophy of the dower and the reason why it came into existence. It will by now be clear that the basis of the dower is the fact in relations between man and woman different roles are assigned to each of them by the Almighty God. It will also be clear that the dower originates in man's feelings of kindness and gentleness, and not from his harsh, domineering and possessive characteristics. The woman's own part in this matter is her characteristic attitude of self-restraint, and not feebleness or lack of strength of will. Haring discussed this right, the rrmaining part of the chapter will discuss other rights of the spouses under the three legal systems. (i.e. Islamic

customary and English legal systems).

Islamic Law lays in enpress and emphatic terms the rights and duties which spring from marriage.

Whenever marriage is validly contracted under any of the three legal systems, it will have some legal effects and consequences that follow it, some immediately after the conclusion of the contract, and some after its consummation. These legal effects are in form of rights and obligations of the spouses it is only when each of the spouses does what he or she is obliged to do, in establishing the rights of his or her patner, that a happy marital life and objectives of marriage as set by Islam can be achieved. In the Western world, where, in the name of the equality of human rights they have altered family rights from their natural form, and have tried despite the law of nature, to put man and woman in the same stuation, and leave them to act out the same roles and to perform the same duties in the family, still, when 'free love', as it is called, appears, and the laws of the land do not change man and woman from their natural course, in an pefforms the same function, which is natural to him, of seeking, requesting, giving something of value, and spending money. Man presents fgifts to the woman and bears the expenses, in spite of the fact that in English m marriage their is nothing like a dower, and as for maintenance, the burdensome responsibility is left to the lot of the woman. On the otherhand, Islamic Law lays in express and emphatic terms the rights and duties which spring from a marriage. Before the coming of Islam women had no locus - standi in the eyes of the customary laws of many societies in the world"[64]

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64. Syed Ameer Ali, in Muhammadan Law Vol. 11, p. 350, quoting from caussin de perceval, History des Arabes, Vol. III, p. 337.

It is pertinent while analysing the rights and obligations building upon the spouses by virtue of their having gome through the formal requirements of a valid marriage and are now united by the marital tie, to have recourse to the main sources of Islamic Law. In the Holy Quran it has been stated that:-

> "..... And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree (of advantage) over them...."[65]

Thus as human benings, women are the equals of men in their rights. But man, being the active partner has been justly regarded as superior to women. The Holy Quran further states:

> "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means....."[66]

The prophet (S.A.W.) is reported to have said in this connection that:-

> "The man is the ruler over his wife and children, and is answereable to Allah for the conduct of thier affairs."[67]

From these authorities and many others it is clear that husband and wife, each of them will have rights and obligations towards the other. The rights and the obligations may be classified as follows:-

5.5.1. MUTUAL RIGHTS OF THE SPOUSES

1. Sexual Intercourse: The right to cohabition and consortium is only permitted by virtue of a valid marriage contract, and each spouse can, as of right, demand it from the other. The Qur'an says:

> "The believers must eventually win through those who... ...and who abstain from sex except with those joined to them in the marriage band....."[68].

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65. Qur'an 2:228.
66. Qur'an 4:34.
67. Buhari Salih al Buhari.
68. Bukhari, Sahih al-Kukhari.

Qur'an goes further to say:

> "Permitted to you--- is the approach to "your wives. They are your garments and "you are their garments----".[71]

We all know what garments mean; they are intended to cover a person's body thereby covering his nudity: so do husband and wife by entering into the contract of marriage they preserve their chastity and secure comfort for each other which can only be obtained through a valid marriage.

Yet another verse of the Qur'an says:

> "It is He who created you from a single person and made his mate of like nature in order that he might dwell with her (in love)".[72]

(ii) Prohibited Degrees of Affinity: Although it may be argued that this is a right, strictly speaking, which belongs to Almighty God as the prohibition is prescribed in the Qur'an yet some jurists would prefer to call it mutual rights of the spouses."[73] Perhaps it may be so because the prohibition arises from the fact that they are married. If they had not married the prohibition would'nt have arisen

(iii) Mutual rights of inheritance: As soon as the status of a valid marriage has been established between the spouses the right to inherit each other's property is established in both of them.

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71. Qur'an, 2: 187.
72. Qur'an, 7: 187.
73. al-Sayyied Sabiq: Fiqh al-Sunna Vol.II.P.153, Beirut, 1973.

The Qur'an says:

> "In what your wives leave your share is one half, if they have no child, but if they have a child you get one fourther after payment of debts and legacies: their share is one fourth if you leave no child; but if you leave a child they get one eighth, after payment of debts and legacies".[74]

(iv) Legitimacy of the children: This means that a child begotten during the subsistance of a valid or irregular marriage is presumed to be legitimate and both parents have duties towards the child, especially in its up bringing and general welfare. The child too, on attaining the age of puberty, has certain duties towards his parents e.g. maintaining them if they are indigent.

(v) Kind and Impartial Treatment: The Qur'an, on several occasions enjoined spouses to treat each other other with kindness and promote good and honourable relation towards each other. For instance the Qur'an emphasises:

> "--- And women shall have rights similar to the rights against them according to what is equitable; but men have a degree (of advantage) over them ------".75.

The difference in economic position between the sexes makes the man's rights and liabilities a little greater than the woman's, e.g.

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74. Qur'an, 4:12.

75. Qur'an, 2:228.

it is the man's duty to maintain the woman, because of the certain difference in nature between the sexes. Subject to this, the sexes are on equal terms in law, and in certain matters the weaker sex is entitled to special protection.

(vi) Observance of the Idda: Again it may be noted here that the duty to observe the 'Idda is a prescribtion of the Qur'an but then while it is the wife alone who observes the 'idda, it is imposed in the husband's own interest in that it is imposed to clarify any doubt as to whether the womb carries his child or not and for this purpose he is obliged to maintain her in case of revocable divorce. Also the duty to observe the idda arises from their act of marriage which legalised their sexual relations which act gives rise to the observance of the idda.

4.5.2 RIGHTS OF THE HUSBAND:

The husband, by concluding a vailid marriage contract and the payment or his promise to pay the dowr is entitled to certain duties from his wife.

The Qur'an says:

> 2Men are protectors and maintainers of women because God has given them more strenth than women and because they (the men support them from their wealth. Therefore the righteous women are devoutly obedient and harmonious in her husband's presence and in his absence guard his reputation and property and her own vitues as ordained by God."76

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75. Qur'an [illegible]

This vase explains in no uncertain terms that the husband has certain rights over his wife. These rights can be summarised as follows:-

(i) Obedience: Thus the wife is obliged to obey her husband's instructions and demand provided that they are lawful.

(ii) Sexual Intercourse: She should allow him whenever he desires unless she has some lawful excuses to offer, such as menstruation or that she is engaged in the rituals of pilgrimage. If however, she refuses without just cause then this is an act of rebellion and her right to maintenance lapses."[77] The Prophet (P.U.H.) is reported to have said that:-

> "When-ever a woman has been invited by her husband for cohabition and she refuses for no just cause the angels will curse her. The authenticity of this hadith has been agreed by all jurists."[78]

She must remain in the marital home and must not go out without permission from the husband unless she has a genuine cause to leave the matrimonial home e.g. maltreatment by the husband or lack of food or the fact that the matrimonial home does not fit her social status."[79] She must guard her chastity and the husband's property she has to look after the

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77. Al-Khirshi (Commentary on the Jawahir al-Iklil) Vol. III P. 331.

78. al-Shaukani: Nail al-Autar; Vol. VI.P. 360 Lebanon; 1973.

79. al-Khirshi (Commentary on Jawahir al-Iklil) Vol. III. P. 331.

children of the marriage and feed them from her breast and serve him in accordance with the prevalling custom of their society and their tradition."[80]

Even if the husband employs servants she must look after the house as she is the administrator of the matrimonial home. The Prophet (P.U.H.) is reported to have said:

> "Everyone of you is a keeper or a shepherd and will be questioned about the well-being of his fold. So the Head of the State will be questioned about the well-being of the people of the State. Every man is shepherd of his family and will be questioned about every member of it. Every woman is a shepherd to the family of her husband and will be accountable for every member of it. And every servant is shepherd to his master and will be questioned about the property of his master."[81]

(iii) Right of Correction: The Qur'an exhorts:

> "As to those women on whose part you fear disloyalty and ill-conduct, Admonish them (first), (next) refused to share their beds (and lastly) beat them (slightly) but if they return to obedience seek not against them means of (annoyance) -----."[82]

There are three Prophetic traditions which need to be mentioned here and they are reported in Nail al-Autar.

(a) The ideal woman is she who pleases you when you look at her, obeys you when you give her

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80. Zarruq (Commentary on the Risala of Abu Zayd al-Qayrawani Vol. II P. 59.

81. Al-Bukhari, Sahih al-Bukhari, Vol VII No. 128, P.98

82. Qur'an, 4:34.

directives and protects her honour and your property when you are away.

(b) "The world is full of objects of joy and delight and the best and most profitable source of delight is the pious and chaste woman".

(c) "Any women who pleases her husband paradise is under her feet."[83]

4.5.3 RIGHTS OF THE WIFE

From the foregoing discussions based on the Qur'anic legislations and the Prophetic traditions it is abundantly clear that Islam has elevated the legal status of woman far better and enviable than her counterpart in the other systems of Law. By the act of marriage she becomes one of the twin halves of the husband and can own property independant of the husband and deal with it the way she likes. Even in Europe she did not enjoy this independence prior to 1874 until that time, the property of the married women in England belonged to the husband.

The rights of the wife towards her husband in Islamic Law may be epitomised below:

(i) Equitable Treatment Between Co-wives:

This means that in the case of plurality of wives it is the right of every one of them to

83. al-Shaukani: Mail al-Autar Lebanon 1973 Vol. VI. VP. 360.

receive fair and impartial treatment from the husband. This is more pronounced in the matters of cohabitation than anything else under the term of 'qasm', meaning division of the term for cohabitation between the wives. It is essential that the gives the wives equal terms for cohabitation on the principle of equality; He is also not allowed to cohabit with one wife when it is not her turn unless he was specificially permitted by the wife whose turn it was. It must be noted, however, that qasm simply means the duty to spend the period allocated with one wife in her apartment to the exclusion of the other wives but it is not necessary that he should have sex relations with her as this is left entirely to his own discretion. But if he wilfully and maliciously continues to refrain from giving her sexual satisfaction in order to reserve his strength for the other wife then this would amount to cruelty."[84] The Prophet (P.U.H.) is reported to have said:

> "Any husband who keeps more than one wife and leans to one of them he will come in the world hereafter paralysed."[85]

Whether the husband or the wife is sick, or she is under menstruation he must still keep to the rule unless he is seriouly ill as to incapaciatate him from moving to the other wife's house when he can stay where the sickness befell him."[86]

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84. al-Dasuqi: Hashiyat al-[illegible] Vol.II.P.339
85. Recorded by all the hadith compilers except Ahmed. Reported by Ibn Rushd, Bidayat al-Mujtahid Vol.II.P.42
86. al-Dasuqi: Hashiyat al-Dasuqi Vol.II.P.340.

In the case of the newly wedded wife he is allowed to spend seven nights with her consecutively if he married her a virgin. While in the case of the thayyiba he is required to spend three nights only."87

Where the husband wishes to travel with one of his wives he is at liberty to choose any one, that is, in his discretion but preferrably he takes into consideration the suitability or the experience of a particular wife for the purpose of that particular journey. But if the journey was for pilgrimage or the holy war then he must cast a lot."88

It is, however, interesting that for mundane journeys the husband applies his discretion in choosing which of his wives to go with while in the case of religious journeys the ballot box should select the wife for him. The woman, it is believed is not obliged to fight in the religious war but if she accompanied the husband her role would not be more than for the purpose of comforting him and if there could be any pious act on her part, it could be the fact that she keeps company of the husband who is on a pious and meritorious expedition. While in the case of pilgrimage she too would have the opportunity of performing the pilgrimage which is one of the obligatory duties imposed on all Muslims. The mundane journey is also, it is submitted, a meritorious act because

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87. al-Dasuq: Hashiyat al-Dasuqi Vol.II.P. 340

88. al-Dasuqi: Hashiyat al-Dasuqi Vol. II. P. 343.

the law prescribes that she must obey her husband and if she refuses to follow him on request because the journey was not religious one she is by this refusal a nashiza thereby inviting upon hereself the wrath of God and of the Prophet. It would have been more appropriate, if the principle of equality between wives is strictly applied and the procedure of ballotting is applied in all cases.

4.6 MEANING, CONCEPT AND NATURE OF MAINTENANCE UNDER ISLAMIC LAW

In its general terms maintenance connotes the act of maintaining or being maintained; the preservation or upkeeping of a certain object in a particular state or condition and to maintain means to preserve; support or to furnish sustenance for a particular object."[89]

Thus, the general conception of the word is that for one to maintain a particular object, one has to by all means provide, for all the necessaries which conducively allow for a smooth existence of that object.

In it's technical term however, maintenance, in a marital life of a Muslim refers to those necessaries incumbent upon a husband to his wife or wives which will render her/their marital life easy, happy and successful. Text writers take such maintenance to

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89. Cf; The Lexicon Webster Dictionary Vol.I

centre around: (A) FOOD, (b) CLOTHING and (c) MATRIMONIAL RESIDENCE."[90] Other necessaries may include also the general care of the wife. Because of the great practical value of these necessaries and their quantum a detailed discussion on them hasseparately been treated below. Our main concern presently is to look at the conditions of entitlement and incidents of maintenance during the coverture of the marriage and on the dissolution of the marriage.

4.6.1 MAINTENANCE DURING COVERTURE OF THE MARRIAGE

(1) Conditions of Entitlement of Maintenance During Coverture of the Marriage

(a) MARRIAGE MUST BE VALID AND SUBSISTING

The marriage between the husband and the wife must have been validly conducted. An invalid marriage cannot confer any right to the wife nor an obligation upon the husband. This therefore necessitates a brief examination of the types of marriages under the Islamic Law.

In the first place, all the schools are agreed upon the legitimacy of rights and obligations conferred upon the spouses by a Sahih (Valid) marriage. This is a marriage which has been conducted in a sound manner excluding all irregularities or prohibitions. It is the one conducted according to the Maliks, in consonance with all the legal requirements of a marriage which have been discussed in

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90. Some text books writers do not count clothing and matrimonial residence to form part of the defination of maintenance of: page 249 of Shar Al-Tuhfah.

n the previous chapter two and three chapter one supra.

The second type of marriage is the Fasid (irregular) marriage which contains a temporary prohibition or prohibitions. Two types of irregularities are identified of this marriage:-

(i) Disputed irregularity and

(ii) Undisputed irregularity.

(i) Disputed Irregularity

Where the marriage is disputed, e.g., in the Malik School, if a woman conducts a marriage by herecelf, the spouses can have no rights or obligations arising from the marriage whatsoever. This is because in the Malik School, a woman lacks representative capacity in that matter. But in the Hanafi School, the position is different. They hold such a marriage to be valid and is capable of conferring rights and obligations on the spouses. It is because of the two opposing views held by the two schools, that is why the irregularity is considered to be a disputed one.

(ii) Undisputed Irregularity:

Where the irregularity is considered to be undisputed as for instance where a man is a husband to two sisters simultaneously, all the schools of jurisprudence are agreed upon the fact that the spouses cannot enjoy rights or incur obligations conferred by the marriage.

The third type of marriage is Batil (Void). This is one which is void ab-initio because it contains primarily a perpetual prohibition or prohibitions; e.g., where a man marries the daughter of his brother. This type of marriage confers no right or obligation on the spouses whatever.

(b) MARRIAGE MUST BE CONSUMMATED:

Consummation means the actual act of having sexual interpourse between the spouses. This must occur between the spouses before the wife becomes entitled to maintenance. Also if the preliminaries of consummation e.g., kissing embrachin; or thw wife stays for a considerable period of time yet no actual consummation takes places?

If however, the cause for non consummation is not from the side of the wife, e.g. where the husband suffers some defects or minority maintenance is still inoumbent on him. Thus in otherwords, the wife shall get her maintenance when the husband is a minor or impotent or too ill to be intimate with her. Where he suffers minority than her maintenance shall be realised from his property (if he has any) or from his father if he has undertaken the liability of maintaining her.

(c) WIFE MUST BE ABLE TO TOLERATE CONJUGAL RELATIONS

It is clear that some of the most important objects of marriage should serve as a safeguard against loose living, provide domestic comfort for the spouses and the procuration of children and live a harmonious companion-

ship. This, therefore calls for some competence and desire to cohabit by each of the spouses. Hence a wife may not be entitled to maintenace when these objects cannot be achieved solely on her account. Where she is of a tender age therefore she is ipso facto disqualified from being maintained, as sexual intercourse is not possible with her at the time in question.

Under the Shafi'i laws however it makes no difference whether the wife is a minor or not, she has to be maintained.

(d) WIFE MUST BE ACCESSIBLE FOR CONJUGAL RELATIONS:

Maintenance will not be payable if the husban is unable to have sexual intercourse for any act or conduct of the wife, e.g., if she is imprisoned for dept, except at the instance of the husband, or even where she is forcefully abducted. The right will not be available even if there is any other impediment to sexual intercourse whether the wife is living at the place of her husband or her father. If she makes unjustified refusal to cohabit she loses the right.

But by looking at the state of the wife, that is to say if the wife is adult and the husband is minor, or is sick or imptent she would be entitled to receive her maintenance.

So also where she goes to perform the obligatory Hajj in company of the husband or an accredited Mahrim, with the consent of the husband, she does not lose her

right to maintenance. But where she goes, without the husband's permission, to perform the obligatory Hajj or Umra, then she loses such a right.

However, the right will not be lost if the wife refuses to cohabit on the ground of non-payment of her prompt dower before consummation.

(e) WIFE MUST RESPOND TO THE INVITATION TO COHABIT BY HER ADULT HUSBAND

Where the husband, if adult, invites the wife to the conjugal roof, she has to comply. Where the wife, without valid reasons refuses to comply, she loses her right of maintenance. It is however immaterial here whether acutal cohabitation takes place or not. The mere invitation to the conjugal roof and the wife's compliance or risistance is the yardstick.

(f) WIFE MUST OBEY REASONABLE ORDERS OF HUSBAND

The wife must obey all reasonable and legal commands or orders of the husband. But while the husband is giving such orders or commands he has to remember his limitations:

(i) that he can only order the wife to do or from doing matters explicitly falling within the range of his rights;

(ii) He has to also see that the orders to do, fall within the sphere of the permissible categories of action and

(iii) That he must not order her to do an act, the performance or non-performance of which violates the rights of God.

Each of the above territories has to be properly guarded and more particularly the rights of the Almighty God: The Qur'an praises th e wife who refused to share her husband's false or condone his wrong doings. Dissent, therefore on fundamental matters of belief is absolutely necessary. And it is even the bounden duty of the wife to correct the husband where she is sure that he errs on such issues and he has to believe her once she is telling the truth.

4.6.2 INCIDENTS OF MAINTENANCE:

By an incident; it is meant to connote a distinct, casual occurance of an event which is more often than not an unnecessary or subordinate to the substantive event. In this regard, the incidents of maintenance are those occurences which in course of time happen in a particular marital association. Such incidents may include inter alia:

(a) Maintenance in I'isar (period of difficulty/ hardship) of a husband,

(b) Maintenance during absence of a husband,

(c) Maintenance during sickness of a wife and

(d) Accumulation of maintenance.

It is pertinent to cast a glance at each of the above incidents; pres nts; present, to be away, wanting or lacking, not attentive or non-existent."[91]

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91. The Lexicon Webster Dictionary vol. 1.

For our purposes however, absence means the state of being at a distance place or non-existence within a certain sphere.

It is imperative from the outset, to point out that this subtopic-absence of husband - should not be confused with the case of missing person - (mafqud). This may allow a clearer understanding of the sub-topic whereas the letter is outside the scope of this writing.

Where a husband has absented himself from the matrimonial residence and is away from the wife either consciously or unconsciously, the fact still remains that, that wife has to get fed, clothed and sheltered; a responsibility which is incumbent upon the husband. What the law demands of such a husband is that before setting out for such a journey/ sojourn which amounts to his physical absence from the matrimonial residence, he has to be positively sure that adequate provisions to cater for the welfare and well-being of his family (wife), which shall cover the whole period of his absence, have been made. This is to safeguard the dignity of both himself and his family. He can put the custody of the materials for maintenance in the hands of the wife or he can charge a trusted relation or friend with a power of attorney to effect appropriate disbursement of the maintenance.

But if the husband has gone without making such preparations and his whereabouts is known and the wife has petitioned him before a court of law, all possible efforts should

be made as may be ordered by the judge, to have contact with him and that he should provide for his wife's maintenance. If he fails to comply within a reasonable time, the judge has the power to order for a sum of money be awarded to the wife in prepartion to the husband's known property. If the husban has no personal effects either in the nature of capital or loans, his tangible (immovable) property e.g., house, farmland etc, can be sold (taking an exact inventory of the property sold). The wife however has to make a sworn statement to the fact that the husband has left nothing for her maintenance. If however the husband has left nothing in the form of movable or immovable property, then the wife can pledge the husband's credit (as she has now become his agent of necessity).

In the event that the husband returns and a dispute arises between the parties concerning the payment of the wife's allowance then the wife's statement before the judge or other recognised authority, shall be believed."[92]

Equally, in all cases in which a judge may decree maintenance to a wife out of the property of her husband, she may lawfully, reasonably and justifiably take it herself, even without the judge's order. This was dictated by the Sunnah of the Prophet (S.A.W.) when a certain Hind Bint Uqbah, the wife of Sufyan went and complained

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92. Cf: Mayyarah: Sharh al-Mayyarah alal Tuhfatil Hukkam, Vol. I. P. 25.

to the Prophet (S.A.W.) that her husband does not give her what suffices her and her children and that she takes from his property without his permission. The Prophet said to her, "Take what is sufficient to your needs and the needs of your children equitably".

As to theproperty left by an absent husband, the HANAFIS differ a little: They assert that where the property left by a husband in his own house or in deposit, is of a different nature from that which a wife is entitled to for maintenance, it can neither be sold by herself or by the judge on account of her maintenance.

The reforms implemented by some of the Muslim countries have laid down some concrete solutions based on the above general principles. For example in Tunisia it is provided that where the husband absents himself leaving back his wife, and neither has he left property for her maintenance, nor appointed any person to provide maintenance to her during his absence the court shall give him one month's time and if he does not come back within that period shall dissolve the marriage after the wife proves the allegation by swearing on oath. And where she spends on her own maintenance with a mind to seek reimbursement from her husband, she shall have a right to do so."[93] The official law applicable in

93. Cf: SS.40 & 41 of the Tunisian Code of Personal Status, (1956).

this country is the Maliki law. In Egypt, a country which applies the Hanafi law if a husband goes to a place where he can be easily contacted and has left no known property from which a maintenance order be executed, he shall be warned by the judge that his wife shall be granted dissolution of marriage unless he either sends money for her maintenance or comes back to support her within a specific period. Where the place he has gone to is far away so that he can not be easily, contacted or where he is of unkonwn destination or is missing (mafqud) and it is proved that he has no known property from which maintenance order could be executed, the wife may, upon her claim, be granted an revocable dissolution of marriage without any delay. This applies to a situation where the husband is serving a sentence order and therefore unable to support the wife."[94]

4.6.3 MAINTENANCE DURING SICKNESS OF WIFE:

Where the wife falls sick, it appears to be, according to common sense, the responsibility of the husband to provide for her all she requires in terms of cloth, feeding, medicine and medical charges or any other thing considered essential to help the recovery of the wife. In law however, the position is different. In many Maliki terms"[95] for instance, it is shown that the husband has

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94. S. 5 of the Egyptian Family Law, No. 25 of 1920.

95. Dasuqi - Hashiyat al-Dasuqi Vol. II pg. 509; Jawahirul Ikilil - Khalil - Vol. I. Page 403. But of Fiqh al-Sunnah Vol. II. page 152.

to pay for the services of a midwife on the occasion of his wife's delivery. He is also required to supply the wife with things considered essential by custom (even where she delivers after divorce); but he is not however obliged to buy her medicine or pay for the clinical charges nor even the doctor's fee,

The HANNAFIS are in total agreement with the MALIKS here. The SHAFI'IS however differ: They include medicine and clinical charges among the necessaries: "A husband must not only supply his wife with necessary nourishment but he must also give her.....medicine when she is sick, and doctor's and surgeons fees. She may insist to having her ordinary nourishment during her illness, both the principal nourshment and the condiments."[96]

4.6.4 THE RATIONALE

The jurists prefered reasons as to why the husband is not bound to buy medicine or pay for the clinical and other services for the sick wife. Some of these reasons include:-

(i) It is a condition for entitlement to maintenance for a wife that tolerates conjugal relations....with the husband, but as she is now sick, she becomes obviously unable to discharge such a function. This therefore disentitles her to be maintained during the period of sickness.

96. Nawawi: Minhaj Et-Talibin page 384.

(ii) It is also a condition that the wife must be accessible for conjugal relations. When sick, she lies either at the hospital, the parents house or at matrimonial home (if the husband gratutiously allow). She is by this fact indisposed and therefore inaccessible for conjugal relation's and thereby loses her right of maintenance.

The soundness of these reasons are a subject of great debate.

4.6.5 REFORMS:

In some Muslim countries the reforms shifted all such liabilities on the shoulders of the husband. Example: In Jordan, the laws of Family Rights, 1951, S. 65 (i) and (ii) state that when a wife delivers a child, the husband is responsible for the payment of the remuneration to a doctor or midwife, whether the marriage is extent, or has been dissolved. Further, where the wife, who is entitled to maintenance falls sick requiring treatment, the husband shall be liable for the expenses of the treatment which shall be liable for the expenses of the treatment which shall be fixed in accordance with his financial condition.

4.6.6 ACCUMULATION OF MAINTENANCE:

For the purposes of clearity, this sub-topic is treated under the following paragraphs:-

(a) Due and

(b) Accumulated.

(a) Due:

Maintenance becomes due to a validly married wife from the very time she fulfills the conditions mentioned supra. The mode of paying it however depends on when it is most convenient for the husband to pay it; it may be on daily, weekly, monthly, quarterly, half yearly or yearly basis depending on his source of income. It is stated in Jawahirul Ikhlil as follows:-

> "Maintenance of the wife is based upon the financial resources of the husband: If he earns his living on daily basis, it should be paid daily, if he is one of those who earn their wages weekly then it shall be weekly; if he earns it monthly then it be monthly as for instance, the government workers and if it is yearly, as for the farmers and those who derive their reasources from like nature, it should be based on yearly basis....."97

The wife normally receives this allowance in advance and the provision may be made in cash or kind though, in principle, it is preferred in kind. The wife has to render an account of what she has received.

(b) Accumulated:

There may sometimes arise unavoidable circumstances which will obviously render payment of maintenance on its due date, impossible. Example of such a case has already been observed in I'isar treated supra. Then what happens in such a situation?

Imams Malik and Shafi'i say that a wife accummulates arrears of maintenance from the time it becomes due until

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97. Khalil, Sheikh - Jawahirul Ikhlil Vol. I P. 403.

it is settled by payment. But Imam Abu Hanifah on the other hand, allows it only to accummulate if there has been a mutual agreement on the quantity of the maintenance or that the payment of such an arrears has been decreed by the court.

Under the MALIKS, if the husband becomes opulent, he is absolved from payment of any arrears, otherwise the arrears is payable as an ordinary debt and does not lapse.

To the HANAFIS however, and as stated earlier, that arrears are not recoverable unless there has been a clear agreement to that effect by the parties or decree of the court and even after the passing of the decree, if any arrears are allowed to accummulate, they would be recoverable if the marriage is dissolved either by the death of either of the spouses or by divorce and if anything is disbursed by the wife for maintenance from her own property nothing would be recoverable from the husband. In such cases if maintenance is raised by the wife on the credit of the husband without the permission of the Judge, the amount would be irrevocable. However, one begs to ask: What date shall be considered as the effective date of recovering the arrears? It is the date of presentation of the petition to the court or the date the decree is passed?

It would seem reasonable to reckon from the date of the decree."[98]

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98. For further details one may wish to glance at the reforms in the Sudan, Egypt, Tunisia, Iraq, Morocco and Jordan.

4.7 APPLICATION OF THESE CONDITIONS AND INCIDENTS IN CASE OF MUSLIM WIFE IN NIGERIA

A typical Northern Nigerian Muslim wife, who has validly undergone the legal requirements of an Islamic marriage, is no different status-wise from any other Muslim wife elsewhere in the world. She should enjoy all the legal rights her counterparts do enjoy. However investigation has made alot of startling revelations about the peculiar position of our wives.

In the first place, and as indicated in the introduction to this writing, there is yet the thirst for knowledge in the society generally. In otherwords ingnorance militates against the understanding of the basic dictates of Islamic law generally and with regards to a marital life in particular. This consequantly leads to a great many of the married couples not knowing the basic rights and obligations the Shari'ah confers on each one of them. Some wives are unecessarily deprived of these rights whereas others enjoy the superfluity of such rights. The latter thereby leading to arrogance and laxity. Yet others are not in law, supposed to enjoy any of such rights but do enjoy them in full scale. For instance, it is a condition before maintenance is due to a wife that she has to be able to tolerate conjugal relation with the husband. Many wives do not consider marriage as the only instrument which legalises sexual intercourse between a couple. They assume that on their getting to the matrimonial residence, they are required to do are the manual services such as cooking

or preparation of the food, sweeping the rooms, courtyard or other appurtunences; bringing the water for ablution or taking the hygienic bath and etc. If the husband seeks to have her carnal knowledge, she proves unnecessarily refractory; quarelling and fighting results from such an attempt. Others are so wild enough (i.e., the wives) to attempt injuring the husband's private part."[99]

One is, by this fact, obliged to question, what might be the possible causes for such unnecessary and unruly refractoriness?

On the philosophical side of it, one would, in most cases, find out that the question of mutual and natural love and affection is nowhere to be treaced in such couples marital life. That is why it has earlier been pointed out in this writing, that the question of exercising the power of ijbar by some fathers defeats the whole aim of some marriages.

Again, the issue of early marriages, where a small girl of say about 9 - 12 years of age is married, is another case in point. One of the conditions for entitlement to maintenance is adulthood of the wife. Girls of such tender ages are not, by virtue of their ages, ripe for sexual intercourse and this, ipso facto disentitles such a married young girl to maintenance.

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99. An incidence of such nature occured around theZaria metropolis in the early 1979 where the wife cut the genital organ of the husband with a razor blade.

Touching on the incidents vis-a-vis a Nigerian Muslim wife, one would find in practice as in case of I'isar that where the wife petitions the husband before a law court, the court normally asks the husband to justify his poverty. The Qadi can order the husband to either provide maintenance for his wife or to separate himself from the wife by means of a revocable repudiation. If he however proves his indigence, the court may give him time within which to effect supply of the required maintenance. The time may extend to two months. This period may be extended in case of imprisonment or sickness. But once the period has expired and nothing is forthcoming from the husband in that regard, the court decrees the repudiation on behalf of the husband. It is stated in the Tuhfah:

As such, such a repudiation is revocable, the husband is free to re-engage his wife on a condition that he has now got a means to provide maintenance to the wife.

But where the wife has already incurred expenses on the husbands behalf in such circumstances of poverty, sickness or absence of the husband, any such expenses so incurred provided they are not exaggerated and that she swears and proves through withnesses that she has actually incurred the said expenses with the hope of getting such expenses settled by the husband at a later date, are to be settled by the husband on court order.

So, the above stanza from the famous book of procedure on the Malik law - SHARH TUHFATUL HUKKAMI popularly and simply referred to as MAYYARAH - has set out three steps in providing a solution where the husband foces difficulties in maintaining his wife:

(i) A period of two or more months, depending on the circumstances of the situation, is granted him within which to furnish the wife with required maintenance;

(ii) The involvement of two (hakamain) arbitrators to assess and rectify the situation between the spouses and

(iii) Dissolution of the marriage may occur.

As indicated much earlier, the last step set above is left at the choice of the wife: She may wish to retain the marital bond and endure on her own volition, the hardships and nor further complaints as she cannot approbate and reprobate, or she, in the final analysis seeks for a dissolution of the marriage so as to become free of her marital commitments to the husband. Where the husband disallows the dissolution the court, upon the wife's petition and adequate proofs, dissolves, the marriage on the husband's behalf. This is because the shari'ah demands maintenance and security for the wife. But this is obviously difficult to achieve if the husband is destitute. It would be unjust and unequitable to force a wife to settle for less than a free

choice whereas the marital tie anticipates compassion and cooperation between the partners. She may become more of a liability than an 'asset' in which case deprivation may increase rather than decrease. That is why the Maliks assign the alternative choice of seperation on the wife.

This right of choice of seperation has some two significant; though indirect bearings on the husband:-

(a) It may motivate him to intensify his drive to improve his lot, so as to keep his family intact and proud;

(b) It may also ecourage him to show the best in his character to acquire personal qualities that can be a source of consolation for the wife who has proven her integrity and understanding under adverse conditions.

IN AMIN GARIN TAFIDA VS. MUSA KEMBU AUDU."[100]

The petitioner sued the defendant for total lack of maintenance and that the defendant is a drug-addict. Any time he comes back he keeps on shouting on the petitioner for food. But the petitioner herself ws always being helped by neighbours. The defendant denied all the allegations. He went on further to cite example that the petitioner once sued him before another area court but the court rejected her complaint

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100. Imrekprted case frp, Li,p Area Court Bauchi State. Civil Suit No. 460/83, dated 12/4/83.

and advised her to go back to the matrimonial home. And as to the allegations of drug addiction the defendant argued that he was not in the habit of drug addiction.

A witness, who was a guardian to the petitioner came and testified. The witness stated that the defendant "is a confirmed drug addict. There was a time he even divorced the petitioner and she had been in my house for a long time. The first case was settled out of court but the defendant was unable to feed and cloth the petitioner. The petitioner threatened to run away from the town."

Based on this evidence and the earlier purported settlement by another court, which terms of settlement the defendant failed to comply with, the present court "hereby divorces the petitioner on the defendant's behalf." The court cited some quotations from Vol. I. of al-Mayyarah as its authority.

IN HALIMAH ALHAJI MUHAMMADU YAHYA VS. ALHAJI MUH. YAHAYA[101]

Halimah sued her husband Alhaji Muhammadu at area court Jos where she requested the court to dissolve her marriage on the ground of his failure to maintain her and also on the ground of his cruelty. On her total failure to prove any of the grounds alleged by her, the area court dismissed her case.

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101. Shari'a Law Report of the CILS, A.B.U, Zaria 1980 S.L.R. Vol. P. 19.

She then appealed to the Upper Area Court which confirmed the decision of the Lower Court, Still agrieved, she applied to the Shari'ah Court of Appeal but they latter also dismissed her appeal. In the Shari'ah Court of Appeal, the appellant enumerated her complaints some of which include the following:

(i) That she no longer loves her husband who humiliates her by beating her and did not feed her properly.

(ii) That her husband no longer clothes her.....

The Shari'ah Court of Appeal, after going through the merits of the case and the incoherent complaints of the appelant found that the appellant was unable to prove the claims she made at the first instance court. She further claimed that she had been living with the respondent for eight years during which he gave her clothes. The respondent, in his statement claimed that he used to provide the appellant and her two other partners with clothes together. The respondents witnesses also testified to that fact; the appellant herself told the Court that the respondent has provided her with clothes at the Id-el-Fitr Festival.

On the totality of all these the Shari'ah Court of Appeal considered the appeal as unreasonable and fetches no merit and it was therefore dismissed, comfirming the lower courts decision.

As for the absent husband, the practice here has assumed an alarming proportion to the extent that we have a lot of such cases pending in the Lower Courts.

However, rarely can one find an interesting case. This is because the wife who petitions the absent husband hardly swears to an oath to substantiate her allegations. Or one finds that the petitioner, instead of relying upon the grounds of her petition gets astounded and confused. The idea of an oath discourages alot of them. The husbands too, appear unmindful. And even where the marriage is dissolved in such circumstances, the husband cares very little to find out the causes of dissolving his marriage lest he avers what the petitioner deposed.

IN DASO KOBI VS. DAN LAMI BAUCHI" [102]

The petitioner told the court that her husband went away for six months leaving her with nothing to feed on. The defendant however responded that when he was going away he deposited with the petitioner some six 'muds' of rice and thirteen Naira in cash for other condiments. He further asserted that when he went away he became sick for four months that was why he wa not in a position to render further supply of maintenance. Inspite of all these, the wife asserted that she wanted the marriage dissolved as she no longer loves the defendant.

A period of respite was granted to the husband to effect payment of what the wife incured even though she showed her unwillingness to receive the reimbursement and that the defendant should go to the petitioner's parents to get her

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102. Unreported Civil Case No. 1149/33 from the Doya Area Court Bauchi dated 20/11/83.

convinced to return to the matrimonial residence. Both petitioner and defendant went back to the court after nine days in disagreement. Further period for reconciliation was granted by the court for one week. Still, the petitioner rejected the idea of going back to the matrimonial home. But for the third and last time' a one month reconciliation period was still granted. This time the parties came to an agreement of settlement.

BUT IN KHADJA KUMO VS. ABDULLAHI SHUAYIBU"[103]

The petitioner stated to the court that just barely a week after the conclusion of her marriage with the defendant, he went away leaving her in a rented quarter without feeding. Since then she heard no mor of his whereabouts for a period of about eleven months. She prayed the court to dissolve her marriage with the defendant. Her story as confirmed by two witneses, near relations of the defendant.

The court allowed a period of respite for a month whether the whereabouts of the husband could be traced. On the expairy of this period, the petitioner came to the court and informed the court that nothing was heard of the husband. The petitioner indicated her readiness to swear to an oath on her allegations.

On the strength of the above points, the judge passed a decree dissolving the marriage between the parties. The judge further commented: "I have noticed that harship

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103. Unreported civil case from Kumo Area Court, Suit No. 79/83 dated 24/5/83.

is occasioned on the petitioner in that the husband has gone away for about a year without any provision for feeding and clothing of his wife. And that even the matrimonial residence is a rented quarter the rent of which is yet to be settled. The husband has not conferred any power of attorney upon any person to take care of the wife, nor has he left any known property. On these grounds I hereby order for the dissolution of the marriage between the spouses, and it is hereby dissolved on behalf of the husband." That Area Court judge cited his authority from al-Mayyarah Vol.I. pages 262 - 264.

As for the sick wife, the practice appears in the North to be more in line with the Shafi'i School rather than the Maliks. This is because, a great many of the husbands have taken it upon themselves to provide for almost everything needed by a sick wife.

The researcher personally considers this practice highly commendable, even thoug it is gratutious. At the same time a question is pased, who caters for the siok wife if she has no near relation, whereas her marriage with the husband is still valid and existing and the husbahd is willing and capable though he may refuse to help since he is not obliged?

4.8 MAINTENANCE DURING DISSOLUTION OF MARRIAGE

1. DISSOLUTION AND IT'S CONSEQUENCES

Dissolution cannotes the act of breaking up; coming to a terminal point; disintegration, or making an undertaking no longer binding. It also cannotes a simultaneous

to maintenance. The time for the iddah of course varies from one woman to another and the mode of how the marriage contract has been determined. Now let us consider the conditions (circumstances) of various forms of marriage dissolution with a view to determining the entitlement or otherwise of the affected woman.

4.8.1 CONDITIONS OF ENTITLEMENT TO MAINTENANCE AFTER MARRIAGE DISSOLUTION

Conditions for entitlement to maintenance after the marriage has been dissolved are not unique. They differ in accordance with the nature and circumstances of the known methods of dissolution on its merits.

(a) [illegible]

Where a husband dies his spouse relics is required to observe a waiting period of four months and ten days as laid down by the Holy Qur'an:

> "And if any of you die and leave wives behind they shall undergo a waiting period of four months and ten days....."[105]

This applies to all consummated/unconsummated wives of the deceased.

(i) Condition of Right to Maintenance

Where the husband dies, the wife, whether revocably divorced or not and whether pregnant or not loses the following rights:-

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104. For a satisfactory analysis on any of these methods of marriage dissolution refer to any written work of Islamic Personal Status and more particularly to: K.N. Ahmed: Muslim Law of Divorce; M.T. El-Imeiri, Personal Status in Islamic Law.

105. The Holy Qur(an: Chapter II. Verse 234.

(i) Right to feeding;

(ii) Right to clothes;

This all the Imans are agreed upon. This is because they have all taken the view of the fact that the whole property now passes on to the heirs and the spouse relic being one of them shall and should not the conferred with additional rights.

(ii) Right to Accommodation

According to the Malik School of Law, from the time of death of husband up to the expiry of the iddah period i.e., 4 months 10 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 spouse or it even is on rental basis. If the latter, it is the duty of the deceased's other heirs to find out what the nature of the tenancy is and whether the rent for the remaining period up to the expiration of the widows waiting period has been settled by the husband before his death or not. If still unpaid, payment or alternative arrangement in lieu thereof be effected from the deceased's estate before distribution.

If however the nature of the tenancy is such that by mere coincidence, it expires just at about the time the deceased died, then if the landlord agrees that the tenancy continue at the same rent and conditions as before, the spouse relic shall be allowed to stay till the expiry of her iddah. If, on the other hand, the landlord (owner) of

the house rejects such a new deal, the spouse relic has to quit and accommodate hereself elsewhere. This is only applicable however to a consummated wife of the deceased. A non-consummated widow of the deceased is not entitled to this."[106]

B. Dissolution as a Result of Divorce

Divorce, as pointed out earlier, is classified mainly into three:-

(i) Unilateral Divorce by the Husband (talaq),
(ii) Divorce at the instance of wife (khul), and
(iii) Divorce through judicial process.

(i) Unilateral Divorce (Talaq)

This is where divorce occurs at the instance of the husband, it is further classified into revocable and irrevocable divorce. In circumstances where the wife is revocably divorced, she enjoys the right to accommodation for observing her waiting period. She cannot be asked to vacate the matrimonial residence by the husband and neither can she, on her own accord opt to vacate the residence. This is ofcourse a right of the Almighty Allah. It cannot be brushed aside:-

> "....Do not expel them from their homes; and neither shall they be made to leave unless they become openly guilty of immoral conduct."107

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106. Cf: Alfawakih al-Dawwan Vol.II. P.98.

107. The Holy Qur'an Chapter 45:1.

So the only condition on which the husband is permitted to send her out of the matrimonial residence is when she commits open lawlessness.

a. Right to Feeding:

She can only enjoy this right if she is pregnant. Otherwise it is lost. The Holy Qur'an further states:-

> "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 then their due recompense."108

b. Right to Clothing:

While pregnant, the divorced is entitled to a complete dress if repudiated at the comencement of her pregnancy. This however is not obligatory on the divorcer if he has provided her with such a set at the beginning of her pregnancy.

A triply divorced woman enjoys feeding, accommodation and a set of dress if only pregnant. The pregnancy however has to be established

A woman divorced by way of mutual imprecation (LIAN) has no right to feeding accommodation and clothing even though she be pregnant. This is because the pregnancy is what is contested by the husband and the child cannot be maintained by that husband.

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108. Th Holy Qur'an Chapter 55:6.

(ii) Divorce Through 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.

4.9 APPLICATION OF THESE CONDITIONS IN CASE OF A A MUSLIM WIFE IN NIGERIA

The applicability of the conditions of entitlement to maintenance after the determination of a marriage, honestly speaking, leaves much to be desired.

In the first instance, taking the position of a widow, whose husband dies, leaving her back, I consider the provision of the law, as pointed out above, as unnecessarily diminitive. What is actually provided in the jurisprudential books is what is in actual practice. But there is little rational in providing a widow with an accommodation whereas her feeding hangs in the air. This suggests that the widow, under necessity has to go out for easier means. What guarantee do we have to safeguard and keep her chastity unpolluted looking at the temptations? If provision for accommodation can be made out of the deceased's estate, it is equally important and desirable that feeding be arranged for the widow. Feeding and accommodation should be considered as inseparable twins that exist together. Any attempt to separate one from the other is palpably injurious and jeorpardises the existence of the other.

This observation has been carried on for a very long time. The writer has with concern noticed for instance in his area how widows are forced by circumstances to go out to the farms to participate along with men in manual work so as to sustain a living. Others are prone to take a certain malpractices - theft, fornication/adultery and etc.

It appears that none of the schools of law has come up with anything different. This is because as mentioned earlier, they have taken the spouse relic as an heir, well, even if she is an heir, which she naturally and undisputably is, it is not all husband that die to leave behin them a great heap of fortunes. She is ofcourse a Qur'anic heir, but the greatest share she can get is ½ of the net estate. Further she might not have any relation to turn to for help in any case of necessity.

Cant we provide a better and more certain solutions for a stable up-keep of such widows? Again, looking at the above provisions of the law, the husband and wife, on separation, both are certain of their statutory rights. The major question however, is, "Is that what obtains in the Nigerian society?" The answer is invariably, No. This is because the very moment a marriage contract comes to an end between a husband and a wife in whichever form, it is evident, in most cases that the wife is so impatient to vacate the matrimonial home. If for example, the marriage comes to an end say about 6.00 a.m. the wife can hardly wait to

see 7.00 a.m. in that house but quits to either her parents home or some other place however distant. In the event that she has no transport money, she still prefers, to move out of the matrimonial home to other places seeking for help for the transport money at the same time giving publicity that, she is no more a married woman now: This is irrespective of whether the purported divorce is revocable or otherwise. Immediately she arrives at her parents home, she starts preparing to come back to the matrimonial home for final packing out (if she did not remove her personal effects along with her on the day the divorce occurs). The husband too, out of exasperation no courage to cool her down and ask her to remain in the matrimonial home until after the expiration of her idda.

When a handful of widows were asked: Why is it that on the whole, women whose marriage contracts come to an end do not want to remain and observe their waiting period in the matrimonial home? The answers proffered are seemingly the same:

(i) "That I cannot tolerate to live with my enemy" (i.e. the husband),

(ii) "The world will accused me of heart lessness and that I prefer the husband's home even though he has divorced me than my parents home."

(iii) "Further stay in the matrimonial home gives more courage to the husband to maltreat me the more."

Conversely a cross - sectional view of some of the husbands, on why they do not permit their divorced wives to observe the waiting period in the matrimonial home, shows that, many of them hate to live together with a wife "one purports to have been divorced." "How can," one of the husbands stated, "keep on maintaining a woman with whom my relation (legal) is now severed?" Such a host of others are the reasons proffered by majority of the divorced spouses on why they cannot live together until the experation of the idda.

So in general, the fundamental issues raised as defences for observing the waiting period in the matrimonial home are mainly due to total ignorance of the rules of marriage and divorce. Otherwise, none from both segments could dare state such as valid reasons to refuse to stay and observe the idda in the matrimonial home. Both seem to forget or are unaweare that this is a right of the Almight God. It cannot thus be waived by either of the spouses. If the husband refuses to accommodate a divorced woman who is entitled to accommodation during iddah, a court order can be issued to restrain him from ejecting the divorced out of the matrimonial home. And if it is the wife who insists on leaving the matrimonial home, a court order can prohibit her from so doing unless there is a genuine reason to order otherwise.

THE RATIONALE OF THE STAY

The Shari'a does not sanction for the stay to observe the idda in the matrimonial home for the sake of inflicting mental, physical or financial tortures on any of the spouses. For fetched reasoned ideals are the basis. And among them are:

(i) That the waiting period shall serve as an interam period within which the husband may regret his action and God may cause him to renew his idea for re-engaging her as a wife once more. In that even he does not have to encounter any type of problem before the re-engagement materialises.

(ii) It is a very good period long enough to ascertain whether there is a pregnancy of the marriage or not.

(iii) The stay is an act of devotion imposed by shari'a and it cannot be waived.

The Qur'an states:-

> "Do not expel them from their home; and neither shall they be made to leave, unless they become openly guilty of immoral conduct. These then, are the bounds set by God.....109.

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109. The Holy Qur'an Chapter 65:1 but Muhammad Asad, in his, "The message of the Qur'an" whilecommenting states: "This particular injuction does not imply a prohibition of a divorced woman's leaving her home of her own free will."

THE RIGHTS AND DUTIES OF THE SPOUSES UNDER ENLISH LAW

The principal effect of marriage under English Law was that for many purposes it fused the legal personalities of husband and wife into one. The clearest exposition of this doctrine of unity of husband and wife is probably that of BLACKSTONE, who said:110

> "By marriage, the husband and wife are one person in Law; that is, the very being or legal existe of the woman is suspended during th e marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our Law-French a feme-covert, femina viro co-operta; is said to be cover-baron, under the protection and influence of her husbands, her baron or lord; and her condition during marriage is called her coverture. Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."

Statutory marriage like its counter part Islamic marriage, confers on the husband and wife rights and obligations that are peculiar to persons who have acquired that status. These rights and obligations relate inter alia, to consortium, maintenance, property, and other civil matters.

By the fact of marriage the spouses owe each other a number of duties and responsibilities which are collectively referred to as consortium. Each spouse has the right to the Other's consortium. Consortium means living

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110. Quoted by Bromley, P.M., Family Law 4th Ed. Butterworth London 1971, P. 90.

together as husband and wife with all the incidents that flow from that relationship. Normally, this, will involve sharing the common matrimonial home, but this is not absolutely essential. It may be possible for the spouses to cohabit only from time to time, as where the husband has to spend long periods away from home for reasons of his profession.

Consortium then, connotes as far as possible the sharing of common home and a common domestic life. It is difficult to go beyond this and to define clearly the duties which spouses owe each other in their domestic life; this is, after all, a matter of common knowledge rather than a subject of legal discussion. English Law like Islamic Law imposed the duty to provide maintenance to the family, while the wife will be responsible for the running of the home, a duty which may take the form of supervising over the members of the household and doing the other household such as cooking and looking after the children. Today in Nigeria, this is not so, especially where both spouses are working, both normally contribute out of their earning to maintain the family. Legally, consortium resembles ownership, for husband and wife enjoy "a bundle of rights some hardly capable of precise defination."111 In spite of the difficulty, it may be worth while to examine some of these incidents

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111. Per Lord Raid in Best v. Samuel fox & Co., Ltd., (1952 ALL ER 394, 401, H.L.; (1952) A.C. 716-736.

of consortium which have been directly or indirectly the subject of judicial decision.

4.9.2 The wife's right to use her Husband's name:

On marriage a wife acquire the right to use her husband's Surmane the right of which she will continue to retain even after the termination of the marriage wither by death or divorce, and the husband has no right legally to stop her from using it, unless if she is still addressing herself as his wife, he may of course restrain her from doing so by jactitation of proceedings.

4.9.3 Mutual duty to cohabit:

One of the incidents of consortium is the duty of the spouses to live together as far as their circumstances will permit. In choosing the matrimonial home both of th e spouses has to agree a to where to stay. Such an agreement may be entered into before marriage or after, and will remain inforce until a change of circumstance (for example, a change in the spouses financial position or health or business interest) makes it necessary or desirable for them to change their home and thus come to a fresh agreement, as a matter of Law neither of them has an absolute right in this respect against the other and all the circumstances must be taken into consideration. This means that in a Large number of cases the husband will be entitled to the last ward for the simple reason that he will be the bread-

winner and must be ab le to live near his place of work."[112]

4.9 k Sexual Intercourse:

By entering into the marital state each spouse owes the other the duty to consummate the marriage. This duty continues to be effective throughout the duration of the marriage. Though sexual intercourse is a mutual right to both spouses; yet, one spouse is not bound to submit to the unreasonable demand of the other party which may be detrimental to that party's health. In ability to consummate the marriage or the wilful refusal of either party may fall within section 15(2) (a) of the Matrimonial Causes Decree 1970 as evidence of the irretrievable breakdown of the marriage. By marriage a wife consents to intercourse with her husband during coverture and she thus confers on him a privilege which she is not entitled to withdraw whenever she pleases. Therefore because of th is right a husband cannot be held guilty for raping his wife. But he may be guilty of aiding or abetting. Also he may be held guilty if the wife obtains judicial separation or where the spouses had entered into a separation agreement, at any rate if it contined a non-molestation clause."[113]

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112. Per Denning, L.J. in Dunn v. Dunn (1949), P.98 at PP. 823 and 103 respectively.

113. R.V. Miller (1954) 2 All E.R. 529; (1954) 2 Q.B. 282.

English Law like Islamic where an unreasonable insistence upon intercourse or the wilful recourse at all will entitle the party suffering as a consequence to seek separation from the other and a course of conduct of this sort which injures the Other's health will amount to cruelty."[114]

4.9.5 Mutual Protection:

The Law has given each spouse a right to use such force as is reasonably necessary to protect the other from attack or Other physical harm and may Lawfully kill an assailant if he or she believes that the act is absolutely necessary to preserve the Others life."[115]

4.10 MAINTENANCE OF A WIFE UNDER ENGLISH LAW.

Under English Law, a husband is bound to maintain his wife either during the continuance of the marriage or after the termination of the marriage. The duty of the husband to maintain his wife is said to be "an inevitable consequences of the doctrine of unity of Personality, for the wife, lacking the capacity to hold property and to contract, could neither own the bare necessities of life nor enter into a binding contract to buy them."[116]

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114 Section 15(2) (c) of the Matrimonial Causes Decree 1970.

115. Sections 59 and 60 of the Penal Code Law, and Criminal Code Act Sections 286 and 287.

Maintenance in this context include not only necessary goods such as food and clothing but also necessary services such as lodging, madical care and education.

The fact of marriage, therefore, raises a presumption that the husband is bound in the absence of any express or implied arrangement to the countrary to provide his wife with (i) the necessities of life, such as food and clothing and (ii) a home. Normally, of course, the spouses will cohabit at that home, so that a wife can only look to her husband to provide separate maintenance for her in a separate establishment if she has good reason for not cohabitting with him."[117]

4.10.1 LOSS OF RIGHT OF MAINTENANCE.

Under Common Law if a wife commits adultry and the husband has meither connived at it nor condon it, the Law says that she loses her right to maintenance for good. This is so whether or not the husband knows of the adultry. Indeed, a reasonable but mistaken belief so long as it is induced in the husban by his wifes conduct that she has committed adultry will entitled him to refuse to cohabit with her and to maintain her until, of course, he ceased to have reasonable grounds for continuing to entertain that belief. Also the wife's right to maintenance cases if

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117. See McGowan v. McGowan (1948) ALL E.R. 1032.

she deserts her husband but not necessarily for all times as is the case when she commits adultry. The deserting wife's right to maintenance is only suspended during the continuance of the desertion: thus, if the desertion comes to an end, the right revives. Indeed it is always possible for a wife to take the remedy into her own hands by taking steps to became recounciled, for, even if her husband does not accept her offer, her right to maintenance will be thereby revived. Conversely, of course, it follows that if the husband is in desertion or constructive desertion, the wife's right to maintenance reains unimpaired.

4.10.2 THE WIFE'S DUTY TO MAINTAIN HER HUSBAND.

The English Common Law considered husband and wife as one and regarded married women as incapable of holding property and of contracting. Furthermore it held that one spouse could not see the Other and therefore she could not be made liable to maintain her husband during or after marriage. But in these days of socalled equality between the sexes certain statutory provisions have now been made giving the husband the right of maintenance during or after the marriage.

4.10.3 ENFORCEMENT OF THE WIFE'S RIGHT TO MAINTENANCE.

We have just seen that the Common Law disallowed wives from giving th eir husbands. One of the consequences of this disability was that the wife whose husband has negelected to maintain her could not directly

enforce her right to be maintained by bringing an action against her husband in respect of his failure. However, the Law accorded her authority to pledge his credit for necessaries as his agent, and the husband shall be responsible for the payment of the same, What are necessaries is a question that has to be decided with regard to the living standard of the husband. The power to pledge the husband's credit was termed the wifes agency of necessity. The agency of necessity is obviously of great importance so long as the wife is generally incompetent to contract and own property under common Law.

The Law Stated shortly, is that a wife whilst living with her husband in a domestic establishment of their own and having the management of the household, is presumed to have his authority to pledge his credit for necessaries which: (i) suitable to his status in life or the status in which he permits her to live and (ii) fall within the domestic department usually confided to her management. This presumption may be rebutted by proving any of the following: (a) that the husband has forbidden the wife to pledge his credit; (b) that the wife has been given a proper allowance for household expenses on the footing that she is not to pledge his credits; (c) that the wife is already adequately supplied with the necessaries in question; (d) that the order for necessaries was an excessive one; (e) that the husband had expressly forbidden the tradesman to give credit, and (f) that the tradesman gave credit exclusively to the wife.

If a wife cannot pledge the husband's credit after the marriage has been terminated by death, divorce or a nullity decree. The wife will still be able to pledge the husband's credit even after a decree of judicial separation. However, Section 20(4) (b) of Matrimonial causes Act 1965 provides that if the payment of alimony has been ordered and it has been duly paid, the husband will not held liable for necessaries supplied for the use of the wife."[118] Under Section 22 of the Matrimonial Causes Act, the High Court may order the husband to make periodic payments to the wife. The amount payable may be secured, but the husband responsibility is only during the joint lifes of the spouses. Though this Act of 1965 cannot apply in Nigeria, but Nigerian Courts have always assured that the section applied TAYLOR, C.J. in Ifeagwu v. Ifeagwu. **(unreported) Nigerian Times** February 1966, awarded the wife ₦100 a month as maintenance in an action brought under Section 23 of the Act."[119]

4.10.4 POINTS OF DIFEERENCE BETWEEN ISLAMIC AND ENGLISH LAWS.

Th Islamic Law differs from the English Law in several aspects. Under Islamic Law, th e husbands responsibility to maintain his wife terminates, in the absence of contract to the contrary when the wife's idda(waliting period) expires. Under English Law however, a Court may

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118. A wife's right under common law remdey (pledging credit) for enforcing a maintenance right applies in Nigeria.

119. See Section 73(1) (a) of the Martrimonial Cause Decree 1970.

order the husband on the dissolution of marriage to make a lump sum or a weekly, monthly, yearly or Other periodic sum to be paid to the wife for her life."[120] Islamic Law in several Other aspects. Under English Law, the wife's financial position is also taken into consideration when fixing maintenance whereas Islamic Law as pointed before, does not take into account the wife's personal wealth when fixing the requisite amount of maintenance and the fact that the wife is wealthy does not in any way affect her right of maintenance under Islamic Law. Under English Law a wife who wants a separation from her husband on the ground of his insanity may be ordered by the Court to make provision for the maintenance of her husban."[121] Under Islamic Law, a wife is never responsible for the husbans maintenance in any way.

Another point of difference between English and Islamic Law is that an English wife was not considered entitled to save anything out of the maintenance paid to her by her husband. If she saved any amount and purchase anything with it, it was held to belong to the husband."[122] This involved hardship to the wife and to save her from it Section 1 of the Married Women's Property Act provided that the savings shall belong to both the husband and wife in equal shares. Islamic Law considers

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120. Ibid.

121. Section 20(1) Matrimonial Causes Act 1965; Section 25 of the Matrimonial Causes Decree 1970.

122. Blackwell v. Blackwell, (1943) 2 ALL E.R. 597.

that the maintenance paid to the wife becomes her absolute property and she can do whatever she may like with it."[123] Hence the savings out of her maintenance shall belong to her. The only restriction on her right to save anything out of the maintenance paid to her is that she cannot resort to such saving at the cost of her health or decency.

4.11 MAINTENANCE UNDER CUSTOMARY LAW.

Under Customary Law, a husband is responsible to maintain his wife during the subsistance of the marriage. The right of maintenance terminates by the termination of the marriage. Also, unlike English Law, Customary Law does not impose any responsibility on the wife to maintain her husband. But, there is, one thing common among the customary laws of Nigeria that, both husband and wife have specific duties to perform. It is the responsibility of the husband to maintain his wife. The duty is usually to provide clothing, feeding, housing and medical attention. The wife on the Other hand is responsible for the preparation of food, weeding her husbands farms plots and to perform other domestic services. In some areas, the duty of the husband to maintain the wife has received statutory recognition. Fro example, under The Native Authority (Declaration of Biu Native Marriage Law and Custom) order 1964,"[124] The Native Authority (Declaration of Borgu Native Marriage

123. Ibn Abidin, Op. Cit, Vol.II, P. 905.
124. Section 7(2) (c).

and Custom) order 1961,"[125] and The Native Authority (Declaration of Idoma Native Marriage Law and Custom) order 1959,"[126] a wife is entitled to "maintenance of her self and her childre, including food, clothing and housing at a standard commensurate with his means.

In each and every tribe in Nigeria one would find the Law and Custom of that area is domanding that the husband to maintain his wife, but the actual fact is Otherwise. To the writer, it is better to put it that, under Customary Law Marriages, it is the wife who is maintaining herself. The reason is that in most of Nigerian tribes, you will find that it is one of the wife's duty to weed her husband's farm. And in some areas, it has even received statutory recognition. For example under the Native Authority (Declaration of Idoma Native Law and Custom) order, 1959"[127] and the Native Authority (Declaration of Borgu Native Marriage Law and Custom) order, 1961"[128]. This is the main reason that under those customary laws there is no limit to the number of wives a person can marry, because every woman is contributing to her maintenance either by farming her own farm plot or by helping her husband on his farm plot. Apart from placing him in higher social status, the greater the number of wives the greater his economic potential, especially in terms of labour. Dure to this

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125. Section 8(2) (c).
126. Section 8(2) (c).
127. Section 8(1) (e).
128. Section 8(1) (e).

fact, I prefer to say that a husband under Customary Law, is only providing to his wife a shelter. Because the reasearch revealed that in a polygamous family each wife has a hut of her own. Therefore, this is the only thing the husband provides to his wife. Even this, in some communities, it is either the duty of the wife to build her hut or to help him in building the hut.

The husband is liable to maintain the wife only during the subsistence of the marriage. If the marriage has been terminated by a divorce, the duty to maintain comes to an end. Failure on the side of either of the parties to a Customary marriage to perform his or her duties, if clearly established, could lead to divorce when attempt at reconciliation fails. Like under Islamic Law, a wife under Customary Law whose husband either fails or refused to maintain her would bring an action for the dissolution of the marriage on the ground of lack of maintenance, or the Court to force the husband to give her the maintenance.

CHAPTER FIVE

A COMPARATIVE EVALUATION OF THE NATURE AND PHILOSOPHY OF THE INSTITUTION OF POLYGAMY

5.1 HISTORICAL BACKGROUND:

Polygamy means the plurality of mates. More specifically, if a man has more than one wife at the same time, he is said to be polygamous. On the other hand, if a woman has more than one husband, it is called polyandary. Although Social Scientists apply the term "Polygamy" both to the practice in which a woman is married to more than one husband precisely called "polygamy" and to the more frequent practice in which a man is married to more than one wife, which they also referred to as "polygamy". The latter view of what constitutes polygamy is essentially subscribed for.

Early human societies realized the danger inhrerent in the practice of polyandary, and it was therefore rarely applied. The danger lay not only in the severe competition that would arise between jealous husbands but mainly in the confusion over determining the paternity of the children. That confusion does not arise in the practice of polygamy It also seems that the interruption of the female sexual capacity, the monthly and postnatal menstrual periods and the lack of such interruption in males had something to do with the greater frequency of polygamy.

The institution of polygamy has existed among the various nations ever since the earliest days both in the polygamous and polyandrous forms.

So far/polygamy is concerned, it was a recognised practice ever since society adopted the patriarchal pattern as is still to be found among numerous civilised nations. As with Polygamy, so also with polyandary, the institution seems to have a definite position in the development of the history of human marriage. It appears that at one stage or the other polyandary in some form has existed among almost all the ancient nations of the world. In India itself fraternal polyandary is not only existing but is recognised as a normal State of Society among some of the tribes in the Himalayan hills. Among them the Common wife of all the brothers is still considered to be the cornerstone of the joint family.

Partial and jealous writers in the West have, generally, misrepresented Islam. Particular care was taken by the Christian priests to keep the real Islam out of the reach of their folk and to present such caricatures of Islam that would be repulsive even to look at. The West, accordingly, levelled charge of originating and advocating polygamy against Islam and its Prophet as a European female Muslim convert (who is married polygamously) has put it, the Westerners view the Muslim woman as "...existing in a world of shadows, oppressed and suppressed .....Side by side with this image... is another on prejected by the entertainment media, that of a Muslim woman as a member of a harem in the Hollywood versions of the Arabian Nights. Here she forms a unit in a flock of scantily-clad and bird-witted yound ladies who lie around in places awaiting the opportunity to be noticed by their Lord and master, the Sultan. These images are of course very appealing to the Western imagination-

in fear of her jealous and brutal husband; She is the traditional maiden in distress, waiting for St. George to slay the dragon and rescue her; Secondly of the Slave-girl, dazzling in silks and jewels, awaiting her masters pleasures. Which Western man or woman has not at one time or another indulged in a fantasy in which he or she plays one of these roles.[1] To know the truth behind this allegation it is necessary to make a brief survey of the world history relating to polygamy.

In our contemporary times, opinions regarding the role of the Church, society and the state in regulating issues concerning the formation, dissolution and the conduct of spouses in a married life are rapidly and radically changing in most Western countries. Individuals have experimented with different senual vicus such as group marriages, swinging couples, common Law marriages, serial-polygamy etc; Parties to these varieties of unions - including marriage proper - have assumed greater roles indetermining the terms of the union rights and obligations, financial packages, dissolution etc; and the state and society have assumed less of a paternalistic role in regulating these and other matrimonial issues.[(2)] These changes in attitude also affected the legal consequences of polygamous unions, and the accompanying social stigma.

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1. A.B. Lemu, Woman in Islam. pp. 13-14.
2. M.A. Glendon, State, Law and family, 1977, P.1, See also N. Stinnet and C.W. Birdsong, The family and Alternative lifestyles, Chicago, 1978, and A. Allott, The limits of Law. 1980, pp. 259-86.

History shows that in all periods of human civilization polygamy has remained, and even today is, an important social institution. M. Letournean in his renowned work Evolution of Marriages says: "The most civilized nations must have begun with polygamy. It is a Law which has few exceptions." It was also practiced in Biblical and Talmudic times. The Mosaic Law encouraged it and most of their famous Prophets had more than one wife. Issac Taylor writes that polygamy is a most difficult question. Moses did not prohibit it. It was practiced by David, (Daud), Solomon (Sulaiman), Abraham (Ibrahim) and other reformers and Prophets in different stages of history.

Like judaism and Christianity, Islam does not provide an explicit prohibition of polygamy, but unlike judaism, Christianity and perhaps other religions as well, Islam deals with the issue more clearly and certain legal requirements and restraints that amount to the discouragement of such a practice. The reason for not prohibiting polygamy categorically is perhaps due to the fact that there are certain conditions which face individuals and societies in different places and at different times, which make the limited practice of polygamy a better solution than either divorce or the hypocritical pretence of morality. Our present day feelings about what is "tasteful" or "distasteful" are something we cannot force on all people everywhere at all times and under all conditions, unless it is a question of a Law coming from Almighty Allah. This will load us to the following question.

5.1.1 Is Polygamy immoral Per Se?

In an attempt to answer this question, reference has to be made to the following universally recognised religions: Judaism, Christianity and Islam. This is to enable us understand the position of / the institution of polygamy in the respective religions.

(1) Judaism

It is notable that most of the old Testament Prophets were polygamous. According to the/Old Testement, Prophets Abraham had two wives, Yaqub had four wives, Moses four Wives, David had nine Wives and, according to other sources(3) he had one hundred wives and the name of those wives are mentioned in the Bible.(4) Prophet Sulaiman (Solomon) had seven hundred wives and three hundred concubines.(5) His Son had eighteen wives and sixty Concubines.(6) All the judges must have had several wives each.(7) and each of Rehoboam's twenty eight sons had many wives,(8) and the Dictionary of the Bible States:

> "Polygamy meets us as a fact: e.g. Abraham, Jacob, the judges, David, Solomon.... In Deutronomy 17:17; the King is warned not to multiply wives; Later regulations fixed the number at eighteen for a king and four for an ordinary man".(9)

The philosophy behined the legalization of polygamy is explained in the Encyclopedia Biblica:

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3. Badaw A.G. Polygamy in Islamic Law 1972 publised by the The Muslim Students Ass. of the U.S. and Canada.
4. Sulaiman M. Rahmatan-lil-Alamin, Vol. 1, P.2
5. I Kings 9:16; 11:3 of., S. of Sol. 6:8.
6. 2 Chron. 11:21.
7. Judg.8:30; 10:45; 12;14.
8. 2 Chron. 11:23.
9. Dictionary of the Bible (James Hasting, Editor), Revised Edition.

"The man who owns his wife as a chattel can on the same principle own as many as he pleases; that is to say as many as he can afford to buy and keep... ... The Talmudists formulate the rule that no Jew may have more than four wives, Kings may have at most eighteen"(10)

It was only at the beginning of the 11th Century (about four Centuries after the advent of Islam) that polygamy was expressly prohibited in judaism.

Westermark remarked,

"Among European Jews polygamy was still practiced during the middle ages, and among Jews living in Muhammadan countries it occurs even today. An express prohibition of it was not pronounced until the convening of the Rabbical synod at worms, in the beginning of the 11th century. This prohibition was originally made for the Jews living in Germany and Northern France, but it was successively adopted in all European countries. Never the less, the Jewish marriage Code retained many provisions which originated at a time when polygamy was still legally in existence"(11)

(ii) Christianity

As the Old Testament is a vital part of the Christian doctrine, it cannot be disregarded in this discussion. It was concerning the Old Testament Law and the Old Testament Prophets that Prophet Jesus (Isa) Said plainly that he came not to destroy the law of other Prophets but rather to fulfill them. In addition, there is no passage in the New Testament that clearly Prohibits polygamy. This was the understanding of the early Church fathers and for several centuries in the Christian era. Jesus had mentioned his coming in these words:

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10. Encyclopedia Biblica (Rev. T.K. Cheyene, and J.S. Black, Editors). The Macmillan Co., London, 1902 Vol, 3, P. 2946

11. Westermark, E.A., The History of Human Marriage, (5th Edition Rewritten). Macmillan Co., London, 1925.Vol.3

> "At that time, the kingdom of Heaven will be like this, once there were ten girls who took their oil lamps and went out to meet the bridegroom. Five of them were foolish, and the other five were wise. The foolish ones took their lamps but did not take any extra oil with them, while the wise ones took containers full of oil for their lamps. The bridegroom was late in coming. The five girls who were ready went in with him to the wedding feast, and the door was closed. The other girls arrived late and were not admitted."(12)

Even if it may be termed a metaphor, still if this act was unlawful or not commendable in the sight of Jesus he would not have given such an example.

There are many examples of Christian Kings marrying more than one woman. Fredrick - Wilhem II and Philip married more than one wife with the approval of the Church and St. Luther also married more than one wife. Westermarck, the noted authority on the history of human marriage states:

> "Considering that monogamy prevailed as the only legitimate form of marriage in Greece and Rome, it cannot be said that Christianity introduced obligatory monogamy in the Western world. Indeed, although the New - Testment assumes monogamy as the normal or ideal form of marriage, it does not expressly prohibit polygamy, except in the case

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12. Matta 25; 1 - 11.

> of a Bishop and a deacon. It has been argued that it was not necessary for the first Christian teachers to condemn polygyny because monogamy was the universal rule among people in whose midst it was preached; but this is certainly not true of the Jews, who still both permitted and practiced polygyny at the beginning of the Christian era"(13)

Furthermore it can not be said that Christianity introduced monogamy to the Western World, or reinforced it out of respect for women or for Social Reform.

In fact, the reality is that many of their scholars and reformers not only favoured marriage but also advocate polygamy in certain cases with great enthusiasm. In 1531, apart from such isolated phenomena as the recent Church of Latter Day Saints (Mormons) and the heretical sect of Anabaptists openly preached at Munster that he who wants to be a true Christian must have several wives. Also in 1650, so on after the peace of Westphalia, when the population had been greatly reduced by the 30 years war, the Frankish Kreistag at Nuremberg passed the resolution that henceforth every man should be allowed to marry two women.[14]

Undoubtedly, polygamy was socially and legally practiced and accepted everywhere in the West and the East only a couple of centuries ago.

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14. Encyclopsedia Britannica, London (1900), Vol.xiii, Article, Marriage P. 950.

Even in England, it was proposed to legalise the institution of polygamy in the 17th and 18th centuries in order to check infanticide, adultery, prostitution and the evil of sexual relations outside[15]. It should not be inferred from the above discussion that recognition and practice of polygamy in judaism and Christianity is the reason for permitting it in Islam. The qualified permission to practice polygamy in Islam, is based upon God's revelation (the Qur'an).

5.2 THE ROLE OF ISLAM IN POLYGAMY

This Sketchy review of polygamy in the broad religious and historical content has been intended to serve not merely as an introductory background, but also, and more importantly, as a general interpretation of the position of Islam. Before the advent of Islam, there was no regard for justice in any respect. Polygamy was practiced without any regard neither to the wives themselves nor to their children. Will Durant writes, concerning the discussion of polygamy before Islam:

> "As the wealth of someone gradually reaches sizeable proportion, and becomes anxious that, since his wealth will be divided into many parts(16). The capital of each of his children will be small, this person begins to think that he should distinguish between his original and favourite wife and his concubines, so that his legacy may become the exclusive lot of the children of his original wife."(16).

15. M. Mazheruddin Siddiqi, Women in Islam, 1978, pp.165/66.
16. The Story of Civilization Vol. 1, P. 330.

The result of all this is that discrimination between wives and their children was a common thing in Pre-Islamic world. Islam, therefore neither devised the system of polygamy, because this existed centuries before it, nor did it abolished it for, in the view of Islam, difficulties would arise for the society, the solution of which depends exclusively upon polygamy. Nevertheless, Islam brought some reforms in these customs.

Although Islam Permits Polygamy, it has imposed restriction upon the number of wives one can marry at a time. Before the advent of Islam there was no limit to the number of wives one can take. However Islam put a maximum limit on their number and laid down that a maximum of up to four wives may be taken by a man at one time, if he is possessed of the strength of character to deal justly with them. The verse of the Holy Qur'an which allows polygamy was revealed after the battle of Uhud[18] in which - many Muslims were killed, leaving widows and orphans for whom due care was incumbent upon the Muslim survivors.

The verse reads:

> "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if you fear that you shall not be able to deal justly (with then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice."(19)

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18. Abd-Al-Atti, Hammuda, Islam in Focus, The Canadial Islamic Center, Edmonton, Alberta, Canada, 1963, P. 103.
19. Qur'an 4:3.

This is the only verse of the Holy Quran from which the permission to marry more than one woman is derived. The important point to be noted here is that, the verse does not enjoin polygamy, it only permits it and that permission, too, is given on a very strict conditions as follows:

(1) That polygamy is neither mandatory, nor encouraged, but merely permitted.

(2) That the permission to practice polygamy is not associated with mere satisfaction of passion. It is rather associated with compassion toward widows and orphans, a matter that is confirmed by the atmosphere in which the verse was revealed.

(3) That even in such a situation, the permission is far more restricted than the normal practice which existed among the Arabs and other peoples at that time when many married as many as ten or more wives.

(4) That dealing justly with one's wives is an obligation. This, according to some understandings applies to housing, food, clothing, kind treatment etc. And according to some it applies to the division of the husbands time among the co-wives, which ever understanding one has taken, is fully, the husband's responsibility. If one is not sure of being able to deal justly with them, the Qur'an Says: "Then (marry) only one"21. This is the other reform introduced by Islam concerning polygamy. It has been made a condition that there must never be, for any reason, discrimination between the wives or their children.

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21. Qur'an [illegible].

This verse, when read together with another verse in the same chapter, will clearly show the discouragement of such plural marriages. The verse reads:

> "You are never able to be fair and just as between women, even if it is you ardent desire: But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air)... "(21).

The requirement of justice rules-out the fantasy that man can "own as many as he pleases."[22] It also rules out the concept of "discrimination" for all wives have exactly the same status and are entitled to identical rights and claims over their husband. It also implies, according to the Islamic Law that should the husband fail to provide enough support for any of his wives, she can go to court either to ask the court to compel the husband to comply or alternatively to ask for divorce.[23]

(5) The verse says: "Marry", not kidnap, buy, or Seduce. What is "marriage" as understood in Islam? Marriage in Islam is a civil contract which is not valid unless both contracting parties consent to it. Thus no wife can be forced or given to a husband who is already married. It is thus a free choice of both parties, as to the first wife. (a) She may be barren or ill and to be in polygamy is a better solutation than divorce.

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21. Qur'an 4:3
22. Qur'an 4:129.
23. See the topic on maintenance under Islamic Law.

(b) She may divorce him (unilaterally) if he is married to a second wife provided that the nuptial contract gives her the right of unilateral divorce.[25]

(c) She can go to court and ask for a divorce if there is evidence of maltreatment or injustice inflicted upon her.

Seeing these two Qur'anic verses, let us now consider the traditions of the Prophet (S.A.W.) on the subject. Ibn Umar reports a tradition which is mentioned in Musnad Ahmad, Tirmidhi and Ibn Majah:

> "Gailan bin Salmah Al-Saqafi accepted Islam, while he had ten wives of the days of jahiliyya. They also embraced Islam with him. The Holy Prophet (S.A.W.) Said to him "keep four and separate from the four."

If a man has got several wives at a time, there must be strict impartiality. Justice or (Adl) which the Qur'an makes reference to in (4:129) is the absolute equity, which demands the husband to have the same indiscriminating feelings towards his co-wives and to control fully his emotional inclinations so that his sentimental sympathy will not be greater for one wife than for another. It is this kind of absolute equity which is impossible to achieve. Yet this does not condone discrimination.

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25. The Hanbali School of Law regards stipulation against a second marriage binding on the husband and enforceable, while the Maliki School takes the concept of "prejudice" (darar or harm) in a broad enough sense allow a wronged wife a judicial divorce.

What the Holy Qur'an requires is what is humanly possible, that is, justice to wives in terms of companionship, provisions, considerateness and such controllable aspects of the family life. Feeling and emotions may sometimes defy control, and it may be in vain to decree that an individual develop or maintain the same intensity or extensity of feelings for a number of persons, even 'Adl' also signifies equality in love and affection, but it is quite natural that a man may incline to a particular wife. Control of mind is in the hand of God and so a man is not guilty if his mind naturally turns to one wife; but he can treat all his wives equally regarding residence and Company. Aisha, the wife of the Holy Prophet (S.A.W.) reports a tradition which is narrated by Tirmidhi, Abu Daud and Ibn Majah:

> "The Messenger of Allah use to have terms among his wives and do justice towards all of them. He used to say, 'O Allah this is my division in what I can contral. So do not blame me in what Thou dost contrel in what I do not contral."

It is enjoined that he who avails himself of the permission must treat his co-wives impartially. The saying of the Holy Prophet (S.A.W.) on this, is well-known; He is reported to have said:

This tradition is reported by Abu-Huraira and is cited in Abu Daud, Nasa'i and Ibn Majah.

From the above exposition the conclusion is inevitable that both the Holy Qur'an and the Traditions of the Holy Prophet (S.A.W.) restricted polygamy to maximum of four wives concurrently, and subject to equal treatment and absolute justice towards them. In this case preservation of the higher values and promotion of righteousness must be the constant objectives. Permission to marry more then one wife at a time is necessary as an emergency for the preservation of high social values and for safeguarding Society against promiscuity.

If they be his children, wives, or close friends. It might be added, parenthetically, that no party, even in a monogamous diad, can be said to have the same invariable feeling for the other party.[26]

5.3 Justification for Polygamy.

A question may arise, "Why did Islam even permit polygamy under any conditions?" In answer to the question, several factors may be suggested as reasons. Among the usual reasons are that, Islam permitted restricted polygamy with a view to meet social, moral, economic and natural eventualities. The verse as we have seen earlier which conditionally permitted polygamy was revealed after the battle of "Uhud" where several male muslims were killed. Many young girls who had became orphans and the widows of th "Shahidun" required support, shelter and protection.

26. See for example al-Shafi, Al-Umm, ed., al-Naggar M.Z. Cairo vol.5 pp.190-3; Shaltut al-Islam, Cairo al-Azhar press, 1959, pp. 172-7, al-Zamakhshari, vol.1, pp.572-3; Ibn Qayyim, Zadal Ma'ad ed., al-Fiqh M.H. Cairo, vol.4, p. 36.

To provide protection to these needy ones, Islam allowed polygamy. Similar situation had happen in Europe after the 1st and 2nd world wars, vietnam Middle East and many other places. Where many women and war babies looked for similar support, but simply because the Western societies do not recognise polygamy, those unfortunate victims were left uncared for.

On Socio-economic grounds a second marriage becomes inevitable under certain special circumstance e.g. wife's barrenness, perpetual illness, unsuitability for cohabitation etc. The Second marriage is possible either in addition to or in place of the first one. Islam opted for the former, because the latter pre-supposes a dissolution of the first marriage, which is bound to be a curse rather than a blessing to the divorced wife in the above circumstances. You can realise what will be the fate of the unfortunate woman divorced under such circumstances. History provides glaring examples of such miserable situation. Social and moral reasons in support of polygamy may be understood and appreciated more clearly if we look into the Social and moral life in the so-called civilized countries where monogamy is the only form of marriage recognised by law. M. Gustave Le Bond says "That the so-called monogamy in most of the European countries is a sort of compromise between celibacy and polygamy. He further remarks that monogamy exists in modern Christian lands in books only. It is not practiced, and so although there is no legal

validity for polygamy the condition of society is worse than it would have been under a polygamous system."[27] According to him, the statistics show that in France adultery increased with about 50 times after 1826, the year in which polygamy was legally prohibited.

With regard to the actual, specific circumstances of Islam, Scholars of various persuasions have observed the following:

1. The Muslims had a great need for progeny to build up and reinforce the nascent community.
2. There was 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 dependents was obvious.
4. The marriage bonds were generally lax at the time and in need of reform. Polygamy was a measure of regularization and stability[28].

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27. Quated in Muslim Personal Law, Papers and Proceedings of a Siminar, Ed. F.R. Faridi and M.N. Siddiqi, Islamic Research Circle Algarh P. 50.
28. Stern, G.H. Marriage in Early Islam. London: The Royal Asiatic Society, 1939., pp. 78-9 Roberts, R. The Social of the Qur'an London: Williams and Norgate Ltd. 1925, PP.8.9

Commenting on these reasons stern has suggested that "Muhammad by his sanction of polygamy was introducing a regularized type of polygamous marriage to meet the emergency of the situation ..."[29]

A French Scholar, Dr. Le Bond says "A return to polygamy, the natural relation between the sexes, would remedy many evils: Prostitution, veneral diseases, abortion, the misery of illegitimate children, the misfortune of Millions of unmarried women resulting from the disproportion between the serves, adultery and even jealousy, since the disregarded wife would find consolation in her cognizance of not being secretly deceived by her husband[30]. And Dr. Westermark gives another reason in support of polygamy. He mention sexual abstinence during pregnancy. There are many women who feel less or no desire for sexual relationships during periods of pregnancy and give preference to total abstinence. Some experts even regard sexual intercourse during periods of pregnancy as very injurious to the health of woman as well as of her unborn baby. According to him "Another ground for polygamy is the strong and innate polygammous instinct of men as compared to women, who are generally monogamous by nature. The man's test, for variety in sex experience is more intense than the woman's and this has led to the often repeated statement that he is instinctively polygamous." [31]

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29. Stern Supra, P. 79
30. Encyclopaedia of Seerah vol.ii, Ed., Afzalur Rahman, The Muslim Schools Trust, London 1982.
31. Westermark E.A. The History of Human Marriage, N.4: The Allerton Book Co., 5th ed. Vol.ii, 1922, P. 42.

Dr. Annie Besant, an eminent woman scholar writes in support of polygamy in the following words: "There is pretended monogamy in the west, but there is realy polygamy without responsibility; the "mistress" is cut off when the man is weary of her and sinks gradually to be the "woman of the street" for the first lover has no responsibility for her future and she is a hundred times worse off than the sheltered wife and mother in the polygamous home. When we see thousand of miserable women who crowed the streets of Western towns during the night, we must surely feel that it does not lie in Western months to reproach Islam for its polygamy. It is better and more respectable for a woman to live in Islamic polygamy united to one man only, with the legitimate child in her arms surrounded with respect, than to be reduced cast out on the streets perhaps with illegitimate child outside the pale of law unsheltered and uncared for, to become a victim of any passer by night after night, rendered incapable of motherhood, despised by all."[32]

The religion of Islam has given a woman her full human rights, and raised to the position of honour and respect in society, and her male counter part (her husband) must recognise this in his dealings with his wives. Annie Besant in one of her lectures in London says:

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32. See Khurshid Ahmad, The Position of Woman in Islam; published by Anis Ahmad, Karachi, 1969, pp. 28-29.

"You can find others stating that the religion of Islam is evil, because it sanctions polygamy. But you do hear as a rule the criticism which I spoke out one day in a London shall where I knew that the audience was entirely uninstructed (about Islam), I pointed out to them that monogamy with a blended mass of prostitution was a hypocrisy and more degrading than a limited poly-gamy. Naturally a statement like that give offence, but it has to be made, because it must be remembered that the law of Islam in relation to women was until lately, when parts of it have been initiated in England, the most just law, as far as women are concerned, to be found in the world. Dealing with property, dealing with rights of succession and so on, dealing with cases of divorce, it was far beyond the law of the West, in the respect that was paid to the rights of women. Those things are forgotten while people are hypnotised by the words monogamy and polygamy and do not look at what lies behind it in the West - the frightful degradation of women who are thrown into the streets when their first protection, weary of them, no longer given them any assistance,"[33]

Another famous Christian Evangelist, Dr. Billy Graham, had this to say on polygamy and Islam:

"Christianity cannot compromise on the question of polygamy. If present-day Christianity cannot do so, it is to its own detriment. Islam has permitted polygamy as a solution to social ills and has allowed a certain degree of latitude to human nature but only within the strictly defind Framework of the Law. Christian countries make a great show of monogamy, but actually they practice polygamy.

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33. Besant, Annie, The Life and Teachings of Muhammad, Madras, 1932, PP. 25-27.

No one is unaware of the part mistresses play in Western society. In this respect Islam is a fundamentally honest religions, and permits a Muslim to marry a second wife if he must be strictly forbidden all clandestine amatory associations in order to safeguard the moral polity of the Community."[34]

Polygamy is allowed in Islam because all sexual relations outside of marriage are absolutely prohibited. There is no double-standard recognized by the Shari'ah, as the drastic punishment for the adulterer and the adultress are identical.[35] Therefore a insists on relationship with another woman, he must marry her, undertake her full support and full parental responsibility in respect of the children of all his wives. As a matter of fact, man is polygamous by Nature, therefore the only two alternatives to the limited polygamy permitted in Islam are divorcing the first wife and throwing her and her children unprotected and unprovided for out of the home, or carrying on a secret, illicit affairs with another woman behind the wife's back deserting and neglecting her. Of course, no woman wants her husband to take a permanent rival to herself to share his bed, but the alternatives of divorce, of illicit set in this world always destined to remain imperfect, are far worse evils.

Ahmad Galwash has quoted the case of Napoleon Bonaparte who had to divorce his well-beloved wife Josephine.

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34. Khursid Ahmad: Op Cit pp. 29 - 30.
35. Qur'an 24:2 reads "The woman and the man guilty of adultry or fornication, flog each of them with a hundred stripes:- "Prophetic Traditions provides for storning to death for the case of adultry (married people).

This was the warmest attachment between them, but Napoleon could not have issue from her, and the country therefore insisted upon her divorce. The account of her divorce as related by historians is extremely pathetic. Though Josephine had been divorced, but their love for each other under went no change.[36] If polygamy had been allowed, Napoleon and his widow would not have found themselves in this miserable situation This is one of the rare occassions where Islam have sanctioned polygamy. If polygamy is not permitted, the result will be sexual anarchy and moral deterioration. As we have seen the Western world is detoriorating morally. Both men and women being human beings,unless their instinctive needs are legitimately satisfied, the temptation is great for corruption and immorality.

But apart from the moral question these women are also exploited. In the West, they are used as tools for men's pleasures, yet have no guarantees, no right or secuity, financial or emotional. Should they become pregnant, it is their burden alone. But even if such women are ready to pay the price for this personally, society also suffers seriously from such situations. The increasing number of illegitimate children born today under conditions such as these provide a potential base for tomorrow's maladjusted and even criminals. Furthermore it is inhuman and humiliating for those children to grow up without knowing who their fathers were and without enjoying a clean and normal family life.

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36. Galwash, Ahmad, The Religion of Islam, Vol.1. (Undated), P.44.

Islam which abhors immorality, hypocritical pretence of morality, and against divorce unless no better solution is available, provides for a better alternative which is consistent with human nature and by permitting polygamy with the preservation of pure and legitimate sex relationships. In a situation like this, it is doubtful that any solution would be better than polygamy, which is, after all, an optional solution.

5.4 FACTUAL EVIDENCE WHY ISLAM PERMITS POLYGAMY

With this back ground it is apparent that Islam did not provide or invent polygamy, and that by introducing the said conditions it does not encourage it as a rule either. It did not abolish it because if it were abolished, that would have been in theory only, and people would have continued the practice as is observed today among other people whose laws and social standards do not approve polygamy. Islam, came to be enforced, to be considered a mere theory. It is realistic and its outlook on life is most practisable. And that is why it permits conditional and restricted polygamy; because had it been in the best interest of humanity as a whole to do without this institution, Allah would have certainly ordered its termination.

The question of war is not peculiar to one country. It is a question which affects the whole of humanity for all ages to come. War must always be a source of decrease in the number of males, bringing about a corresponding increase in the number of females, and a solution will have to be sought by all well-wishers of humanity for the problem

of the excess of women over men. In Europe, the first and second world wars created a similar situation. Similar situation arose in the Biafran war in Nigeria and similar situation was created in Vietnam and the situation is now going on in Iran-Iraq, Lebanon, Afgainstan, Sudan and many host of Countries in the world. Monogamy is undoubtedly a right rule of life under normal conditions, but when abnor conditions are brought about by the excess of females over males, monogamy fails, and it is only through a limited polygamy that this difficulty can be solved.

In addition to the above reasons, there are a variety of other reasons according to many Muslim Scholars for which Islam permits polygamy. Some of these reasons are very clear and taking into consideration many of them affect human beings, they are real and can be seen everyday and every where. Let us examine some of these reasons.

1. In some Societies women outnumber men; This is especially true of industrial and commercial regions, and also of countries that get involved in wars. .Now if the Muslim society is in this category, and if Islam were to forBid polygamy and restrict legal marriage to one wife only, what would the unmarried ones do? Where and how would they find the naturaly desirable companionship? Where and how would they find sympathy, understanding, support and protection? The implications of the problem are not simply physical; they are also moral, sentimental, social, emotional and natural.

2. No one can pretend that all married men are happy, successful and satisfied with their marriages. Whether it is his own fault or his wife's, the unhappy husband will look for some other kind of companionship and consolation from some body else. This is made easy for him when women outnumber men. If he cannot get it through honest channels, he will get it by other means with the result of immoral and indecent way which may involve illegitimacy, abortion and other endless trouble. The solution which Islam offers in this respect is a permission to the unhappy and dissatisfied husband to marry a second wife and live with her openly in a responsible way with equal fulfillment of all obligations to the first wife and the second. Similarly it helps unmarried women to satisfy their needs, realize their expectations and fulfill their legitimate aspiration and natural desires.

3. In some instances of marriage the wife may not be capable of having any children for some reason or the other. To have a family life in the full sense of the word and contribute to the preservation of the human race, the presence of children is fundamental. Besides, it is one of the major purpose of marriage, and man desires by nature to have children to preserve his name and strengh then the family bonds.

4. There are cases and times where the wife is incapable of fulfilling her marital obligations. She may fail to be as pleasant a companion as she should be or even as she would like to be. She may be in a state where she cannot give the husband all the affection, satisfaction and attention he deserves and desires. All this can and does actually happen. It is not always the wife's fault; it may be nature itself. It may be along illness, or a period of confinement or some of the regular periods. Here, again, not all men can endure or exercise self-control or adopt an angelic manner of behaviour. Some men do fall into the pit of immorality, deception, hypocrisy and infidelity. Here again, Islam has allowed recourse to polygamy with the reservation and conditions mentioned above[37].

5.5 THE ABUSES OF POLYGAMY IN NIGERIA.

The existence of polygamy depends on circumstances. Certain times, and conditions of society, make its practice absolutely needful, for the preservation of women from starvation or utter destitution. There are notable contrasts between the polygamists practice of some Nigerian Muslims and the Islamic ideal outlined outlined above. These could be briefly described as follows:

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37. Abd al-Afi Islam in Focus, Supra.

1. Alot of Nigerians go into polygamy for stentation not that there is a genuine need for it.

2. Many polygamists marry a second wife for the simple purpose of frustrating the first wife. They achieve this by open display of favouritism towards the second wife. It is also the practice of many a Muslim married to more than one wife to alienate the older wife or wives and to feel inclined more to the younger bride.

3. Alot of women in a polygamous home do not understand the concept of the 'Adala' referred to in Qur'an 4:3. They take it to encompass every little detail of a marital life. They quickly start to draw conclusions out of non-issues which to them mean a sign of discrimination and hatred. This is irrespective of how se ever the husband treats them or their children. This practice bites harder and is more often noticed in a family where discrimination in terms of food, clothing or residence has to conspicuously shown between the co-wives in compliance with the Maliki School principle of marrying a SHARIFAH to live together with a non Sharifah.

4. Some husbands do get married to more wives so as to belittle the other wive for simple misbehaviours, and this sometimes extends to divorce. This practice is not within the contemplation of the Shari'ah. Polygamy should be read to mean permissiveness and postulating the principles of harmony, peace, tranquility and dynamism in a family. Whatever the situation may be, the Shari'ah does not allow a husband to leave any of his wife or wives in suspension as we have seen from the tradition reported to have said:

"Any one who has two wives and he inclines to one more than the other, he shall come with a section of his body peralysed on the way of judgement. "38.

The inclination in this tradition is defined to prohibit inclination to one of the Co-wives on principal issues within the control of the husband. This is so even if he or the wife is sick unless the sickness is so serious that he cannot be able to keep to the rule of moving to the other wife's residence.[39] The Prophet (S.A.W.), during his last days of his life while he felt very sick, he remained in the house of his wife Aisha with the permission of his other wives. Sometimes the strict rule of movement from one wife to the other may be affected in the case of newly wedded wife. In this case, the husband is allowed to spend seven nights with her consecutively if he married her a virgin. While in the case of Thayyiba (Matron) it is three days. He is required to spend these days not for the reason of honeymoon as some people think of it, but rather to find out how far the woman know her religion. If he finds her wanting, it is his main responsibility to teach her.[40]

In the case of journeying, if it is non religious, he is at liberty to choose any one of them, taking into consideration suitability and experience for the particular journey.

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38. Al-Shawkani, Naylui Awtar Vol.vi, p. 371; See also Ibn Rushd Bidayat al-Mujtahid, vol.ii. p. 42.
39. Al-Dasuqi; Hashiyat al- Dasuqi vol.ii, p.340.
40. Al-Dasuqi Supra p. 340.

But if the journey is for religious purposes like pilgrimage or jihad (holywar), then he must cast a ballot[41].

It should however be added that inspite of all the above divergencies between the ideal Islamic form of polygamy and the practice of some Nigerian Muslims, the influence of Islamic form is, in many other respects, inestimable. Its absolute restriction on the number of wives a Muslim would marry to similtaneously is very much observed.

5.6 POLYGAMY: A SOCIOLOGICAL ISSUE IN NIGERIA.

The main purpose of marriage in Nigeria is the production of children who are his glory. In the traditional African society, the number of a man's wives and children were the measure of his souccess in life, since this, is regarded as a sign of wealth and nobility. The practice of polygamy is by no means uniform in features or frequency of occurence. The institution is so complex and multi-dimensional an institution that it is difficult to explain away or justify its incidence in some cultures but not in others. The practice is attributable to a variety of reasons and factors. Social, economic, personal etc.[42] Its general features are that a man marries two or more wives. In some societies all the wives live in separate residence which are within a common compeund.

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41. Al-Dasuqi Supra p. 340.
42. See for example R. Konig, Family and Marriage as universal Institution of human society, vol.iv, int'l Encyclopaedia of Comparative Law Chap. 1, pp. 41-2; Westermark, Human Marriage, Supra,pp.52-84.

In others each of the co-wives has a separate residence of her own, whether within the same town or different towns.[43] The husband distributes his time between them according to their arrangement.

In most societies, there are clear and definite set of rules and norms that govern the relationship of the co-wives. In many African societies, though they may have common and equal rights, but the first wife who used to be regarded as the senior wife holds a position of higher social status. She has a greater say and participation in the decision-making power of the over-all head of the family except the husband. Among many societies, it is said that she helps the husband through her actrice and even in some communities in the selection of additional co-wives.[44] Anthropologists tell us that among various tribes and societies, polygamy is a social and economic necessity. In some very poor areas, the infant mortality is very high. Children on the other hand, are a source of additional labour for the earning capacity of the family. To have more children under such institutions would require the practice of polygamy. It is by this very reason Christian Missionaries in some African regions justified their permission to local people to practice polygamy without being excommunicated from the Church. One researcher has even found, through his studies that women in such societies not only accept polygamy,

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43. For Example, the Custom in Sudan is for every co-wife is to have her separate residence within the town and in Nigeria, the wives are to live separate residence within a common compound.
44. Reporting about this role of first wife W.N. Stephens, The Family in Cross-Cultural Perspectives 1963, quoted the

but some of them even prefer this.[45]

5.7. MONOGAMY: A FOREIGN INSTITUTION IN AFRICA

Most Africans feel that monogamy was an institution brought by missionaries during their evangelisation, side by side with Christianity. It was part of European culture imposed on the newly converted Africans by the Missionaries. Thus, monogamy is nowadays regarded as a foreign institution while polygamy is accepted as being traditional. When the Christian Missions began their work of evangelisation, it was extremely difficult for them to admit certain essentially African aspects in the face of an official policy that had been laid down in this respect. If a Christian became polygamous, he was excommunicated from the Church.

In 1888, for example, the first authoritative Anglican ruling on the subjects was given at the Lambeth conference when it was decided that a polygamist might be received as catechuman but should not be Baptised, though the wives of polygamists might be admitted.[46] In the early stages, the Christian Churches were of the opinion that polygamists who had contracted their polygamous marriages before knowing the demands of the Christianity, should not be asked to divorce them before Baptism. It can be clearly seen that polygamy has all along been a traditional African institution which was recognised by early missionaries.

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45. See for example Campbell, D., In the Heart of the Bantu land, Seeley; services and Co., Ltd., London, 1922, p. 160; and Cory, H. Sukuma Law and Customs, Oxford University Press, N.Y. 1953, P.52.

46. Proceedings ofthe C.M.S., 1857, P.32; also see the Proceedings of World Missionary Conference 1910; p. 11.

The Bishop of Lagos issued the Diocesan direction in 1948 saying that "wives of polygamists need not to be excluded provided the alliance was entered into when, they, the wives, were in a state of ignorance... The wives full understanding entered into marriage with their husbands after Baptism union[47] As for the Baptism of children not born in a Holy "edlock, the Archbishop of West Africa has permitted that they "need not be demied the sacrament of Baptism, but due and proper provision must be made for their Christian upbringing and god-parents must be chosen who are in full communion with the Chruch[48]. The 1938 meeting of the International Missionary Council at Tambaram[49] sum up the Christian attitude towards polygamy. "The Church must maintain its insistence on monogamy. This is not a matter to be settled by the individual conscience - the criterion is the will of God for the people whom he has redeemed and purified in Christ. Monogamy is not a mere factor of civilization; it is vital to the life of the Church, and its value has been realized in its own experience; it was taught by the Lord Himself and has Scriptural authority behind it."[50]

Evidence shows, however, that nowadays, these rulings are not strictly adhered to especially as far as the Anglican denominations is concerned, some staunch members of this

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47. Parrinder, Religion in an African City, O.U.P. 1953, p. 166.
48. Ibid, p. 166-167.
49. It would be true to say, however, that a more tolerant attitude to polygamy has emerged in some liberal Christian Missionary circles since then.

denomination are said to be polygamists and nothing has been done to eject them from the church. Their wives are not denied the opportunity of being full members of the fold, although the official ruling is not changed. A question that may be asked is are the rulings of 1888 and 1938 meetings now outdated? or do they need a review? The authorities are aware of the fact that there are polgamists within its fold. It may be suggested that the Church, is still remembering the clash which ensured between Christianity and the traditional African Institutions when Missionary activities were at their embroying stage, is trying to avoid divisions within its congregati... society changes with time, it may be that all the denomination is trying to do is to cater for both the spiritual and the social needs of its people.

The Catholic Church is still very strict about monogamy being practiced by its members. Polygamy is strictly forbidden. Polygamists cannot be baptized until they have renounced all the wives, leaving only one. According to the authorities of this denomination, the women are not house wives in the real sense of the term but concubines, so they are deprived of the opportunity of receiving Holy Sacraments which practising Catholics enjoy. They are denied Christian burial and their thanksgiving offerings are rejected. It is because of the strict meaasures taken by Catholic Church that their members must be strictly monogamous made it to lose some of its members who cannot endure monogamy.

They see no reason why they should be deprived of their tradition and so they leave the catholic Church for those protestant Church and Aladura Church of the Lord which seem to be silent over the issue of polygamy.

Polygamy in Africa is a sociological rather than a religious factor; it results more from conformity to the African social pattern than from religious dogmas. One may quote the example of the Apostolic Church which is confessedly monogamous but has a high percentage of polygamous followers. On the contrary, when the African Church broke away and later declared that its followers could be polygamous if they so desired, the consequences were not as expected. Indeed, quite the opposite situation resulted and a monogamous section of their followers reverted to their original Church[51] Answers to our questionnaires which we circultated in a sample survey in Gboko, Benue State and Waja in Bauchi State among the Catholic Church members, regarded polygamy as a sign of prestige and wealth. For example Igirgi who is Tiv by Tribe Said: "One other person Audu Iliya from Waja Said; he practiced polygamy" because having many wives showed high prestige among my people and our neighbours." The other person interviewed said; the more wives he has the preater the number of helpers he has on his farm. This may be said is the general attitude of African people in marrying more wives.

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51. J.B. Webster, The African Churches Among the Yorubas 1888 1922, Clarendom Press, 1964, p. 84.

Because most of the reasons given for polygamy were not religious but rather for political, sociological and economic reasons. Contrary to this view, polygamy is essential to preserve higher value and promote righteousness. Therefore, permission to marry more then one wife at a time is a necessary provision for emergency in order to preserve and foster high social values and for safeguard ng society against promiscuity. This is the reason why permission for polygamy may be availed. Circumstances make it desirable that the ordinary rule of monogamy be departed from (incase of increase in women's population).

5.8 THE NATURE OF MARRIAGE IN NIGERIA

In the previous pages we have traced the historical background of both polygamy and monogamy among the various religions (Islam, Christianity and judaism), and we have also seen the views of all religious and social writers on the two institutions. Since our discussion is on the matrimonial laws of Nigeria, it becomes imperative to discuss the applicability of these two institutions under the Nigerian Law. As Stated in the Second Chapter of this work, there are two systems of marriage which are legally recognized in Nigeria - the polygamous and the monogamous. These two systems of marriage differ fundamentally both in character and nature. Therefore, it is necessary for the purposes of our disoussion on matrimonial laws of Nigeria to take into consideration the differences.

5.8.I Polygamous Marriage.

A polygamous marriage may be defined as a voluntary union for life of one man with one or several wives. Its essential characteristic is the ability of the man to marry as many wives as he pleases.[53] Polygamy is an institution practiced both by Muslims (marrying under Islamic Law) and non Muslims marrying under their various customary laws.[54] It is necessary to distinguish between polygamous marriage under Islamic Law which is restricted and polygamous marriage under other customary Laws which are not restricted. Polygamy is a prevalent practice among Nigerians. It is practiced not only by the rich or the ruling class but by the poor. And, contrary to the assertions of some authorities, it is more prevalent in urban than in rural areas.

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53. Nwoguru, Supra, Introduction, p.XXIII.

54. In Nigeria, the term 'Customary Law' generally includes Islamic Law according to Sec.2, High Courts Law, of Northern Nigeria, 1963, will not be accepted. Since non of the three features of the Customary Law would be find in Islamic Law. The features are "in written" Islamic Law is a written Law", Its rules change with time." Osborne, C.J. in Lewis v. Bankole (1909) I N.L.R. 81, 101, Islamic Law does not change with time. Moreso Section 2 of Area Courts Edict of N. States the partial defination of Native Law and Customary no longer appears. See also item 23 of the Federal Constitution which speaks of "Moslem Law or other customary Law".

As an institution the customary or traditional polygamy pre-dated the Islamic form. It would appear that under pre-Islamic form, there is no limit to the number of wives a husband could take. It invariably depends on his wealth. The mere fact that at a given time he has only one wife does not affect the character of the marriage so long as the capacity of taking more wives is retained. The unrestricted polygamy under customary law may be viewed as an institution being symbolic of a patrilineal and male-dominated society. In such a society, men especially the wealthy and aristocrats want to enhance their social and economic status and political position. Accordingly, marrying many wives and having many children help the achievement of this objective. The multitudes of wives and children provide free labour thereby increasing the wealth of the head of household. The more the number of wives and children a man has the higher the esteem with which he is held by the members of his community.[55]

In variably (all) Muslims in Nigeria, marry according to the teachings of Islamic Law. But many of the conditions and requirement that govern the the application of polygamous relationships are observed more in breach than in compliance by many

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55. Westermark, Supra, at pp.80-84, listed the husbands desire for large progany, increase in wealth from free Labour, enhancement of social importance and authority as the main causes of polygamous societies.

polygamists. For instance, instead of treating his co-wives fairly and equitably as required by the injunctions of the Holy Qur'an,[56] many a Muslim married a Second wife as apunishment to, or a simple purpose of frustrating the first wife. He achieves this by open display of favouritism towards second wife especially if the first wife is old and the new one is young.[57]

A monogamous marriage in Nigeria is a type of marriage imported into Nigeria by the marriage Act which is the same as marriage in England which the Courts there have traditionally characterized as the "voluntry union for life of one man and one woman to the exclusion of all others."[58] It will be seen that this definition involves three conditions. First, the marriage must be voluntary. Thus there must be free consent on the part of both parties. Secondly, it must be for life. If by marriage" as understood in christendom Lord penezance was referring to the view traditionally taken in the West by the Roman Chatholic Church and

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56. Qur'an, 4:3.

57. See Yadudu, A.H.(1985) Islamic Law Reform Discourse in Nigeria: A comparative studies and Another view point (Unpublished) Ph.D. Thesis. Harvard University, p.155.

58. Hyde v. Hyde, (1866), L.R. I P & D. 130, 133.

some other denominations, his statement is of course unexceptionable. But it does not mean that by English Law marriage is indissoluble. What is required here is that the parties when entering into contract must intend that it would last for life unless it is previously determines by a decree or some other act of dissolution.[59] Thirdly, the union must be monogamous. Neither spouse may contract another marriage so long as the original union subsists.

According to the Interpretation Act I964, a monogamous marriage is a marriage which is recognized by the Law of the place where it is contracted as voluntary union of one mand and one woman to the exclusion of all others during the continuance of the Marriage.[60] The most important statutes on family law having application throughout Nigeria is the marriage Act I94I[6I] and the Matrimonial causes Decre I970[62] which establishes the conditions and formalities for a valid monogamous marriage defines the grounds and means by which it may dissolved.

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59. Nachimson v. Nachimson, (I930) p.2I7, C.A.

60. No. I of I964, Section I8

6I. Cap.II5, Laws of the Federation of Nigeria, I958.

62. Decree No. I8 of I970.

In Nigeria as in other African countries, the marriage Ordinance expressly denies to a person married under it the capacity to marry under Native Law and Custom during the subsistence of the statutory marriage. This Law brought an unbearable hardship on the people of this country-One popular method of keeping and supporting the existence of this law has been the outlawing of bigamy for all persons married under the Act. Despite the existence of the Bigamy Law, many did not quite determany/from going through another customary marriage. Neither has the state deemed it necessary to enforce the Law perhaps out of complicity or a realization of the futility of the whole exercise. Despite the existence of the Law and its rampant violation in this country, one would find very few decided cases in the area. Throughout my research, I can find only one case decided under Section 370 (anti-bigamy Section) of the Criminal Code.

The Queen v. Princewell[63] is the first case ever decided in this country under Section 370 of the Criminal Code. There, Bartholomew Princewell, married Mary Hudung on 26th August 1950 at St.Lukes Church in Jos. This was a marriage under the Nigerian Marriage Ordinance.[64] By Section 34 of that Ordinance:

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63. (1963) N.N.L.R. 54.

64. Cap.115 Federal Laws.

> "All marriages celebrated under this Ordinance shall be good and valid to all intents and purposes."

At the time of his marriage, he was a Christian, but subsequently Princewell, having embraced Islam married another woman Fatima under the Islamic Law. This was on I6th July, I960. In the present action Pricewell was charged with Bigamy under Section 370 of the Criminal Criminal Code which reads:

> "Any person who having a husband or wife living, marries in any case in which such marriage is void by reason of it taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for seven years."

This Section denies princewell the capacity to marry under any Native Law and Custom and therefore his marriage to Fatima under Islamic Law become necessarily invalid. Once the second marriage becomes invalid, by reason of subsisting valid marriage, the elements required for conviction under Section 370 of the Criminal Code became completed. Mr. Justice Reed himself had great difficulties in sentencing the convict. He said, "I have not been refferred to, and I have been unable to find, a reported case on Section 370 (anti-bigamy Section) of the Criminal Code. In my experience on the bench, first as a Magistrate and then as a judge, since I946 I have not seen a prosecution under this Section."[65]

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65. See Draft Bill for a Reformed Marriage Act, Sponsored by a member of the Law Commission, p.I5. It is not altogather accurate though to say 'there has never been a conviction' Indeed there was the Case of Princewell in I963.

As a result of this problem of the unjust Law, The Nigerian Law Reform Commission in defending their first Law reform programme which among other things proposed the repeal of the anti-bigamy Law observed thus:

> "The Commission considers it a bad policy to leave on the statute book a serious crime which has existed for over sixty years, which is committed in large numbers by people in high places and low, and in respect of which there has never been a conriction".(66)

Actually every one would agree with members of the commission in their view of repealing this law. The effect of the law is to rob a man marrying under the statute of his capacity to marry under the Native Law and Custom and thereby to preserve unto him(and her) the exclusive status of being married under the ordinance right up to the point of his death or divorce.[67] This, is an indication of the leathsome attitude that the English Law had towards polygamy. The English Society was traditionally conservative and the judgements in the nineteenth century in particular bear evidence to the vehemence with which polygamous marriages were condemned as not being "marriages" at all. This is exectly what Lord Brougham said in Warrender v. Warrender.[68] He said

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66. See M.L. Marasinghe, an article on Monogamy, Polygamy and Bigamy; Published in Journal of Islamic and Comparative Law, Vol.2 1963. Journal of the Centre for Islamic Legal Studies.

67. (1835) 2 CL. Fin. 488, 532.

68. This dictum was adopted with approval by Lord Penzance in Hhyds (1865) I P. & D 130, 134 and by Romer L.J. Nachimson v. Nachi.

> "Our whole Law of marriage assume this: and it is important to observe that we regard it as a wholy different thing, a different status, from Turkish or other marriages among infidel nations because we clearly never should recognise the plurality of wives and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authoriesed and validate.[69]

This passage in I832 represent the attitude of mind of the English society up to the present day century and it should be of very little surprise that they still prefer to be monogamous in name but polygamous in action. It is not a hidden fact that those so-called monogamous are the same people who are keeping what is variously described as "nonring", "extra", "Mistress", "girl-friend" and other varieties of sexual relationships in addition to the 'Church' or 'statutory wife'. These relationships are consual and do not involve any financial consequences nor gre they blessed with religious moral or social approval in any form.

5.9 PRACTICE OF POLYGAMY BY THE PROPHET(S.A.W.): AN IDEAL EXAMPLE.

To complete the discussion one has to examine the marriages of Prohet Muhammad (S.A.W.). These marriages are not problem for a Muslim who understands the ideal character of the Prohet and the circumstances under

which his marriages were contracted. But the European writers as well as those Muslims who are influenced by the European orientalists have created alot of mischievious propaganda and raised much controversy over the marriages of the Holy Prophet (S.A.W.). As we have discussed before, polygamy was an established practice among all the early Biblical Prophets and extended to the time of Prophet (S.A.W.). As a matter of fact, polygamy was never considered undesirable and had became an integral part of most social systems throughout the world.

Among all the nations of antiquity, Prior to the advent of Islam, unrestricted polygamy, which was sanctioned by usage and customs, was prevalent among the ancient Arabs. According to Tabari, an Arab could take ten or more women at a time by the customary law of ancient Arabia. To Islam and its Prophet goes the credit which restricted the unlimited polygamy of pre-Islamic Arabia, and instead of a limitless number of wives and controlled polygamy to the extent of four only. The Prophet Muhammad (S.A.W.) died living nine wives behind. Looking at these nine marriages were contracted individually one does not fail to find the actual reasons behind these marriages, Out of these marriages, he had only two "normal" marriages, one with Khadija, his first wife and the other with Aisha. The other marriages were contracted as a necessity and that too was based on various considerations which moved the

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Ibn Jarir al-Tabari, Tafsir-Tabari, Vol. IV,p.145.

the Prophet, despite his active life and frugal living to take other seven wives which was demanded a great sacrifice on his part.

He lived in an extremely hot climate where the physical desires press hard on man, where people developed physical maturity at an early age, and where easy satisfaction was a common thing among people of all classes. Nevertheless, Muhammad (S.A.W.) had never touched women untill he was twenty-five years of age, when he married for the first time. In the whole Arabia he was known by his unimpeachable character and called al-Ameen (the Trusted), a title which signified the highest standard of moral. It is really surprising that a man living in the jahiliyya society of Arabs spent twenty-five years of his life as a model of chastity and modesty in a social environment of wine and adultery. It was at the age of twenty-five that he selected his first wife Khadijah, and old twice-widowed lady who was fifteen years senior to him. She herself initiated the contract, and he accepted the proposal inspite of her older age and in spite of her being twice-widowed. At the time he could have quite easily found many prettier and much younger girls. With this lady Khadijah (May God be pleased with her) alone, he spent another twenty-five years, and with her he had all his children with the exception of Ibrahim. She lived with him through her life and during this period he never had any other marriage. She died at the age of sixty five. After her death, he stayed without any wife for sometime.

The Holy Prohet was very grieved and hurt at the loss of his most loving companion. Seeing his grief, Kaulah bint Hakim suggested to him that he should get married and if he wished he could marry a widow who would look after his children and a virgin who would comfort him and love him and relieve his grief. Then there was Sawdah, who emigrated with her husband to Abyssina in the early years of persecution. On the way back her husband died and she became a widow looking for shelter. The Prophet(S.A.W.) extended his shelter and married her. Later in the same year, he married Aishah, who was a minor of seven years the daughter of his closest friend and companion Abubakar. The marriage was not consummated till some time after the migration to Madina. The motives of these two marriages can be understood to be anything except passion and physical attractions. However, he lived with the two wives for five to six years, up to his fifty-sixth year of age, without taking any other wife.

At Madina, the Prohet married his remaining wives for various reasons and various considerations, personal, tribal, political, etc. He was fity-five years old where he begun to expand his family, they were all widows of one kind or another and all were over thirty six years of age, except two. Could anyone believe that he started womanising when he was in his midfifties and was engaged in a most terrible and fierce struggle for survival? He was surrounded by his enemies from all directions and

from inside was being threatened by the hypocrites and jews. Due to these problems, it was difficult to sleep peacefully during the night. How could anyone, not to speak of the noble person of Muhammad, indulge in sensuous and pleasure-seeking acts in that situation? These are all insituations of evil-minded people who see everything and judge every person according to their own inner feelings and desires. As the evil is in themselves, they therefore see every other person in the same light.

The Holy Prophet was sent to guide mankind to the way of Allah by his words and actions and this he did most effectively and faithfully. However, there were practical requirement and needs without which this mission could not be successfully carried out to completion. He lived a most simple, austers, and modest life. During the day he was the busiest man of his era as he was Head of State, chief justice, commander in chief, Instructor, etc. all at once. At night he was the most devoted man. He used to stay one to two-thirds of every night vigilant in prayers and meditation.[68] His furniture consisted a mats, juge, blankets and such simple things, although he was the king and sovereign of Arabia.

It should be considered here the exclusive and well-defined tribal system of pagan Arabs of those days with prejudices against men of other clans. In Arabia

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Qur'an, 73:20.

no one could carry on the work of reform and uplift unless he belonged to some specific and respectable clan and so in the interests of his mission the Propher needed inter-tribal and clannish factions into one Muslim Umma (nation) and as a bretheren in faith. In order to succeed in this difficult task, he was indirectly informed of his extra burden on him of his enlarged household in these words of the Holy Qur'an:

> "O Prophet! Surely, we have made lawful to you your wives to who you have paid their dowers; and those whom your right hand possesses of those whom Allah has given you as spoils of war, and the daughter of your paternal uncles and aunts, and daughters of your maternal uncles and aunts, who mirgrated (from Makka) with you and any believing woman if she gives herself to the Prophet and the Prophet desires to ask her in marriage; a privilege for you only, and not for the rest of the believers; we are aware of that which we enjoined upon them concerning their wives and these whom their right hands possess that you may be free from blame, for Allah is forgiving, Merciful."

In this verse, Allah has made special alllowances to the Prophet in regard to his marriages because of his special position as a messenger of Allah entrusted with the heavy burden of coveying his message to the people of the world.

There were many war prisoners captured by the Muslims and according to Islam entitled to security and protection. They were not killed or denied any right,

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Qur'an 33:50.

his will, it would give rise to adultery, concubinage and prostitution.[96] The best course open for Muslims therefore, is to strive to the Qur'anic advice", so take what the Apostle assigns to you, and deny yourself that which he withholds from you."[97]

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96. Ingells, N.W. Biology of Sex, quoted by Khalid Rashid Muslim Law, Easten Book Co. Delhi, p.72.

97. Qur'an 59.7.

human or physical. On the contrary, they were helped to settle down through legal marriages to Muslims instead of being taken as concubines and common mistresses. That also was another moral burden on the Muslims and to be shouldered jointly as a common responsibility. Here, agai n, the Holy Prophet carried his share and took some responsibilities. According to this permission, three came into his possession. The first of them is juwairiyuah in the battle of Banu Mustaliqa. She belonged to the Banu Mustaliq clan which was very powerful. The entire clan was the bitterest enemy of Islam from the start. At last it was suppressed by military action, but when the Prophet freed juwairiyauah and married her and as a result of that, the Muslims released all their prisoners saying that they could not keep the Prophets relatives in bondage, and it was due to this marriage that the whole clan accepted Islam and became peaceful and obedient to the laws of the New Islamic State.

The Second lady who was captured and freed by the Prophet was Safiyah. She was captured in the battle of Khaibar. When she was set free and willingly accepted Islam and chose to stay in the household of the Prophet. The Prophet married her and gave her her due dower. Safiyah was the daughter of a very prominent Jewish Chief, Huyayya ibn Akhtab. In considering of her family status she could not be merged into ordinary household. So the Prophet married her himself. After

this marriage, the Jews did not dare to revive their opposition to the Prophet andhis mission. The third lady was Maria Qibtiya who was sent to the Prophet by the ruler of Egypt. Maria Qubtiya by her own choice was kept as milk yamin (whom your right hand posses). By accepting her in his household, he formed a political alliance with a king of great magnitude.

Maimunah also came from a very powerful clan of Najd and was sister of the wife of chief of Najd. It was this clan which had brutally murdered about seventy members of the Islamic missionary deputation. The Prophet's marriage with Maimuna changed the whole atmosphere and Najid accepted Islam. Ummu Habibah bint Abu-Sufyan his cousin who migrated to Madinah was the daughter of Abu Sufyan a Makkan chief an early Muslim who had emigrated to Abyasinin where her husband Ubaid Allah ibn Jahsh embraced Christianity. She was very grieved and the Prophet showed her favour for her sacrifices in the cause of Islam and because of her high status as the daughter of Abu-Sufyan. This marriage won the hearts of many members of her family, and it was the largest family in Makkah, who later became supporters of Islam/ This marriage was largely responsible for the conquest of Makkah. Zainab bint Khuzaimah who was called Ummul Masakin (Mother of the poor and helpless), belonged to a very poweful tribe of Hawazin. Her husband Abdullah bin Jahsh had given a supreme sacrifice to the cause of

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Islam and was killed in the battle of Uhud. To rescue her from widowhood, the Prophet took as wife in the same year but died after three months, she was the only wife of the Prophet; after Khadijah, who died in his lifetime.[70]

The Prophet contracted some of his marriages for socio-political reasons. His principal concern was the future of Islam. He was most interested in strengthening the Muslims by all bonds. That is why he married Hafsah the daughter of Umar bin Khattab. After the death of her husband Khunais ibn Hadhafa who died at the battle of Uhud. The Prophet wanted to show his smympathy for the family and also find his strong friend and companion, Umar bin Khattab, in a close relationship to him. He had already as a we have seen earlier bound his relationship with his friend and companion Abubakar by marrying his daughter Aisha. He had also married two of his daughters to Uthman. When Ruqiah died, he gave his second daughter Umm-Kulsum to him. He married his daughter Fatimah to Ali. He had established relationship between those four families, and this sort of relationship was indispensable at that time.

Some of the Prophet's marriages were for legislative reasons and to abolish certain corrupt traditions and taboo about adopted sons had to be distroyed. The

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The Meaning of the Qur'an Supra Vol. VIII, p. I6

Prophet (S.A.W.) had married his first cousin, Zainab bint Jahah, to his freed slave, Zaid bin Harith, whom the Prophet had adopted as his son. It was instead to break the family and the social barrier but the marriage did not prove as success and ended in divorce. The Holy Prophet was ordered to marry her after her iddah. Before Islam, the custom of adoption was the order of the day. But Islam abrogated this custom and disapproved its practice. So he was commanded by the All Mighty Allah to marry the divorce of his "adopted" son to show that marriage is lawful for divorces.

By contracting this marriage and others, the Prophet meant to eliminate the caste system, the racial and national varifies, and the religious prejudices. He married some of the humblest and poorest women. He married a coptic girl from Egypt, a Jewess of a different religion and race, a negro girl from Abyssinia. All these are to teach the mankind of brotherhood and equality before Islam.[72]

If we look over the political significance of the Prophet's marital relations, we will see that it was through these relationships that the following tribes

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Qur'an 33:36, 37 and 40

Naeem Siddigi: Muhammad, The Benefactor of Humanity Lahore, 1978, pp.247-250. Quated in Encyclopaedia of Seerah, Vol. II, p.213.

were closely link up with the Prophet (S.A.W.) (I) Bani Asad bin Abdul Uzza, (2) Bani Amir bin Luayyah, (3) Bani Tiam, (4) Bani Adi, (5) Bani Makhzoom, (6) Bani Umayya, (7) Bani Asad bin Khuzaimah, (8) Banu Mustaliq, (9) Arab Jews, (IO) Bani Kalb and Salim, and (II) Banu Kindah. Geographically, these tribes spread all over the Arabian peninsula and strengthened the position of Prophet through tribal link. And by this, he has also suceeded in uniting all these important clans, and thereby ending oppositions and establish universal peace and justice.

These are the facts that led the Prophet (S.A.W.) to contract his multiple marriages. I consider those non-Muslims who were accusing the Prophet of his sensuousness was as a result of their sheer ignorance, religions prejudice or hatred for the Prophet of Islam and his unique philosophy of life. What he did, was nothing abnormal, it was the normal practice of those days. His predecessors, Prophet Sulaiman, Dauda and others, had many wives and no one of the Europeans have ever raised any controversy about them, so why should they be specially bothered about the marriages of the Prophet Muhammad? He did not do anything extraordinary,

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For further discussion on this subject see Encyclop Encyclopaedia of Seerah Vol.II, pp.I45-220; See also Hammudah Abd al-Ati, Islam in Focus, Supra, pp.I74-I79; See also, A.R. Doi, Woman in Shariah (Islamic Law), I983, Gaskiya Corp. Ltd., Zaria, pp.I48-I5I.

something out of the blue, which was not practiced in his time.

As honest Observer and sincere and genuine critic who learns from history, when he studies the life of Muhammad spontaneously cries out:

> "Mahomet himself, after all that can be said about him, was not a sensuous man. We shall err widely if we consider this man as a common voluntary, intent mainly on base enjoyments, any, enjoyments of any kind. His houshold was of the frugalest; his common dict barley bread and water: Sometimes for months there was nota fire once lighted on his hearth.... Much as been said and written about the sensuality of Mahomet's religion; more than was just. The indulgences, criminal to us, which he permitted, were not of his appointment; he found them practised, unquestioned, from immemorial time in Arabia; what he did was to curtail them, restrict them, not on one but on many sides. Not till he was already getting old, the prurient heart of his life all burnt out, and peace growing to be the chief thing this world could give him did he start on the career of ambition; and, belying all his past character and existence, set up as a wretched, empty charlatan to acquire what he could now no longer enjoy! For my share, I have no faith whatever in that."

5.10 MODERN REFORMS OF THE LAWS OF POLYGAMY.

There is a growing tendency to consider some Islamic institutions to be out-moded when they among some modernists do not conform to the western pattern of life. With regard to the family law

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Thomas Carlyle: On Heroes, Hero-Worship and the Heroic in History, London, 1911, pp.288-305. Quoted in Encyclopaedia of Seerah, Vol.II, pp.208-209.

there are two areas which are subjected to severe criticisms by modernists, orientalists and others are those of its aspects that concern polygamy and divorce (talaq). Those who vehementally opposed polygamy subject the Islamic form of polygamy to all the conventional charges against plural marriages which we discussed above often with greater force. Women liberators and feminists view it as the bastion of female subjugation. As a result of these varieties of criticims of the Islamic legal system, Muslims in different countries have advocated the reform of the system.

The modernists and orientalists consider polygamy as an old social institution which will not stand the test of modern times and ought to be stamped out. They have started by misinterpreting certain Qur'anic verses to prove that even Islam does not allow polygamy. The verses of the Holy Qur'an which they have referred to support of their arguments are verse 3 and 29 of Chapter four. Verse 3 read:

> "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one...."

Verse 29 Chapter 4, also reads:

> "You are never able to be fair and just as between women, even if it is your ardent desire....."

The argument usually tendered in respect of these two verses is that Islam has allowed marrying more than one wife on the condition that the man can be perfectly

fair and just to all the wives. But this conditions according to them is almost impossible to fulfil as it is mentioned in verse 129 quoted above, hence they argue that polygamy is not allowed in Islam because a man who marries more than one wife puts himself in impossible position. Since verse 3 says, 'if you fear that you shall not be able to deal justly with them then only one'.

The advocators for reforms in polygamy considered verse 129 as a clause and legal condition attached to polygamous unions; Since impartial treatment cannot be possible, therefore monogamy, being the natural and universal form of sexual relation, ought to be uplifted to replace it. What they overlook is the fact that 'impartial treatment' in the matter of residence, food and clothing is a relative term which will differ from person to person and from place to place according to the economic standard of the society. Perhaps I will say that, the question of impartial treatment between co-wives is more of an individual conscience rather than the states or the Muslim community. The Islamic injunction to potential polygamist to consider their capacity to treat all the co-wives fairly and equitably is a moral obligation directed to them personally. The State or the community would only come in when they failed to fulfill the obligation which will serve as a ground for the dissolution of the marriage upon the complaint of the injured wife.

Contemporary social reformers in some Muslim countries, feel that it is time and their obligation to engage in fresh ijtihad in order to reform some of the outdated Islamic institution to the Western or European pattern of life. Polygamy is one of the fact, in a few countries Islamic family law has been completely abolished. In other countries they have introduced some major reforms into the traditional Islamic family law, whereas on the contrary a large number of other countries have preserved it various traditional forms. The impact of colonial era on the Muslim Countries was so great that they change their law of personal status and imposed restrictions on the husband marrying more than one wife. The first attempt of this kind came from Syria. It was argued that according to the interpretation given by the Shafi'i School, the Qur'an subjected the permission for plurality of wives to the condition of the husband's financial capability of maintaining more than one wife. The Shafi'i view represented in a particular form the basic and the essential nature of the policy of Islamic Law towards big any which it rather permitted as remedial measure with a view to avoiding greater social evils. The new law authorises the Qadi (judge) to decide, as of fact, the question that the husband is financially capable of maintaining more than one wife, and in case he

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Syrian Law on Personal Status(Decree No.59) of 1953. For a discussion of the nature relating to the Islamic Law of bigamy and the opinions of the various jurists of Islam on it, See Tahir Mahmood: Disoasive Procepts in Muslims Family Law, 2 ALL L.J. 1965, pp.122-26 See also JND Anderson, Law of Personal Status Vol.7(1958) p.262.

is not so capable, to refuse permission for a second wife.[77]

In Tunisia, polygamy was prohibited outright by the law of personal status in 1957. The Tunisian code of personal status, 1957 says:

> "Polygamy is forbidden. Any person who, having entered into a bond of marriage, contract another marriage before the dissolution of the preceding one, is liable to one year imprisonment and to a fine...[78]

Here, too, the modern jurists, influenced by Western pattern of life declared that the Qur'anic verse 3 of chapter 4 would not be construed strictly as a moral exhortation, but as a legal condition precedent to polygamy, and therefore, no second marriage should be permissible unless and until adequate evidence was established that the wives would be treated impartially. Since they thought that in the modern social and economic condition such impartial treatment was practically an impossibility, they maintained that the essential conditions of polygamy was impossible of fulfilment.

The problem of reform in Islamic Law has assumed a highly controversial nature. The opponents of reform regard the Shari'a Law as absolutely immutable, while its advocates reject their theory and maintained that ao Muslim ruler has the power to exercise his authority under the

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77. Article 17 Syrian Law of Personal Status 1953.

78. Article 18 Tun'isian Code of Personal Status, 1956.

doctrine of Siyasa to prohibit. Some Lawful things if it is for public good. It was under this, that, the Tunisian Prime Minister sees the justification of doing away with some of the Islamic institutions. He was convinced that monogamy was the ideal, more humane and progressive form of marriage. For in broadcasting the reforms he had clearly indicated that:

> "Ideas which were valid in the past, today offend the human sprit-such as polygamy, divorce as the Law stands, and all the problems to which these give rise in family life."

He has also said:

> "That the prohibition of polygamy was reform which many Muslims have long been demanding, since polygamy has became inadmissible in the 20th centrury and inconceivable by any right-minded person."[79]

The Moroccan Code of 1958 took a middle course and prohibited polygamy conditionally. The new Law provides that if any injustice between co-wives is feared; plurality of wives is not permitted, which is simply a reiteration of the Qur'anic injunction. This Law however, provides certain other rules relating to polygamy:

(i) no Second marriage with a woman shall be contracted unless the fact that the man is already married to another woman is communicated to her.[80]

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79. JND Anderson, Supra, at p.263, quoting the Prime Minister and at p. 269

80. Article 30(2), of the Monocaan Code of Personal Status, 1958.

(ii) a woman may stipulate in her marriage contract against her husband's right to contract a bigamous marriage; in such a case, if the stipulation is violated, the wife shall have a right to dissolution of her marriage.[81]

(iii) even in the absence of a stipulation, if the second marriage causes injury to the first wife the court may dissolve her marriage.[82]

Similarly in Iraq, the Law of personal status of I959 did not declare polygamy as prohibited but imposed restrictions on the institution. The law provides that any man who want to marry bigamously must apply to the court for permission. The court shall grant such permission on the three grounds namely:

(i) he should be capable of maintaining two wives simultaneously;

(ii) Some Lawful benefits should be involved in the second marriage; and

(iii) There should be no fear ofinjustice between the Co-wives, the exertainment of which fact shall be made by the court itself.[83]

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81 Article 30(2) of the Moroccan Code of Personal Status, I958.

82. Article 30(2) of the Moroccan Code of Personal Status, I958.

83. Article 30(20) of the Moroccan Code of Personal Status, I958.

Originally bigamous marriage contracted without the permission of the Qadi (judge) was regarded as irregular,[84] fasid, but this received opposition from the Ulama of Iraq on the basis that man made laws could, if necessary in the interest of the society impose restrictions on something which was permissible under the divine law but could not declare it invalid all together. The rule was therefore modified in I963. Violation of the rule against bigamy entails penalty only but does not invalidate the marriage.[85]

In Pakistan, the restriction was placed on polygamous marriage by the Muslim Family Law Ordinance of I96I. The new law set up an arbitration Council whose responsibility among other things was to decide on cases of polygamous marriages. The Law stipulates that the council may give permission to bigamous marriage subject to any condition that it deems fit and that such bigamous marriage is necessary and just.[86] Section 5 of the Ordinance requires the husband seeking permission for a bigamous marriage to state whether the existing wife has given her consent to the proposed second marriage. A bigamous marriage

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84. Article 30(2) of the Morocan Code of Personal Status, I958.

85 Personal Status Amendament Law I963.

86. Section 6. Muslim Family Law Ordinance, K96I.

contracted in violation of these provision will not be invalidated, but it will have the following consequences:

(i) the husband contracting it shall incur the prescribed penalties.

(ii) the dower of the first wife shall become immediately payable, irrespective of any division therefore, made at the time of marriage, into prompt and deferred parts; it shall be realised like the areas of land revenue:[87] and

(iii) the first wife shall have a right to seek dissolution of her marriage by the court under the dissolution of Muslim Marriage Act, 1939.[88]

Under the provision of the Iranian constitution, Islam is the official religion of the kingdom and any-man-made law which is repugnant to the sacret principles of Islam shall be ultra-vires.[89] Between 1928 and 1935, the country condified its law of personal status as a part of the comprehensive civil code.[90] The law requires that if at the time of the marriage a man is already married, he must inform the woman of

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87. Section 6 (5) (b) ibid.

88. Section 6 (5) (a) ibid.

89. Articles I and 2, The constitution of Iran 1906.

90. Banani: Modernization of Iran, Stanford: 1961 p.71

this fact and failure to do so is an offence punishable under the code.[91] To this rule, the family protection Law of 1967 adds that a person desiring to contract a bigamous marriage must seek the prior permission of the court.[92]

Although the introduction of substantive law reforms in the countries mentioned above claims that it was a reform of the locally prevalent schools of Islamic law and not of Islamic Law entirely. According to them the techniques generally adopted for such reforms has been the adoption and enforcement of rules and principles of schools other than that of the country introducing the reforms or the opinion of a variant jurist within or without the same school. Accepting this, will lead us naturally to consideration of the conflict between the the Qur'anic injunctions and the so-called reforms in respect of polygamy in some Muslim countries. There are countries where the Islamic Law has not been tempered with the modernist forces like Saudi Arabia, most countries in East and West Africa, and in Asia. There others where it is only restrictions that have been imposed by law in contracting a Second marriage. But others prohibited by law the polygamy which the Qur'an and Sunnah allowes.

It is interesting to note that these law reforms in Muslim countries are of recent origin. Since it was

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91. Article 6 of the Marriage Law 1931.

92. Article 14 of the Marriage Law 1931.

introduced in Turkey. The Ottoman Law of family rights I9I7 now applicable only in Lebanon. Between I920-I946 Egypt undertook some sporadic reforms through the application of either talfiq[93] or takhayyur.[94] The other countries which later followed the suit are the Sudan, Jordan, Syria, Tunisia, Morocco, Algeria, Iraq, Iran and Pakistant.[95] All these it may be noted are Muslim countries. As mentioned earlier, those who advocate outright prohibition of polygamy do so upon a reinterpretation of the relevant Qur'anic verses. To them, the apprehension or knowledge that no one can fulfil the Qur'anic pre-conditions of polygamy-namely, the capacity to treat the co-wives equally-is not sufficient ground to prohibit polygamy in totality. It is my candid view that, those who prohibited polygamy by law have gone against the injunctions of the Holy Qur'an and the Sunnah of the Prophet. No one has the power to render unlawful (haram) that which All Mighty Allah has made Lawful (halal) to the believers.

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93. This is an evolution of a new legal rule by combining two conflicting juristic views on the same problem or by blending certain parts of two or more such views.

94. This is an electic choice between the corresponding legal principles of the various schools of law; or enforcement of one of the conflicting solutions brorided by various jurists to controversial lases in suppression of all other solutions; or preference of an absolate or lesser known legal opinion over a generally accepted principle.

95. Tahir Mahmood, Supra, pp.40-I63

More than fourty years since polygamy was banned in some Muslim countries. Much has been written to appreciate these reformers by European Scholars. The existence of such reforms are cited as a factor which makes people more cautious in contracting Second marriage, or else make them more reckless in marrying more wives. If we take statistic of polygamous marriages before and after the prohibition of in Syria and Tunisia, we would find a few cases where people have refrained from contracting a second marriage. But at the same time it has heightened tension in the minds of those who were capable both economically and physically to marry and satisfy more wives. A few have married contrary to the law and undergone penalties, but many have taken a short cut of entering into extra-marital relationship secretly following the style of life in the Western world in order to cling to monogamy.

On the other hand, it should be noted that all the reinterpretations of polygamy verses offered by the reformers to justify the prehibition or other forms of regulations of the institution of polygamy can be traced to the Western ideas and norms which consider monogamy to be the universal and civilized type of marriage relationship. There is no doubt knowing the unpredictable human nature, if his legistimate biological desires are suppressed against

his will, it would give rise to adultry, concubinage and prostitution.[96] The best course open for Muslims therefore, is to strive to the Qur'anic advice", so take what the Apostle assigns to you, and deny yourself that which he withholds from you".[97]

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96. Ingells, N.W. Biology of Sex, quoted by Khalid Rashid Muslim Law, Easten Book Co. Delhi, p.72

97. Qur'an 59:7

CHAPTER SIX

LAW AND PRACTICE OF DIVORCE IN NIGERIA

6.1 INTRODUCTION:

In this chapter an attempt will be made to look into the Law and Practice of divource among the People of Nigeria. It will also attempt to described why and how divorce is considered a social problem in the Western judio-christian culture which forms par of Nigerian society and the efforts being made for centuries to deal with, what in light of the intensity and consequence of its occurence, is understood to be problematic.

In the Chapter it would be argued that the problems, if there are any, which face the Islamic Law and practice of divorce especially among the Nigerian Muslims and some what different from those conceived of any sought to be contended with in the West. It would finally analyse what are locally and generally viewed to pose certain problems in divource Law and practice among the Nigerian muslims.

In no age has the danger of the break-up of the family and evil side effects that arise from it has not been the object of so much attention as this time. Law makers, jurists, psychologists - all of them try, within all the means in their control, to further strengthen, stabilize and render indistructible the structure of marriage, but all efforts have failed and have instead aggrated the problem of divorce. Statistics shows that Year after year the number of divorce increases, and that there is imminent danger of the breaking-up of many other homes.

6.2 DIVORCE IN WESTERN SOCIETY: HISTORICAL PERSPECTIVES

As divorce is the action which set in motion the process of terminating a marriage contract - and in most cases leads to its dissolution thus freeing parties from obligations arising therefrom- it will be pertinent to say something about marriage as an integral aspect of the institution of the family in this society. In Western societies, marriage is in both its formalities and essentials is very much influenced by christianity which in turn had incorporated the practices of the ancient Greeks and Romans.[1A] According to a leading English case, "marriage, as understood in Christendom, may be defined as a voluntary union of one man and one woman to the exclusion of all others."[1B] By this notion, marriage is considered a sacrament in every sense of the religious term among the catholics and in the civilly, considered sacrosantity of an indissoluble union among others. Thus culturally and religiousl marriage shared the same notion, that means a union which the parties have had to live with through for better for worst until either party dies or is dissolved or or annualed; on any of the few recognized grounds of putting asunder that which God has jointed. And this is regardless of whether or not parties love each other or that either

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1A. P.D. Bardis Family forms and variations Historically considered Handbook of Marriage and The Family P.4-5

1B. Hyde v. Hyde (1866) L.R. 1P.D.P. 130 at 133.

party or both may secretly or even openly be wishing the death of the other so as to be relieved of the unhappy union which the law says they cannot bring to an end except through some unpalatable way which is attached with all sorts of stigma." [2]

Arising from such a notion of the spouses as indissoluble, is the acceptance of the biblical statement that "What therefore God hath joined together, let not man put assunder!" [3] Once this notion of divorce has been internalized for centuries, both the parties directly concerned and the society at large have come to view long surviving marriages as something to advertise and show off and a divorced or separated couple as abnormal and looked down upon with scorn and social dispproval.

It is for this background that divorce a mechanism for terminating marriage relationships which have been entered into voluntarily has come to be viewed as one huge societal problem in the west. It is not surprising therefore that it is seen to pose problems from the following perspectives and considerations: the frequency of its occurence; whether or not it should be permitted at all and if permitted, upon which grounds; its socio-economic consequencies on the immediate parties and the society at large, unequal treatment, and the distribution of property upon disssolution. Because most divorce reforms in the

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3. E. Westmark A Short History of Marriap P. 288.

west have centered around these themes and modern reformers among the Muslims who, having undoubtedly been influenced by these considerations, seek to introduce similar measures, I will explain further how and why these issues are considered as such.

6.2.1 PERMISSION AND GROUNDS

According to the canons of the Fathers of the early church, as conflicting as their views have been shown to be,"[4] with marriage the two parties become one flesh. The divine preception is that, to borrow Leo's phrase, those whom God has joined should not be separated. By this precept, divorce or any form of dissolution of marriage is not permitted. With time, however, certain grounds for divorce - some fictious and others dictated by practical considerations - were allowed. For instance the ecclesiastical authority was prepared to do what amounts to a divorce fictitiously assuming that the marriage between the parties never in fact took place regardless of cohabitation, duration of the union or its fruits: (the offspring). Other grounds gradually allowed included adultery, commission of certain crimes, attempts of one party on the life of the other, affliction with certain diseases etc."[5] At the zenith of its exercise of temporal authority, the Papacy also allowed divorce to parties who could not or were undesirous of proving any of the well recognized grounds

4. Kifchin, supra, Pp. 16-28.
5. Kitchin, id, Pp. 59 - 88.

through the privileged act of dispensation which in the course of time became available only to the highest bidder, the noble or aristocrats. After the reformation, dispensation could also be secured through a private member's bill in the British parliament.

In modern times myriad types of additional grounds for dissolving a marriage have been through centuries of struggles for bettering the lots of women and feminist movements. Although there are still a few countries where the strict prohibition of divorce except through the backdoor is retained, a great deal has been achieved in widening the grounds and removing fault as the basis of divorce. It has been a long struggle from the very rigid canonical grounds discussed above through the reformation. The matrimonial laws of the different western countries, until very recently, provided that the main recognized grounds for divorce were the adultery of one of the spouses and, of course, to the other more practical grounds which have long been accepted. Thus in order to secure a judicial dissolution of a marriage a spouse had - and still has to in some jurisdictions - to prove that the other partner was guilty of one kind of matrimonial offence or another. In U.S. where matrimonial causes are under state jurisdiction and with its diverse laws, there are numerous other grounds,

Section 4 of the Act provides:-

> "The jurisdiction of the High Court of Region in relation to marriage, and the ennulment and dissolution of marriages and in relation to other matrimonial causes shall, subject to the provisions 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 forced in Enland."

The Roman Catholic doctrine of the indissolubility of marriage was accepted by the English acclesiastical courts. In 1857 Matrimonial Causes Act was passed to give effect to the report of a royal commission which had been appointed in 1985 to look into the law relating to matrimonial offences. In addition to vesting the existing jurisdiction of the acclesiastical courts in a new statutory Divorce Court from which it was transffered to the Hight Court in 1875 by the judicature Acts of 1873 and 1875. The law in England remained in this state until 1937 when matrimonial causes Act of 1937 was passed and further extended the grounds for divorce to cover cases of cruelty and desertion for three years. After Second World War, the cases of divorce increases to an alarming state which led to too much public discussion of the whole basis of the Law. As a result of this alarming situation Divorce

Reform Act of 1969 was passed. Its essential principle is the abolishing of all the old grounds for divorce and their replacement by one ground: That the marriage has "irretrievably" broken down.

6.3 TERMINATION OF MARRIAGE IN NIGERIA.

A statutory marriage can be terminate in Nigeria by the death of one of the parties to the marriage or by obtaining a divorce through the courts.

6.3.1 TERMINATION BY OBTAINING DIVORCE.

The Matrimonial offence theory which Originated from the old ecclesiastical courts in England was brought into Nigeria and was reflected in the Pre-1969 English statutes governing the dissolution of marriages which formed part of Nigerian Law on this subject. In 1970 The Matrimonial Causes Decree was passed. Most of the provisions on divorce contained in the Decree have been borrowed from the Divorce Reform Act, 1969 of England."[10] Section 15(1) of the Decree which provides that either of the party to a marriage may petition for its dissolution on the grounds "that the marriage has broken down irretrievably." This section is based on sections one and two of the English Divorce Reform Act, 1969. The Act itself has its Origin from putting Assunder's report.

published in 1966 by a group appointed in 1964 by the Archbishop of Canterbury to examine the Law of divorce in England as at that time.

Section 15(1) of the Decree has provided only one ground for divorce in Nigeria "that the marriage has broken down irretrievably." But, at the same time one find that many of the old grounds of divorce still apply indirectly as grounds" since the Decree declares that "the Court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the Courts of one or more of the facts....." enumerated under Section 15(2) includes adultry, cruelty and desertion, each in a odified form. Therefore, for a Court in Nigeria to grant a decree of divorce the petitioner has to establish one of the 8 facts mentioned under Section 15(2) which we shall now consider breifly.

1. Wilful and persistent refusal to consummate.

The wilful and persistent refusal to consummate the marriage is relevant ground for the grant of a decree of divorce."[11] What constitute wilful and persistent refusal to consummate will depend on the facts of each case. For a petitioner to succeed inder this heading he or she has to prove that it was a continuous act rather than an isolated case of refusal, was a conscious and free act of the respondent.

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11. See Section 82 of Matrimonial Causes Decree 1970, See also Akinyemi V. Akinyemi, (inreported), F.S.C. 303/62, Oloko V. Oloko (1961) W.N.L.R. 101.

2. Adultry

According to Section 15(2) (b) of the 1979 Decree there is an irretrievable break-down of the marriage where petitioner proved that the responded has committed adultry and that by reason of such adultry he or she finds it intolerable to leave with the respondent.

Adultry may be defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. In order that adultry should constitute a ground for a petition therefore, the defendant must have had sexual intercourse with someone other than the petitioner since the celebration of the marriage. The petitioner must satisfy the court that the defendeant has committed the act with his or her free will. So, where a spouse has extra-marital sexual intercourse without his or her consent there will be no adultry. The standard of proof needed in this case is that of reasonable satisfaction of the court.

3. Respondent's Behaviour.

Another fact which may be advanced as proof of the irretrievable breakdown of the marriage relates to the behaviour of the respondent. The petitioner may prove that the respondent has behaved in such a way that he or she cannot reasonably be expected to live with."[12]

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12. Section 15(2) (c) of the Matrimonial Causes Decree.

Conduct which previously would have been characterised as cruelty, rape, sodomy or bestiality, habitual drunkness and all the situations mentioned under section 16 of the Decree would come under this heading, with the difference that the petitioner does no longer need to prove that the other spouse has injured or thretened to injure the mental or physical health of the petitioner.

The exact limits of this fact are not very easy to state. Many questions remain to be answered. Must the respondent's conduct relate directly to the petitioner? or does the respondent's behaviour towards other come under consideration? The decisive question in all events is whether the conduct of respondent is such that the petitioner cannot reasonably be expected to live with her or him. This will enable the court to take into account the subjective disposition of the parties. For example in Oladetohun V. Oladetohun,"[13] the husband who was a man of God petitioned for divorce on the ground that the marriage has broken down irretrievable because the defendant indulged in the use of charms and juju. Adefarasin J. held that the conduct of the wife was such that a reasonable husband who is averse to juju or charms could not be reasonably expected to live with her.

4. Respondent's Desertion.

The Petitioner may show that the marriage has irretrievably broken down by proving that the respondent

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13. Suit No. HD/111/70, (unreported) High Court Lagos, 6/7/71.

has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition."[14] The period of desertion must be continuous i.e. a spouse cannot add up several short periods of desertion in order to obtain the statutory requirement. To constitute desertion some elements has to be proved by the petitioner, these are - the de-facto separation of the parties, animus deserendi, lack of just cause for the withdrawal from cohabitation, and the absent of the deserted spouse.

5. Two Year's separation

The Petitioner may establish that the marriage has broken down irreetrievably by showing that the spouses have not lived as man and wife for a continuous period of at least two years immediately preceding the petition and that the respondent consents to the dissolution."[15] "Living apart" in this context means means living in two separate homes."[16] and is therefor identical with the concept of separation necessary to constitute desertion."[17] Consensual divorce has finally been introduced in the Law. The question that one would ask here is, if the parties themselves agreed to separate why is it necessary that they have to go to

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14. Section 15(2) (d) of the Matrimonial Cause Dcree.
15. Section 15(2) (e) of the Matrimonial Cause Decree.
16. Section 15(3) (e) of the Matrimonial Cause Decree.
17. Section 15(2) (d) of the Matrimonial Causes Decree.

court. They would have simply agreed to divorce each other and that's the end of the marriage.

The couple wishing to divorce under this heading needs only to separate for two years and consent to divorce in order to satisfy the court that their marriage has broken down. The duty of the court in this case is to ensure that consent has been freely given and that the respondent was fully informed about the consequences of the consent.

6. Three Years separation.

The next fact to prove that the marriage has broken down is that the spouses have not lived as husband and wife for a continuous period of at least three years preceding the presentation of the petition."[18] This ground is similar to the previous one except that the period of separation must be at least three years and the consent of the other spouse is not required for the divorce. Both Sections 15(2) (e) and 15(2) (f), bring relief to hundreds of couples who are living in stable illicitunious but are unable to marry because one or both of them cannot secure release from another union.

7. Failure to comply with a decree of restitution of Conjugal right.

A marriage may be regarded as having broken down where the respondent has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Decree."[19]

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18. Section 15(2) (f).
19. Section 15(2) (g).

The Statutory period of at least one year must be continuous, as any intervening resumption of cohabitation would constitute compliance with the judicial decree.

8. Presumption of Death.

A marriage may also be terminated on the ground that one of the parties died. There is no difficulty if the death of the other spouse can be proved as a fact. If however there is no direct evidence of death as in the case where the party has been absent from the petitioner for a long time. The party has to present a petition to the court to have it presumed that the other party is dead and to have the marriage terminated."[20] But before the Court gives a decree of divorce on this, the petitioner has to proof the respondents seven years continuous absence immediately before the petition and that the petitioner has no reason to believe that the other party was alive at any time within that period."[21]

When a spouse has been presumed dead by the Court and a divorce decree has been granted on that assumption, the marrital tie between the spouses is deemed to have been completely severed even if it turns out that the spouse presumed dead is still alive."[22] If, however, the court has only granted a decree nisi and the spouse who was presumed dead is still alive, the judicial decree will not be made absolute."[23]

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20. Section 15(2) (h) of the Matrimonial Causes Decree 1970.
21. Section 16(2) (a) of the Matrimonial Casuse Decree 1970.
22. In such a case the Court can order the maintence of such spouse (if it is the wife). See Deacock V. Deacock (1958) 2 ALL-E.R. 238.
23. Manser V. Manser (1940) 4 ALL E.R. 238.

6.3.2 TIME LIMIT FOR PETITION OF DIVORCE

The Court, will not, unless under exceptional cases entertain any petition of divorce from any other party of the marriage within two years from the time of the marriage. Section 30(1) of the Matrimonial Causes Decree provides:-

> "Subject to this Section, proceedings for a decree of dissolution of marriage shall not be instituted within two years after the marriage except by leave of Courts."

This subsection has reduced the waiting period which used to be four years under the Matrimonial Causes Act 1965 to two years. But the two year rule is not without an exception. In the case where proceedings are based on wilful and persistent refusal to consummate, adultery, or the commission of rape, sedomy or bestiality, the court may grant leave to institute proceedings within the prohibited period. To refuse to grand leave on these cases may cause hardship to the party applying."[24]

The view maintained by Roman Catholic and which is to be found in our statute books that, marriage is a Sacred pack: It is a union of hearts and souls, and must always remain intact and secure; and that words "divorce" should be dropped from the vocablary of human society. A wife and a husband who marry each other should know that nothing except death can separate them

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24. Section 30(3) of Matrimonial Causes Decree 1970.

from each other. Obviously, one is free to say that this law is still existing even though the Law of divorce is officially allowed in our statutes, but the procedure as to how to obtain it makes it very difficult if not impossible. The sanctity of marriage, a necessity for its inviolability and indestructibility is of course acceptable, provided that the relationship of the husband and the wife can be securely maintained in practice; but there arise occasion when compatibility between the husband and the wife is impossible. On such occassions it is not feasible to keep them tied up to gather by force of Law and call it the union of husband and wife.

If every body in the family is respected, divorce is an unpalatable and detestable thing. The Society is responsible for removing the causes and incentives to divorce, but at the same time the Law should not bar the way of divorce for incompatible marriages. The way to get out of the bond of marriage should be kept open for the husband as well as for the wife. This is, actually the view of Islam on this subject. It provides the door by which the husband is to come out of this situation different from that which the wife is to use. Because the right to divorce is souly given to the husband, while the woman has been given the right to redeem herself from an unhappy marriage. In most cases under Islamic Law, it is not necessary to involve courts for the purpose of separating the spouses as we have under English

Law. The husband on his own may divorce his wife, or they may mutually agree to separate.

Every Society has its own structural means of ending a marriage which cannot fulfil it's functions. And yet in every Society marriage dissolution is subject to some social disapproval. It is observed that, "there are probably as many reasons for marriage dissolution as there are for marriage contraction. These reasons spread over a very wide range, stretching from the unavoidable death of a spouse or involuntary barreness to the trivial cooking mistake of burning husband's food or putting so much salt in it, not to mention the man's arbitary dislike of his spouse or capricious preference for another woman who seem more pleasing to him."[25]

6.4 DIVORCE UNDER CUSTOMARY LAW.

Divergent views have been expressed on divorce under customary law. Elias, for example, has declared that "under ancient customary law, marriage was almost indissoluble, as it was looked upon as a parmanent social and spiritual bond between man and wife on the one hand and their respective families on the other."[26] It has also been suggested that divorce is a phenomenon resulting from industrialization."[27] On the other hand, it seems

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25. Abd al-Ati, The Family Structure in Islam (A.T.P. 1977) P. 217.

26. Ground Work of Nigerian Law, P. 288. It should perhaps be emphasized that Elias limits his statement to ancient customary Law. But what exactly is ancient customary Law?

27. E.G. W.J. Goode, World Revolution and Family Patterns, New York (1963), PP. 195 - 199.

to be agreed that in some Nigerian communities, divorce has always been fairly hight and easy to obtain."[28]

6.4.1 THE SOCIOLOGICAL BACKGROUND.

Under Customary Law, marriage is not merely a union between the two individuals involved. It is also, to a large extent, a social contract between the two families. Forinstance in some communities,"[29] after the payment of dowry and observance of other ceremonies, a new wife is formally led to the home of the bridegroom. There, she is formally handed over by a senior member of the family to an equally senior member of the family of the bridegroom, but never directly to the bridegroom himself. The representative of the bridegroom's family welcomes the new bride into the family and makes some presentations to her. Moreover, under most systems of Customary Law, parental consent is a pre-requisite of celebration of marriage,"[30] Complience with this requirement ensures that the bride price to be paid in respect thereof will be dully accepted.

Just as the families of the parties are fully involved in the formation of a customary law marriage, so are they equally concerned with its sustenance and dissolution. When, for instance, there is a serious matrimonial dispute this is usually dealt with by a joint meeting of the two

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28. Op. cit. p. 133.

29. This is common to Bachama, Idoma.

30. Okpanum V. Okpanum suit No E/misc, 2/72(unreported) High Court Enugu. Sept. 11, 1972; Registrar of Marriages V. Igbinomwanhia Suit No. B/16m/72 (unreported) High Court Benin, August, 5, 1972.

families, where the differences are discussed and resolved. Even in urbanized areas, it is usual to refer a serious family problem to a meeting of elders of both parties resident in the city or in the village. The role of the familility in sustaining a marriage is so important that sometimes the union endures more by sheer family pressure than by desire of the parties concerned.

Similarly, the families of the parties are called upon to play an important role in the dissolution of a marriage. As participants in its celebration, they also discharge some functions in its dissolution. When a family disrute is referred to a joint family meeting the assembly may be able to bring the parties back to cordial relationship. . If their efforts in this direction fail, the meeting may be called upon to deal with question of dissolution of the marriage and the consequent refund of bride price.

6.4.2 PROCEDURE.

A Customary Law marriage may be dissolved either by non-judicial divorce, or through the orders of an appropriate court.

1. Non-Judicial Dissolution.

Unlike the law governing the dissolution of statutory marriages the customary law of marriage, of most tribes in Nigeria permits the parties to a marriage under customary law to terminate their marriage without going to court. As already pointed out, the joint family meeting

may provide the machinary for non-judicial divorce. Where the assembly fails in its efforts at reconciliation, it may at the request of one or both parties decide that the best solution in the circumstance is the dissolution of the marriage. On the other hand, it is permissable for party to a customary law marriage to declare formally at a joint family meeting his intention to terminate the marriage and proceed in appropriate cases to refund the bride-price or renounce it.

Non-judicial divorce may come about either by mutual agreement or by unilateral act of one of the parties as mentioned above. However, the availability of the latter varies from place to place. Although a wife of a customary marriage is allowed to terminate her marriage by refunding the bride-price to the husband, in most places in Nigeria the unilateral act of terminating a customary marriage is [illegible] only to the husband. For example, section 8 of the Biu Federation - Native Authority Declaration of Native Law and custom Relating to Marriage and Divorce,"[31] provides:

"8 Husband and wife shall be deemed to be divorced -

(a) Upon the granting of a divorce by a court on application of either husband or wife; or

(b) Upon oral repudiation of his wife by the husband in her presence before two adult male witnesses of full capacity;

(c) Upon repudiation of his wife by the husband in writing signed by himself and dated."

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31. A.N.L.N. 9 of 1964.

In most cases where a husband unilaterally divorced his wife under Customary Law will usually fofeit any claim to return of his bride-price.

2. Judicial Divorce

With the exeption of the former East Central State, Customary and Area Courts in other parts of Nigeria possesses exclussive original jurisdiction to dissolve customary law marriages."[32] In former East Central State, Customary Courts were abolished in 1971 and their jurisdiction transferred to Magistrate and High Courts. Under section 5 of the Magistrate Court Law (Amendment) Edict, 1971,"[33] a magistrate's court has jurisdictinn:

> "To hear and determine matrimonial causes and matters between persons married under Customary Law...."

It is the function of the ccurt after hearing all available evidences to decide whether a marriage should be dissolved or in appropriate cases to declare that actions already taken by the parties constitute legal divorce under Customary Law.

Both Judicial and non-judicial dissolution of marriage exist side by side in most localities in Nigeria. Recourse is had to the courts where the parties or their respective

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22. Section 17(1) (6) High Court Law (N.R.) cap. 49 Laws of Northern Nigeria, 1963; Sec. 9(1) High Court Law(W.R.) cap. 44 Laws of Western Nigeria, 1959.

33. E.C.S.N. Edict No. 23 of 1971. See also E.C.S. Government white paper--official Document No, 7 of 1971 "Integrating the Administration of General Law and Customary Law."

families fail to reach agreement either on the question of whether a marriage should be dissolved ornnot, as for example where a husband refuses to accept a refund of the bride-price he paid on his wife, or where a wife refuses to leave the matrimonial home on being asked to do so by the husband, or on the quantum of the bride price repayable in the event of the comtemplated divorce being accomplished.

The Court at its end, may attempt a reconsiliation of the parties, and usually the method to be used vary from place to place and from court to court. In some places, the courts used to play an active role in trying to get the spouses to settle their differences by setting up an arbitration panel who would try to reconcile the spouses. While doing so, the court will usually ask the wife to go and live with her parents and the husband may be asked to visit her in order to persuade her for the reconciliation. But if the attempt fails, it has no choice but to declare the marriage desolved, and order the repayment of pride-price accordingly.

In the light of what has been discussed above, it is safe to conclude that unlike English or Statutary Law, on matrimonial causes, Customary and Islamic Law marriages may be validly dissolved by non-judicial process. On the other hand, however, in some parts of Nigeria also, the right to non-judicial divorce under Customary Law has been explicitly abrogated by written declarations of customary laws. This is achieved under various laws

which allow Local Government Bodies in some parts of Nigeria make written modifications of native law and custom of the area."[34] This power has been exercised in several parts of the Northern State. Thus, under such modifications in Borgu [35] Idoma,[36] and Tiv [37] divorce can only be granted by customary court. The introduction in to the customary law rules of divorce of this requirement will certainly go along way to ease some of the existing problems. A written record of a divorce obtained under customary law, will to a large measure reduce the burden of establishing the dissolution of a marriage and the time the divorce was affected.

6.4.3 Grounds for Dovorce

Customary Law puts more emphasis on the fact that a marriage has broken down irretrievably than on the individual responsibility of spouse for that failure. Technically, there are no grounds for divorce under Customary Law. Dr. Obi declares: "There are strictly speaking, no grounds for divorce, if that term is used in its technical connotation of facts which requires to be established before divorce could be granted by the court."[38]

34. Northern Region Native Authority Law No. 4 of 1954, section 48; Western Regional Local Government Law, cap. 68, Section 78.

35. Section of the Native Authority(Declaration of Borgu Native Marriage Law and Custom) order, 1961(N.A.L.N. 52 of 1961).

36. Section of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) order, 1959(N.A.L.N. 63 of 1959).

37. Section 5(2) of the Native Authority(Declaration of Tive Native Law and Custom) order, 1959(N.A.L.N. 149 of 1955).

38. Op. Cit. p. 366.

Kasunmy and Salacuse are equally emphatic on this. They said, unlike the law governing the dissolution of a statutory marriage, customary law generally speaking, does not contain a set of grounds for divorce which must be proved."[39] However, there are number of reasons and situations which are generally regarded as providing sufficient moral cause for dissolving marriages. They include, inter alia: adultry (particularly by a wife) though, this is not a strong reason for dovorce to many communities where in most cases the husband would prefer to claim compensation from the other man,[40] impotency or sterility on the part of the husband or sterility on the part of the wife since, one of the main objects of marriage is the procreation of children. Witchcraft, IU-treatment and physical cruelty considered excessive, in ability to maintain wife and children on the part of the husband or failure on the part of the wife to carry out her domestic duties; and finally, if one spouse has contracted a dangerous or incurable desease, it could often be a good reason for divorce."[41]

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39. Op. Cit. p. 175.

40. Adultery is an offence under section 387 of the Northern Nigeria Penal Code: cap 89 Laws of Northern Nigeria 1963. Obeya V. Soluade and S.G. for Benue and Plateau State SC 125/69 March 6, 1970(held that section 387 of the Penal Code does not contravene the Nigerian constitution.

41. At the various customary courts, I observed divorce cases and found that although some of these are mentioned, but there could be other underlying factors. A good number of divorce seekers are women who if well investigated are discovered to have an admirer seeking for their hand in marriage.

I happened to witness one practical case of divorce in one of Idoma village Oji. The case was between Enenu and her husband Otene. Otene married Enenu in 1971, but after five years of their marriage he became impotent. Enenu requested to be allowed to return the bride price. Otene asked her to remain in his house, that he would allow her freedom outside and would also give her material needs. Yet Enenu refused. When attempts to convinced her to stay failed, she was allowed to return the bride proce thereby finalizing the divorce.

Except where the husband dicides to forget the bride price,[42] it has to be refunded to the husband to finalize a divorce. Until this is done divorce would be regarded as "incomplete" since the woman will not be allowed to marry where the new husband would be asked to refund the dowry of the former husband. On the other hand, among the tribes who see non-undement of bride-price as the continuation of the existence of the marriage in law, the woman has to wait untill the bride-price is refunded. If she does not it is illegal and the former husband can lay claim to any pregnancy that may result there from. Apart from being illegal remarriage, when the bride-price has not been returned, carries its own social stigma, a situation which every divorce woman wants to escape.

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42. Under Nupe Custom where a woman is divorced and the husband refused to demand the refund of bride-price such cases are referred to as (towo-towo) meaning she is divorced with the money. Such action may potray how notorious the wife is and that the husban hates not only herself but also her wealth. This is a stigma for the woman in Nupe Land, because people repeatedly say such a woman has been divorced together with bride-price.

6.4.4 DEATH OF HUSBAND UNDER CUSTOMARY LAW.

The death of the husband does not necessarily dissolve a marriage under Customary Law. Under most systems of Customary Law, the marriage is not considered dissolved when the husband dies leaving the wife surviving him;.however, if a wife dies, Survived by a husband, the marriage is dissolved. The majority of the Northern Nigerian Tribes practice levirate marriage whereby the widow will be taken over as a wife by a brother to her deceased husband or his son without payment of any thing as bride-price. The believe is that the bride-price which was settled on her by the deceased husband is still existing. But again in some of the tribes this rule seems to have been relaxed since they are no more forcing the woman to do it. It is only when she decided to do so. If she decides to marry an outsider, she will simply return the bride-price to the family of the deceased, the exact amount pending upon where she has had children by the deceased. She may also refuse to marry anyone and still continued to live in her husband's family's compound if she has children with the deceased husband, especially if she is old.

6.5 DIVORCE (TALAQ) UNDER ISLAMIC LAW

6.5.1 PRE-ISLAMIC PERIOD

Divorce (talaq) among the Jahaliyya Arabs belongsed to husband alone. The power was unlimited. A husband could divorce his wife as many time as he liked and take her back by revoking the divorce, for any reason or without any reason. A husband could, if he were so inclined, swear that he would have no intercourse with his wife, though still living with her. This is simply to punish her. There were about four different ways or types of dissolution of marriage known in pre-Islamic Arabia. These were (talaq) divorce, Ila, Zihar and Khul'u or Mubarra. A woman if seperated through any one of these four ways was free to re-marry after the expiration of waiting period known as Idda. This was to ascertain the legitimacy of the child if any. Some time this rule of Idda was not be followed. For if a pregnant wife was divorced she was allowed to marry another person on condition that the child if born would belong to the former husband. It was also interesting to note that the period of idda in case of death of husband then was one year.

6.5.2 THE ADVENT OF ISLAM AND ITS REFORMS:

When Islam came, it looked upon these customs of divorce prevailing in that period with extreme disapproval, and regared their practices as unjust, and therefore introduced some reforms on the prevailing practices.

For example, Islam allowed the exercise of the power of divorce to husbands under certain conditions. Islam also limits the number of divorces to three. Permitting the divorced parties three distinct and separate periods within which they might endeavour to became reconciled; but should all attempts at reconciliation prove unsuccessful, then in the third period the final separation became effective."[43] Among the reforms introduced by Islam was also that. not only restraining the unlimited power of divorce by the husband, but it also gave to the wife the right of obtaining the separation on reasonanle grounds. Also some guidelines were made as to how and when the divorce is going to be effected.

It is natural that there should be differences of opinion, differnces of thought, differences of test, differences of temperament and inclination and differences arise disputes which might develop grudges between the parties and this situation brings about unbearable life. In such circumstances spouses are always advised to keep down their tempers and be patient. Theyshould be tolerant and treat each other honourably for the Holy Qur'an says:

> "Live with your wives on a footing of kindness and equity. If you hate them it may be that you dislike a thing while Allah brings about through it a great deal of good."[44]

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43. Amer Ali, The Spirit of Islam, (London, 1965) pp. 243-244.
44. Qur'an 4:19

Qur'an in another verse says:

> 'If a wife fears cruelty or desertion of her husbands part, there is no blame on them if they arrange amicable settlement between themselves and such settlement is best."[45]

The Prophet(S.A.W.) in many traditions ordered spouses to be patient and tolerant. One of such traditions reads:-

> "The best of you is who is best to wife."

If the parties fail to compromise between themselves arbiterators should be appointed to look into their differences.

For the Holy Qur'an says:-

> "If you fear a breach between them twain, appoint (two) arbiters, One from his family, and the other from her's if they wish for peace, God will cause their reconciliation ....."

This is an excellent plan for settling family disputes, without too much publicity or mud-throwing or resort to the Courts. Legal system of many Countries recognise this plan. But it is pity that Muslims do not resort to it universally as they are supposed to. The arbiters from each family would know the peculiarity of mind of both parties, and would be able, with God's help to effect a real reconciliation.

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45. Qur'an 4:128.

If all steps of reconciliation fails and the spouses have come to a point where they can no longer live tog ther in peace and harmony then there divorce is allowed. Divorce is therefore a remedy, an exceptional rule which chooses the lesser evil and avoid the greater one:

> "But if they disagree and part, God will make them richer out of his abundance for God is that who care for all and is all wise." [46]

6.6 DIVORCE (Talaq)

6.6.1 DEFINITION

Talaq is a verbal noun from the Arabic verb Tallaqa, Yutalliqu which means to untie, to free. Technically Talaq is a unilateral power vested in a Muslim husband to repudiate his wife as and when he wishes. The word Talaq, "is usually rendered as repudiation; it comes from a root 'tallaqa' which means to release (an animal) from a tether; whence, to repudiate the wife, or free her from the bondage of marriage. In law, it signifies the absolute power which the husband possesses of divorcing his wife...."[47]

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46. Qur'an 4:130.

47. Qur'an 16:106 see also Ibid 6:145.

6.6.2 The Premissibility of Talaq.

Based on many verses of the Holy Qur'an and numerous traditions of the Prophet (Peace be upon Him), the Muslim jurists differ on the permissibility or non-permissibility of talaq. Ibn Umar reported the Prophe (S.A.W.) as saying, "divorce (talaq) is the most detestable in the sight of Allah of all permitted things" and "he who destroys between a wife and her husband is not part of us". The Majority view is that talaq is permitted when there is a genuine reason for it. Those that play with it or resort to it as an excuse of changing women like chinging their shirts are cursed in these words of the Prophet (S.A.W.), "Allah has cursed the taster and the person who divorces so often." The whole idea is that marriage being a mithaqun ghaliz (strong Covenant) should not be taken lightly. Depending on the nature of the genuine excuse that permits divorce, the jurists went on to enumerate examples of circumstances thinking faculty and self control and therefore they are not fully liable. In other words Talaq pronounced by them is invalid and legally void.

Lastly, the majority of the jurists held the jester or the person who thoughtlessly, in a joke pronounced talaq as liable and therefore his talaq is valid and effective. They relied on a tradition of the Prophet (S.A.W.) reported by Trimidhi and Ibn Majah to the effect that joke in a divorce is effective. The

mentioned in the Qur'an meaning the same thing. The Zahiris went further to say whether direct or indirect only the use of the above three words make a talaq valid."[50] This view is definitely making it unnecessarily difficult for non Arabic speaking people who may not even have an idea as to how to use such words in sentences connoting divorce. According to Malik and Shafi'i, where the direct method is used, intention is not a necessary condition as it is where the indirect method is employed. The Hanafis on the other hand do not consider intention as the test of validity or otherwise of the talaq but insisted on looking at the circumstance to assertain whether the words used in such circumstances can amount to talaq as such. An example is as narrated by A'isha "when the daughter of John entered upon the Prophet (S.A.W.) when he called her, she said "I seek refuge in Allah from you" then he said to her, "you sought refuge from something big, go back to your people." Here, the expressions used by the Prophet are surely construed as meaning and intending a talaq due to the circumstances, whereas in the case of Ka'ab. Malik when he is being disciplined after his refusal to go to the battle front for no reason - he is told that the Prophet (S.A.W.) has instructed you to obstain from cohabitation with your wife. He replied'Do I divorce her or what should I do?' 'No just abstain from cohabiting with her and do not approach her'.

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50. See Rus, Obin, Bidayat al-Mujtahid Vol. II (Dar al-Fikr).

Then he said to his wife, "go back to your people." Here the expressions used by Ka'ab are not interpreted as intending a talaq due to the peculiarity of the circumstances.

2. By Writing.

Where the talaq is handed to the wife in a documentary form the writing should be clear, unambiguous direct.

3. By Sign or Gestures.

Where the talaq cannot be pronounced by words of mouth or writing cannot be employed, signs or gestures made by the husband as denoting talaq are acceptable as valid and legally effective. This method is generally so resorted to by the deaf and the dumb.

4. Through a Messenger.

Where the husband sends a messenger to convey to the wife the talaq, it is also accepted as legally valid and effective once pronounced by the messenger. is seen as an agent acting under the authority of his principal. However all the legal requirements to Tawkeel (delegation) must be present.

5.6.5 Witnesses to Talaq.

When Talaq is pronounced, is it condition essential in its validity to have people to witness it or not? Majority among the Muslim jurists answer in the negative. They are of the view that even though no one witnesses the pronouncement, it is still valid and effective. Their argument is that talaq is

exclusively the husband's right which Allah has placed in his hands. Therefore the requirement of witnesses is recommendatory and not mandatory. The Imamiyya Shari'a insisted that the requirement of witnesses is mandatory and talaq is void without it. They relied on the verse in Surat al-Talaq that is saying, ... and take for witness two persons from among you endued with justice and establish the evidence (as) before God....."[51] It is further reported that Ali b. Ali Talib (may Allah be pleased with him) is among the Sahaba (companions) who insisted on witnesses as a condition of validity in talaq. With Ali b. Abi Talib insisting on the requirement of witnesses as a condition of validity for talaq, it is very clear why the Shari'a also insisted on the same.

6.6.7 Conditional Talaq.

Where the talaq is pronounced in simple terms without any condition, it takes effect from the time of pronouncement. A situation may arise where the talaq is pronounced subject to a certain happening or event to take place in the future. All the Muslim jurists accept it as valid as far as (a) the condition on which the talaq is suspended is a condition possible of happening. For Example where the husband says, "if you go out of this house tomorrow, you are divorced." Or "if the sunsets, you are divorced." Here, the talaq takes effect the moment she steps out of the house or

51. Qur'an 65:2.

the sun sets. (b) The wife is eligible to or subject of talaq at the time the talaq is to take effect."[52] In the first example, the jurists are of the view that even if by his pronouncement the husband merely intends to prevent her from going out of the house, there is still a lid talaq if she goes out. Ibn Taymiyya and his student Ibn Quyyim said there is talaq only if by his pronouncment, he really intends talaq, otherwise there is none."[53]

6.6.8 Procedure of Talaq.

According to the procedure of its pronouncement, talaq is classified into, Sunna and contra-Sunna (bid'i).

6.6.8.1 Sunna Talaq.

The Sunnah talaq, is the talaq done according to the procedure directed by the Prophet (S.A.W.). Three important conditions are laid down before the pronouncement:-

1. The wife must be in a state of 'fresh purity'. That is, she must be fully recoverd from the menses of the regular menstruation and the usual post-natal fluxes, whosemaximum time spans are about 15 and 40 days respectively.

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52. See Sabiq. S., Fiqh al Sunnah Vol.I[1] (Beirut) 1977 p. 224.

53. Ibid p. 224.

2. The wife must not have had an intercourse at any time during this period of fresh purity, which covers the whole interim between the the monthly courses.

3. The formula must be said only once.

The first two conditions are laid down for the following obvious reasons:-

(a) 'Fresh purity' is insisted upon because menstruation is called by the Qur'ān "hurt"; its' tern is a difficult time of fatique, depression, irritability, tension etc. Much of this is due to the wife's physical condition, which makes her sexually both undesirous and undesirable, and also to the husbands unfulfilled needs. Intercourse is forbidden during such times of impurity. All these factors may lead some parties to act hastily or misjudge each other. It is r quired therefore that they wait for these periodical difficulties to pass and then act, if they must, under normal conditions. Secondly when the wife enters her period of purity, she is usually fresh and pleasantly companionable, both desirous and disirable, more consideration and responsive. She has not only the capacity, but also the opportunity to strengthen the marriage tie and command the husband's love, compassion, devotion. If, inspite of this, there is a desire to dissolve the marriage, it will be, presumably, for some serious reason other than a passing fatigue, momentary depression, or causal unfulfilment.

A divorce contemplated under these congenial circumstances is unlikely to be rash, thoughtless, or irresponsible."[54]

(b) The iddah period is shortened for the wife. Allah most High say, "O Prophet, when ye do divorce women, divorce them at their prescribed periods....."[55] This verse is interpreted to mean when they are in a state of fresh purity before having intercourse with them. It was reported that the Prophet (peace be upon him) instructed Abdullahi b. Umar to return his wife when he (Abdullahi) divorced her while she was having her menses."[56]

However, before this final breaking-point of Talaq is reached the parties are strongly advised to first try and exhaust all possible peaceful means of reconciliation some of this means as instructed by the Qur'an, is beautifully summarised by Abd al-Ali thus; ".... should conflict over or covert, originate with the wife, the husband is directed to consider the whole situation carefully, to search his own soul, to judge his wife as a total person; to act patiently, responsibly and charitably.... 'if the conflict becomes chronical and the husban fears the wifes' defiant recalcitrance, he is instructed to follow a phased disciplinary course of three steps.

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54. Abd al-Ati, The Family Structure in Islam (A.T.P. 1977) p. 228.

55. Qur'an 65:1.

56. Abd al-Ati, The Family Structure in Islam (A.T.P. 1977) p. 229.

He should allow sufficient time intervals and move from one step to the next only after having tried in earnest the previous one and found it of no avail. This disciplinary course has three phases:

i. Kind exhortation,

ii. temporary abandonment in bed or deliberate abstinence from the usual sexual intimacy; and

iii. symbolic beating without inflicting any physical harm or injury.... fears his cruelty, desertion, or aversion, it is their joint obligation to settle their differences together for, as the relevant Qur'anic statement has put it, "peace is best". She may try her own way to make peace, and he should respond to her initiative. The two together must co-operate to solve their internal problems between themselves..... should these private measures, alternatives and remedies fail to bring about a viable harmony, one final detour must be taken before the breaking-point of divorce. A family council of two arbitrators representing both sides shall be selected to look into the situation with a view to settling the dispute. If they see any possibility of reconciliation and so recommend, it should be attempted. But if they recommend a divorce as the only solution after the failure of arbitration, then a divorce may be entered into, unless the principals choose otherwise. Finally, if a divorce is to be pronounced in accordance with the Sunnah, all the other necessary conditions enumerated above must be fulfilled...."[57]

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57. Qur'an 65.1.

1. Advantages of Sunnah Talaq.

This talaq does not terminate the marriage completely, much less does it necessarily entail any resentment or unkindness, of any kind. The Husband is unequivocally obliged, among other things, to keep the woman in the same home or at least furnish her with a comfortable residence which will be easily accessible to him. She may not be evicted from her home nor should she leave it, unless she has committed a manifest offence of indecency."[58] Moreover, he must provide for her adequately as if no divorce had taken place. These particular obligations continue through the probationary 'waiting period' which usually lasts for about three months, except if the wife is pregnant. In this case, the waiting period expires with the termination of the pregnancy. If pregnant, the woman is forbidden to conceal her condition,"[59] because pregnancy may be a good one for both of them. "Keeping" the woman in this way, under the manâI eye and conveniently accessible to him or discovering her pregnancy may change the situation because, to paraphrase the relevant Qur'anic passage, "who knows? Perhaps God will bring about thereafter some new congenial situation."[60]

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58. Qur'an 2.228.

59. Qur'an 65:1.

60. Abd al-Ati, The Family Structure in Islam (A.T.P. 1977).

If during the probationary period there develops a desire for conditions it should be fostered. The man resume his full marital status by simply revoking his previous pronouncement in words or indeeds e.g., by paying the woman a suggestive compliment, kissing her etc. To facilitate the reunion, nothing else is required other than this initial revocation. If the probationary period expires without revocation, the divorce becomes ultimate in the sense that she becomes free either to marry a new or reunite with her former husband. But this reunion requires a new marriage contract with all the standard requisites, a stipulation which may deter more rash actions."[61]

The Sunnah Talaq can finally be said to have been introduced to eliminate the pre-Islamic abuses of marital relations and to limit the husbands arbitrary and unfettered right of divorce. Previously, the wife's physical or emotional condition was immaterial to the husban The wife was kept in a vicious circle of indefinite suspence, she was neither fully married nor fully divorced to enable her re-marry another husband or her choice, The circle runs thus; divource pronouncement, an almost completed iddah, then another divorce pronouncement, followed by another almost completed idda, then another divorce pronouncement etc. All such practices were forbidden in Islam. The relevant Qur'anic provisions run thus:

> "Divorced women shall wait concering themselves for three monthly periods. Nor is it lawful for them to hide what God hath created in their

61. Agreed upon. See also Pavdatun Nadiyya Vol.7 p. 49.

wombs, if they have faith in God and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation..... A divorce is only permissible twice; After that the parties should either hold together on equitable terms or separate with kindness ..... So if a husband divorces his wife (rrevocabily), he cannot, after that re-marry her until she marries another man and got divorced. In that oase there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by God, which He makes plain to those who understand. When ye divorce women and they fulfill the term of their (iddah) either take them back on equitable terms or set them free on equitable terms. But do not take them back to injure them or to take undue advantage. If anyone does that, he wrongs his own soul..... When you divorce women and they fulfill the term of their (iddah) do not prevent them from marrying their (former) hushabd, if they mutually agree on equitable terms. This instruction is for all amongst you, who believe in God and the Last Day. That is (the course making for) most virture and purity amongst you. And God knows and ye know not." (Qur'an 2:228 - 32.)

6.6.8.2 The Bid'i (Contra-Sunnah) Deviant Talaw.

Any pronouncement of Talaq which is not made in accordance with the Sunnah procedures, as outlned above is considered as deviant and contra-Sunnah, or bid'i which is an act of deviation in the disapproved direction. Such a pronouncement is both religiously forbidden and legally void, according to some schools of Law. The majority of the jurists hold it as relgiously forbidden, but formally and legally valid. The majority argue that this type of Talaq is also covered by the verses on talaq.

The minority including Ibn Taymiyya, Ibn Hazm and Ibn Qayyim argue that it is not only religiously forbidden but also legally void and of no effect whatsoever. They based their reasons for holding it coid on:

(1) It is not the talaq that Allah ordained by His saying "... Divorce them with their Iddah ...."

(2) When the Prophet (peace be upon him) said to Umar while referring to Abdullah. Umar who divorced his wife while she was in her period of menses, "ask him to return her." It shows that the Prophet was annoyed for he is never annoyed with anything permissible in the sight of Allah.

They further argue that the fact the Bid'i Talaq is not in accordance with the stipulation of the Sunnah makes it void as reported.

The Prophet (S.A.W.) clearly said, "Any Bid'a (deviation) is say here." It is also narrated by A'isha (May Allah be pleased with her) that the Prophet (S.A.W.) has said "Any work or deed which is not in accordance with our instructions is rejected."[62]

The history of the Bid'a Talaq can be traced as far back as the second decade of Islam when some people began to misuse their right of talaq. Untill then, it has been accepted that if a man told his wife that she was "divorced thrice", the word thrice is counted only as one revocable talaq. When some people used this t thrice formula carelessly, Umar, the second Caliph reacted with indignation. He consulted with his companions and it was decided to consider such a formular as a triple irrevocable divorce. The interesting fact here is that this new provision was conceived as a punitive measure to discipline the divorcing men and protect the divorced women. A few centuries later people like Ibn Taymiyya observed that many people were using divorce formular like ordinary casual forms of oath. But he realised that the breaking of an oath was easily expiable by freeing a slave, whereas the breaking of a "divorce oath" meant the breaking of a marriage and a home. So he ruled that such divorce oaths were void and inconsequential as far as the marriage bond was concerned. He also opposed the decision of Umar and other leading schools of Law with respect to the "thrice formular" counting it as one revocable Talaq, not three.

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62. Agreed upon. See also pavdatun Nadiyya Vo1.7 page 49.

What Umar had considered disciplinary measures against irresponsible men turned out with the change of time and conditions to be harmful to innocent women. Ibn Taymiyya sought, by his rulings to re-dress his situation.

The bid'a talaq is rejected as regards the triple divorce but not as regards pronounce ment during menses. Almost all the Muslim countries that introduced reforms in the area of divorce, have rejected triple talaq as viod and ineffective, counting it as only one single revocable talaq.

It is reported that right from the beginning Abdullahi b. Umar, Sa'id b. Musayyib and Dawus had held Bid'a talaq as void. The Shari'a lying on its' rejection by the Ahl al-Bait also rejected it as void. The Zahiri School also rejected it and so also He jurist like Ibn Aqil of the Jabali school.[63]

2. Talaq During Pregnancy.

The majority view is to the effect that Talaq is valid and effective at any time during the subsistance of pregnancy. Can the three talaqs all be said during the pregnancy? The Sunni schools, excluding the Hanafis answered in the affirmative. Abu Hanifa and Abu Yusuf said yes, but with a month interval between each pronouncement, while Muhammad and Zafar are of the view that only one Talaq can be said during the pregnancy and the rest after its termination.[64]

63. Sabiq, S. Fiqh al-Sunnah (Beirut 1977) P.226 - 7.
64. Mukhtasar Sunnah Vol.p.94.

3. Talaq in Death-Sickness (Mard al-Mawt).

Talaq pronounced by the husband during a sickness from which he died is regarded as valid by the majority of the jurists. They only differ on the question of whether the wife can inherit from such husband. The leaders of the four Sunnah schools excluding Imam Shafi'i are of the view that she can inherit from such a husband if he dies during her iddah period. The Hanafis' say she cannot inherit if he dies after the iddah period, while Malik and Ahmad Ibn Hanbal say she can inherit even if the death occourd after her iddah period. Some of the jurists, notably Imam Malik, say if it is the wife who dies even during her iddah, the husband will be prevented from inheriting her.

The interesting thing to note here is the length the jurists can go to protect the interest of the wife. It is not common for some impious and unGodly men to divorce their wives when they are seriously sick just to prevent such innocent women from inheriting them.

6.6.9 Revocable and Irrevocable Talaq.

According to it's effect Talaq is divided into two types; the Talaq Raj'i (revocable) which permits revocation and resumption of marital relations and the Talaq Ba'in (irrevocable) which is considered ultimate in ending the marriage relationship. The irrevocable Talaq can also be either the type that allows resumption of marital relation with a new marriage contract between the couples or one that allows remarriage after the wife had married

and consummated the marriage with a third party.

6.6.9.1 Revocable Talaq (Talaq Raj'i).

Talaq is revocable where it is pronounced to a woman whose marriage is consummated:

(a) For the first or second time.

(b) not on any material consideration.

This is based on the saying of Allah Most High. "A divorce is only permissible twice, after that, the parties should either hold together on equitable terms or separate with ....."[65]

For the Talaq to be revocable, the law provides that the marriage must have been consummated. This is because with out corsummation, there is also no idda for the woman and return or revocation is only possible during and before expiration of iddah period. This is also based on the Qur'anic provision, "O ye who believe, when... ye divorce them before ye touched them, no period of iddah have ye to account in respect of them...."

a. Method of Revocation.

Revocation can be effected by express words, like where the husband says 'I have revoked my Talaq', or by implication like cohabitation with the wife or even its' preliminaries like kissing it is also agreed by the majority of the jurists that revocation like the initial talaq, is valid and effective without witnesses.

b. Consequences of a Revocable Talaq.

A revocable talaq does not end the marriage relationship. The marriage becomes dissolved only when the iddah

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65. Qur'an 2:229. See also 2:228 and 2:230.

period expires without reconciliation. The husband continues to provide for her full maintenance as if no Talaq had taken place. She is not to be rejected from the house nor is she to leave on her own.[66] The husband has the right to revoke the talaq and take her back at anytime within the iddah period.[67]

6.6.9.2 Irrevocable Talaq (Talaq Ba'in).

This type of Talaq arises under the following circumstance:

(a) First or second revocable Talaq if not revoked before the expiration of the iddah period.

(b) Talaq pronounced on material consideration.

(c) Talaq before consummation, and

(d) The pronouncement of the third Talaq.

A revocable Talaq turns into irrevocable by the expiration of the iddah period. A Talaq based on release for monetary or other material consideration is also irrevocable; So; also, is a talaq pronounced before consummation irrevocable, because, as said earlier, the wife has no iddah to serve. All these three cases have the same effect in terms of the chances of re-marriage between the couples. The couples can resume marital relation again by a new marriage contract which can take place anytime, they like. This type of irrevocability is termed 'imperfect' (Ba'in Bainuna Sughra). The distance between the couples is said to be short, because re-marriage is possible without much delay or difficulty.

The third pronouncement of a talaq terminates the marriage contract immediately, and the distance between

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66. Ibid 2:229. See chapter 3 for a full discussion.
67. Ibid, 33:49.

the couples becomes long. This is because re-marriage between them is only possible after the wife marries a third party and after a divorce from him if they are still interested she can go back to the first husband with a new marriage contract. It is clear that the irrevocability here is 'perfect' and is termed "Ba' in Bainuna Kubra."

2. Tahlil

The intervening marriage with a third party and its consummation is what is termed tahlil. Meaning, to make lawful the wife for the former husband who divorces her for the third time. This condition of Tahlil is based on the saying of the Most High, "So if a husband divorces his wife (for the third time), he cannot, after that, remarry her until after she has married another husband. ..."[68] This marriage should not be arranged solely for the purpose of making her lawful to the first husband. The Prophet (S.A.W.) has cursed all the parties to this type of arrangement. There must not only be a marriage, but consummation must have taken place in full as the Prophet, (S.A.W.) said to the wife of Rifa'a. "No! (it satisfies the condition of the law) only when you have tested his manliness and he has tested your womanhood"[69] i.e., sexual intercourse must have taken place between you. This measure which as observed by Abd al-Ati, "was meant to be a disciplinary chect against the thoughtless, rash, and a release for the helpless innocent has

68. Ibid, 65:1.
69. Ibid, 2:228.

become the subject of condemnation, abuse and disgust. Sometimes, thriced divorced women are humiliatingly married off casuistically to invalid or minor persons, who are forced or bribed to divorce them immediately so that they will become, by the end of the waiting periods, lawful once again to their first mates. This practice is absolutely contrary to the teaching of Islam and is unanimously condemned. A marriage which is contracted with the explicity or implicit stipulation of tahlil is both religiously forbidden and legally void, according to the majority of jurists. Other jurists consider the stipulation of tahlil forbidden and void but marriage itself is valid, and no party may be forced to dissolve it against his or her wish..... Moreover, the Prophet (S.A.W.) is reported to have said, ... "condemmed by God are the second as well as the first husband." This condemnation is inflicted both upon the man who marries a thrice-divorced woman intending only to divorce her in order to legalise her reunion with her first husband, and upon the men for whom the legalisation is intended."[70]

6.6.9.3 Delegated Talaq (Talaq al-Tafweed).

Talaq, being the right of the husband, can either pronounce it himself, or delegate the right of pronouncing it to another person on his behalf and under his instruction. It is unanimously agreed that where the right is delegated to the wife she can exercise it anytime she likes.[71] The basis of this is the saying of Allah Most High,

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70. Ibid, 2:230.
71. Narrated by Bukhari and Muslim.

"O Prophet say to thy consorts, if it be that ye desire the life of this world and its' glitter, then come! I will provide for your enjoyment and set you free in a handsome manner. But if ye seek God and His Apostle and the home of the Hereafter, verily God has prepared for the well-doers amongst you a great reward."[72] It was further reported that on the revelation of this verse the Prophet (S.A.W.) read it to all his wives asking them to decide and they all promptly decided to choose Allah, His Apostle and the Last Day by remaining married to the Prophet (S.A.W.)[73]

There seems to be unanimity on what number of Talaq take place when the wife exercises the power delegated to her. It iscounted as one single revocable talaq even if she purported to have done three.[74] The delegation can be done either during the contract of marriage or after. And, delegation once made can not be retracted.

6.6.9.4 Number of Talaqs.

In a properly consummated marriage, the husband becomes entitled to a maximum of three talaqs after which revocation and return is not allowed. It is unanimously agreed by the jurists that pronouncing the three talaq at one and the same time is forbidden.

Even though all the jurists have agreed on the blame worthiness of pronouncing the three talaq at one sitting. they differ on some issues regarding it. These differences can be summed up as (a) Is to (a) is 'yes' then, are

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72. Qur'an 33.28-9.
73. The Zahiris and Ibn Hazm did not recognise delegation to the Wife as valid.
74. Abd al-Ati, The Family Structure in Islam(A.T.P. 1977 page 234-5.

the whole three pronouncements counted or is such pronouncement counted as only one revocable talaq?

As regards the first question, the majority view is that it is valid and legally effective, they only differ on the second question; some say it should be counted as three separate talaq while some say it will be counted as only one. Those that see it as three separate Talaq argue that all the verses of Talaq in the Qur'an,"[75] talk in general terms without specifically insisting on, one, two, or three pronouncements at a single or several sittings. They also relied on certain traditions that pointed to the Prophet (S.A.W.) as impliedly recognising the three pronouncement in one sitting as three separate talaq. This is the view of the leaders of the four Sunnah Schools of Law.

The group that argue that only one Talaq should be counted relied, as their authority on traditions, reported Muslim Ahmad and Abu Dawud and on historical facts. The tradition runs thus, Ikramah reported, on the authority of Ibn Abbas that, "Rukanah divorced his wife by three pronouncements in one sitting. He later regretted and informed the Messenger of Allah (S.A.W.). The Prophet (S.A.W.) asked him, 'how did you divorce her?" He answered "thrice" he (the Prophet asked him again "in one sitting?" And he again replied 'yes'. The Prophet (S.A.W.) then said "This is but one. You can return her if you like." He (Rukanah) then returned her.

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75. Bukhari, Muslim, Abu Lawud, Tirmizi, Nasa'i and Ibn Majah.

It was reported that it was Umar the second Caliph who ruled that three pronouncements at one sitting will be counted as three separate talaq."[76]

Suppose more than three pronouncements are said at one sitting, how many talaqs will be considered? Umar b. Khattab reported to count it as only one while Ali b. Abi Talib counted it as three. Malik, counted it as three while Imam Shafi'i says it will be the number intended by the husband.

To conclude this chapter we have said, at the beginning of this study that this method of talaq is the most popular and practically resorted to among the Muslim community of Northern Nigeria. What is probably needed here is a strong backing by the authority to curb the abuses by the husband and to alleviate the suffering of some of the views that happen to unfortunately fall under such men. Our suggestions are contained in the last chapter.

6.6.9.5 Power of the Woman to divource

At this juncture, it is necessary to mention one thing, that is, up to this time all our discussion has been about the fact that divorce is a natural right peculiar to husband. Nevertheless, some times and under certain circumstances, the wife also may have such rights. Thus, in the view of Islamic Law, a woman has no inherent natural right of divorce, but as a stipulatory right, namely in the form of condition contained in the marriage contract, she may have that right. The husband, may confer on his wife the power of pronouncing divorce (talaq)

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76. For a detail discussion see Sayyid Sabiq Fiqh al-Sunnah Vol. II (Beirut 1977) p. 241-4.

and thereby dissolving the marriage. Once he has conferred such power, he cannot afterwards revoke it and will depend upon the wife whether to exercise it or not. Such conferment of power is called tafwid or delegation. The delegation may be one of the following ways: 1.

1. al-ikhtiar, meaning, the husband saying to the wife "choose for yourself" or "divorce yourself".

2. al-amru bilyadi, the husband saying, "your business is in your hands" and

3. al-mashi'at, the husband saying, "if you wish divorce yourself."[77]

I want to submit that I do not subscribe to views advocated by some writers in some Islamic countries under the pretex of social reform, that the exercise of the "power" of divorce should be completely transferred from the hand of the husbands and vested in the court. Such a view is wholly inconsistent with the sharia scheme of just distribution of rights, powers and duties between husband and wife. The reason why husband has always been empowered to pronounce divorce is clearly stated in the Holy Qur'an, where it provides in Surat al-Talaq:

> "O Prophet when you divorce women, divorce them at their prescribed periods and count (accurately) their prescribed periods. And fear

77. Abdurrahman Al-Jaziri Fiqh ala mathalib al arba'a Vol. IV p. 376.

> Allah your Lord; and turn them not out of their houses, nor shall they (themselves) leave except in case they are guilty of some open lawness....."[78]

The address in this verse is clearly for the whole Muslim community and this understanding has been drived in the address in the following phrases

i. "When you divorce women"

ii. "Divorce them at their periods",

iii. "Count their periods, and

iv. "Turn them not out of their houses.

Therefore any suggestion which tend to remove the divorce from the hands of the husband is not only unacceptable, but contrary to the Qur'anic injuction itself. In addition to this, economic wise, the husband is under an obligation to pay sadaq (dowery), as a condition precedent to the enforcement of the contract, and to maintain the wife irrespective of her wealth or recurrent income. Moreover divorce entails post facto obligations such as maintenance of the wife during retreat.

While giving the husband the right to determine the marriage relationship, Shari'a has made it clear that indiscriminate use of such right is abhorrent. At the same time frivolous recourse to divorce is bound to reduced by the post facto obligations created by such divorce such as maintenance during the wife's idda and

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78. Qur'an 65:1.

> "If a wife fears cruelty or desertion on her husbands part, there is no blame on them if they arrange amicable settlement between themselves and such settlement is the best....."[79]

If still the parties fail to compromise, they are advised to seek reconciliation through the intervention of arbiters representing each side. The Holy Qur'an reads:

> "If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their reconciliation; for Allah has full knowledge, and is acquainted with all things."[80]

From these and other verses and many Prophetic traditions, we hardly used to emphasize that the above procedure in addition to religious disapproval and the social stigma attached to divorces, will work against hasty divorces. But the only problem is that muslims do not resort to it universally as they should. The arbiters from each family would know the peculiarity of mind of both parties, and would be able, with Allah's help to effect a real reconciliation.

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79. Qur'an 4: 128.

80. Qur'an 4: 35.

In addition to the above, I would urge for the proper consideration by our present jurist of necessity of having witnesses for divorce. Although the provision is there, but the muslim jurists differ as to whether it was obligatory on the person divorcing or it was only recommended. The Holy Qur'an reads:-

> "Thus when they fulfil their term appointed, either take them back on equitable terms, or part with them on equitable terms; and take for witnesses two persons among you, endued with justice, and establish the evidence as before Allah....."[81]

The four sunni schools hold that evidence on talaq and raj'a is only recommended and not obligatory. But the Zahiri and Shi'a schools hold it to be obligatory. So I am suggesting that, the present muslim jurists due to the problems of divorce cases we are witnessing in this era, should follow Zahiri and Shi'a schools in respect of taking evidence at the time of divorce. This procedure of taking evidence at the time of pronouncing divorce will lessen the incidents, because the divorcer in most cases pronounces divorce at time of anger. The taking of evidence will also save the court alot of trouble.

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81. Qur'an 65:2.

6.8 LEGAL EFFECT AND CONSEQUENCES OF MARRIAGE DISSOLUTION.

6.8.1 After Dissolution.

The first reaction of the parties to a dissolution is either a sense of regret or joy or a combination of both. Where the reaction is a sense of regret and loss, the parties "are encouraged and given the opportunity to ractify their mistakes, at once for their gilt, and repeal their action." This is possible, especially if the correct and prescribed procedure of divorce is followed by the parties.

Whatever the feelings of the parties, a divorce pronouncement does not necessarily mean an immediate separation of the parties. Various mechanisms are given to the parties to revoke the divorce pronouncement and resume marital relationship. Resolution of divorce and reconsiliation is highly commendable whenever possible. Moreover equity an kindness is mandatory at all times within as well as without marriag"[82].

Different types of dissolution produce different consequences which are generally common to all marriages in Nigeria. The consequences may vary depending on the type and method adopted in dissolving it, and under which the dissolution of marriage took place. We shall now state the consequences of divorce on the parties themselves.

Dissolution of marriage affects the economic well-being, emotional stability,,social status and other aspects of the personality of those who go through it. It also affects, minor children and the society.

82. Qur'an 2:228, 232, 233 and 241.

6.8.2 IDDAH (WAITING PERIOD)

When a marriage is dissolved either by divorce or under a decree of a court after consummation or death of the husband or in any other way the woman cannot contract another marriage under Islamic Law till the expiration of a certain period of time. The period of time is called "**idda**". The word "idda" is derived from "ad" (i.e., number). It literally means to count. In Law, it means a period of waiting by a woman on dissolution of her marriage after consummation or on the death of her husband or under the Maliki, Hanafi and Hanbali schools also on a valid retirement."[83]

The author of Hidayah defined idda as "The term of probation (or waiting) incumbent upon a woman in consequence of the dissolution of her marriage after carnal connection; it is the term by the completion of which a new marriage is rendered lawful."[84] The author of al-Fatwa al Hindiyah described idda as "the waiting for a definite period which is incumbent upon a woman on the death of her husband or after the dissolution of a rightful or semblance marriage that has been confirmed by consummation."[85]

6.8.2.1 OBJECT OF IDDA

The period of idda has been ordained by the Almighty God for many reasons among which are:

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83. Ibn Abidin, Radd al-Muhtar, Vol.II pp.614-15 Cairo 1318 A.H.
84. al-Hidahay, Vol.II, p.402. New Delhi.
85. al-Fatwa al-Hindiya Vol.II, p. 134. Kampur, 1349 A.H.

i. to ascertain whether the woman is pregnant or not at the time of the dissolution so that the paternity of the child that may be born to her after the death of her husband or the dissolution of her marriage may be determined.

ii. It is a period within which the parties may have time to reconcile and return the conjugal relation in the case of a revocable divorce.

iii. It is a period to serve as a mark of respect for the deceased husband, or as a mark of sorrow for the dissolve marriage.

The Holy Qur'an reads:-

> "O Prophet; when you do divorce women, divorce them at their prescribed periods; and count (accurately) their prescribed periods; and fear God your Lord. And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lowdness, those are limits set by God...."[86]

During the waiting period it is prohibited for the woman to contract another marriage. On this, the Holy Qur'an reads:

> "..... But do not make a secret contract with them except in terms honourable, nor resolve on the tie prescribed is fulfilled....."[87]

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86. Qur'an 65:1

87. Qur'an 2:235.

From the above verse it is clear that the woman during her waiting period should never contract a new marriage. Muslim Jurists agree on this Malik Law went further to state that if a woman contract herself in marriage during this period, and the marriage is consummated, that marriage is null and void. Muslim Jurists. In addition according to Shafil schools a permanent prehinition has encroched in between the spourses"[88].

1. Iddah for a Non-Consummated Woman:

Where a wife is divourced by her husband before the marriage is consummated, that divource does not undergo waiting period. She is free to marry another person from the moment of the divource. This is because the question of pregnancy does not arise as the marriage has not been consummated. So the waiting period on the part of the divource would be meaningless and of no benefit either to her or to her former husban (Rationale of Iddah is discussed infra).

The Holy Qur'an makes the position much clearer:

> "O you who have attained to faith! If you marry believing women and then divorce them

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88. Ibn Arabi, Ahkam al-Qur'an, Vol. p. 215.

> Before you have touched them, No period of idda Have ye to count in respect of them"89.

It should however be noted that where the husband dies and the marriage is not consummated, the wife has to observe the waiting period of a widower.

2. Iddah for a consummated woman:

Where the wife and the husband consummated their marriage and the wife usually menstruates, and she happens to be divorced, she has to observe the waiting period of three quru' (three periods). This connotes three blood gush (hayd) or three purities.

On this point the Holy Qur'an reads:

> "Divorced women shall wait concerning themselves for three periods....."90.

Jurists differ in opinion on this period which is reffered to as quru'u. The word is an Arabic word and has many meaning in the Arabic language. Jurists deffer in their understanding of the word. According to Maliki, Shafi'i and Hanbali the word mean the time of purity, and this also is the view of some companions of the Prophet (S.A.W.), among whom are, A'isha, Ibn Umar, Zaid Ibn Thabit.

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89. The Holy Qur'an Chapter 33 verse 49.

90. Wur'an 2:228.

(May God be pleased with them). According to Hanafi the word "quru'u" means the time of menstruation, and this is the view of other companions among whom, are caliphs Abubakar, Umar, Ali, Ibn Abbas, Ibn Mas'ud and others (May God be pleased with them):

> "This however depends on the nature of the woman. Majority of the women have a blood-gush every month whereas others have it once in every two-three months or more."[91]

And where the former husband dies while the divorce is serving the three purity-term, and where the divorce is revocable, the waiting period changes to that of the woman whose husband dies. This does not apply where the divorce is irrevocable.

3. Iddah for a pregnant woman:

All the four schools of Jurisprudence are in agreement that the waiting period for a pregnant woman expires when she delivers. This is irrespective of how the marriage becomes dissolved.

4. Iddah for minors and adults who do not menstruate:

'Minors' in this context refer to those young girls or women who have not started menstruation whereas adults refer to those old women who have pased the the age of menstruation.

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91. Al-Khirshi Volume 3 page 383.

90. Qur'an 65:4.

The Iddah for anyone of them is a period of three months. However, if during that period one of them happens to menstruate, the iddah for her will be three periods of hayd.

The Holy Qur'an provides:

> "As for such of your women who are beyond the age of monthly courses, as well as for such who do not have any course, their waiting periods shall be three calendar months....."[92]

All the prescribed periods mentioned above commences immediately from the time of divorce, husband's death or othercauses and it is not in any way affected by the wife's ignorance of the fact that it has been effected. Hence, if she does not receive any information about the divorce or the husband's death till such time as when the prescribed period of idda has already expired, then it shall not be necessary for her to observe any idda at all. In this case if the cause of idda is for divorce, then it has to be known to some people.

6.9 HABANA (CUSTODY OF CHILDREN)

6.9.1 Right of Mother to Custody of her Children:

The mother is entitled to the custody of her male child until he reached the age of puberty and of her female child until after the consummation of her marriage."[93]

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92. Qur'an 65:4.

93. Dasuqi, Hashiyat al-Dasuqi; Vol.II, p.526; Mudawwaman al-Kubra, Vol. III, 356.

If she marries a second husband, she will loose the right. The father is the primary and natural guardian of his minor children and that the right of custody of the mother and female relation mentioned above is subject to the supervision of the father who is entitled to exercise this power by virtue of his guardian-ship.

Under Shari'a law, the mother is entitled to the custody of male child until he attain the age of two years and of a female child until she attains the age of seven years. After the child attains the above mentioned ages the custody belongs to the father. If the mother dies before that age, the father is entitled to the custody.

According to Shafi'i, Hanafi and Hambali the child will be under its mother's custody until a boy reaches the age of seven and if it is a girl the age of nine. The argued that at this age the child will be able to look after itself in the case of washing and dressing without the help of another. This principle of Law was established by an answer given to a woman by the Prophet (S.A.W.)." It has been reported that "A woman had just been repudiated by her husband, by whom she had a son. She took the child in her arms and went to the Prophet (S.A.W.) "Prophet of Allah she said, visibly affected, "this child is my son, my womb is the vessel that contained him, my breasts are the vesseds whence he fed, my garments forms the cover in which I hold him wrapped up. And his father repudiated me and wants to take away

my child, he wants to separate me from my son." "To her, said the Prophet, "nelongs the right to keep that child, until though marriest agains, and has consumated the marriage".

In case where a mother is disqualified because of some other reasons, the following women will take her position accordingly

1. Mother whether a Muslim or a Kitabia
2. Mother's mother
3. Maternal aunt
4. The mother's maternal aunt
5. The father's mother
6. The father
7. The paternal aunt
8. The child's sisters
9. The father executor
10. Anyone appointed by the court
11. The child's brothers, uncles and paternal G/father.

6.9.2 Qualifications of the Custodian.

A person entrusted with the custody of a child must possess the follwing qualifications.

1. He or she must be in full possession of his or her faculties.
2. He or she must be adult and sane
3. He or she must be able to look after the child i.e., not too old according in majority's view he or she should not be over 50 years.

4. He or she must live in a place where the child that is his or her charge may remain absolutely secure from seduction, licentiousness, or loses of property.
5. He or she must be free from all immorality or other vices, and from all infectious diseases.
6. He or she must be honest in all his dealings with the child's property"[94].

If the person entrusted with a child is a mad, it must be ascertained that he has a mamily capable of taking care of the child. A newly married woman shall not be entrusted with custody of a child, since her duties as a bride might prevent her from giving all her attention to the child.

A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody:

1. If she marries a person not related to the child within the prohibited degrees.
2. If she goes and resides during the subsistence of the marriage, at a distance from the father's place of residence.
3. If she is leading an immoral life e.t., prostitution and the likes.
4. If she does not take proper care of the child"[95].

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94. Section 13(2) of Biu Declaration; Section 15(2) of Borgu Declaration and Section 15(2) of Idoma Declaration.

95. Ibid.

CUSTODY OF CHILDREN UNDER CUSTOMARY LAW

Unlike under Islamic Law where the right of custody has been given to the mother, it is a generally accepted under Customary Law that it is the father who is normally entitled to the custody of the child. On the death of the father, the right of custody continues with his family. Most research has shown that, on the death of the father his brothers take over the custody of the children who will also be entitled to take over his deceased brother's wife. In the absence of the brother, then the right goes to the father and other relatives. The only instance when the mother is entitled to the custody is when the child has not been weaned, the child shall remain in its mother's Custody until such a time when the care of the mother is not important."[96]

It seems that the Customary Laws of this Country does not regard the welfare of the child as the first and paramount consideration by vesting the exclusive right of custody to the father. In some parts of the Country there is a statutory limitation on the right of the father to the Custody of his infants and minor children, but the unfortunate situation is that it has never been put in to practice. The customary courts Law of former Western and Eastern Nigeria states :-

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96. Section 13(2) of Biu Declaration; Section 15(2) of Borgu Declaration and Section 15(2) of Idoma Declaration.

"In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and Pramount consideration."[97]

In the Northern part of the Country, it is only Igbirra declaration that has provided that "All children must have a woman's care until they reach the age of Seven."[98] Even though, the Law does not specifically mention the mother, but still it is a better Law than the Law that gives the father the right of Custody.

When the matter is taken to Court, the Court is supposed to take into consideration the welfare of the child whether is too young to live a away from his mother. Normally, the Court when granting the divorce will ask the mother to live in her family's house until her children are old enough to go to their father. During this time the father is to provide food and clothing for the children, while the mother will be fed by her own family. A child under Customary Law is not allowed to make a choice as to the parent with whom he or she wishes to live. If a child is old enough to stay apart from its mother, it must live with its father. The mother on the otherhand has the right to visit her children. The ex-husband cannot prevent her from enjoying this right. Sometimes,

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97. Section 23, Customary Courts Law, West cap 31; and Section 25, Customary Courts Law East, cap. 32.

98. Section 33 of the Igbirra declaration.

When the Court sees that the woman need some help due to her old age or sickness, it may allow her to use some of the children to bring food and perform some of domestic services for her.

It seems that there is no available reported cases on Custody. But during my research I came across two cases similar to each other but in different tribes and states. The first case is in Idoma land Benue State in the Area Court of Ugbolpo between Kasuwa and Onchi. Kasuwa was married to Onchi and they had three children, At the time of this case, the children's ages are 6.3 and 1½ years respectively. Upon divorce the husband Onchi, took Custody of all the three children. Kasuwa the mother feeling that the last born was too young, to be separated from her, took the case to Court, where the Court asked the husban to return to her the smallest child"[99].

The other case is among the Birom trine in Plateau State in Gyel Area Court on February 18th. The case is between Chollom and Gatak. Chollom having been divorced from Gatak took the custody of his children. Gatak complained to the Court that she does not dispute the fact that the children belong to him, but she says she cannot live apart from her daughters and moreover she was divorced by her husband about four years ago and that she had given birth to the children in her house without Chollom knowing about it and with-out providing any

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99. The case was decided on 14th July, 1987.

financial help for their upbringing. The husband countered that because the fact that she did not refund his bride-price the children belong to him, and since one of them is grown enough to be separated from her he want his child. The court ruled that, the two girls belong to Chollom but they will continue to live with their mother since they are not yet grown up. And the father will supply them with food and clothing.

In a similar case but in a different tribe and state, a Customary Court awarded the payment of compansation to the mother for taking care of her child without the help of the father. The case is from Igo-Okpaya Customary Court in Benue State between Erunu and Anebi Ada"[100]. Anebi divorced his wife Enenu. At that time, the child was only 4½ months old. The child remained with the mother until she was four years. Throughout this period Anebi never sent any money to the ex-wife for his little girl's food. When Anebi came to take his daughter away, the mother refused to release her on the ground that he has to pay for the expences she incurred in upbringing of the child. The mother became so serious that it had to go to the Court. Attempt to reach a compromise was made, and Anebi was asked to pay ₦200,00 which was half of what the mother demanded. Whem he agreed to pay, the daughter was realsed to him.

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100. Judgement delivered on 3rd August, 1988.

ration whether from any other point of view the claim of the father, or any right at common Law possessed by the father, in respect of such custody is superior to that of the mother, other claim of the mother is superior to that of the father."[102]

The provisions of English Common Law appears to be different from that of Equity. At Common Law the father was entitled to the Custody of his legitimate children untill they reached the age of 21."[103] His right might be lost, however, if that would probably lead to the physical or moral harm to the child or if his claim was not made bona fide gave effect to the father's right to the Custody of his children, would deprive him of it if their welfare so demanded. Ewuity considers the welfare of the child as the first and promount.

The provision of Section 71 of Laws of Matrimonial Causes Decree of 1971 is in line with the provisions of Section 2[4] of the English Guardianship of Infants Act 1925 in taking into consideration as paramount, the interest of the child inquestion Section 71(1) Provides:

> "In proceedings with respect of the Custody, guardianship, welfare, advancement of education of children of a marriage, the court shall regard the interest of these children as the paramount consideration, and subject thereto, the court may make such order in respect of those matters as it thinks proper."

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102. Thmasset v. Thmasset (1984) p. 295, C.A.

As a result of this provision the court has to take into consideration a number of factors in deciding whom the custody of the child is to be given. In this respect both parents posses the same right of claim to the Custody of the child. The fact that the child is an infant is not a guarantee that it can be given to the mother, the court has the right to decide otherwise if it is in the interest of the child. In Afonja v. Afonja[103] the court held that it was in the best interest of the infant to be given to the custody of the mother, who was anxious to live with the child all the time, then to be left in the custody of the father, who had arranged for the child to live with his sister-in-law during school term and to reside with him only during the holidays.

This same principle was applied in a cas where the character of the mother of the child was found wanting. Despite this fact the court gave the mother the custody, since this would be in the interest of the child. For instance, In Oladetohun v. Oladetohun[104] although the court found the mother of the child to be an unsatisfactory wife; and that she was involved in the practice of Juju and also that she had been proved to be a bad mother, nonetheless it granted her the custody of the only child of the marriage who was three years-old on the ground that doing so, was in the best interest of the child. However the court reserved the right of reviewing the right of custody when the child is a little older.

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103. 1 UILR 105 1972.

104. Suit No HD/111/70, (Unreported) High Court Lagos, 6th July, 1971.

LEGITIMACY

6.11. A legitimate child is one born of parents who are legally married under any one of these three systems, or one conceived in Lawful wedlock even though before his birth the marriage of his parents has been terminated by death or divorce. In Nigeria, legally "recognised marriage" includes marriages under Islamic Law, Customary Law and Marriage Act. These types of marriages are by law of this country legal, and the children of the marriages are legitimate.[107] Under the Marriage Act, a child born of marriage that has since been annulled is legitimate if the marriage annulled was merely voidable, but illegitimate if it was void ab initio, unless at the time of the act of intercourse resulting in the birth either or both parents reasonably believed that the marriage was valid."[108] This is also the view of some jurists under Islamic Law.

Despite recent attempts through various legislations to assimilate the legal position of an illegitimate child to that of a legitimate one in this country, the legal relationship between a child and his parents still depends to a large extent upon whether or not the child is legitimate. It is difficult to define legitimacy as an abstract concept without reference to a particular

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107. Ademola, CJN, in Lawal V. Yunana (1961) 1 ALL - NLR, 245, 250.

108. English legitimacy Act, 1959, Sec.2 Upon pronouncing a decree of nullify on the ground of bigamy the court may, if there are children, state that it was satisfied that the petitioner reasonably believed at the time that the marriage was valid: Wynn v. Wynn, (1964) 108 S.J. 239.

legal system. Nevertheless most if not all systems of jurisprudence have drawn a distinction between the legal position of a child born of a legally recognised union and that of a child born of an illicit union or as a result of a casual act of intercourse. Just as there are various types of marriages in Nigeria, there are various laws of legitimacy which apply with varying effects. The existence in Nigeria of different form of marriages, each with its variations and with different effects on legitimacy and legitimation, present problems especially when we consider marriage under the Act is monogamous while marriages under Islamic and Customary Law are polygamous. We would try to discuss the various Laws applicable to legitimacy under the three systems.

ESTABLISHMENT OF PARENTAGE

5.11.1 Parentage is the relation of parents to their children. Paternity is the legal relation between father and child. Maternity is the legal relation between mother and child. These legal relations give rise to certain rights and liabilities as regards inheritance, guardianship and maintenance.

The maternity of a child is established in the woman who gives birth to the child, irrespective of whether the child is an offspring of a valid or invalid marriage or a child of "zina" that is fornication or adultery. But the paternity of a child can only be

established by marriage which may be valid or viodable. Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is presumption drawn from certain facts e.g., prolonged cohabitation with the mother, acceptance of congratulation after its birth or by acknowledgement. According to Islamic Law a child to be legitimate must be the offspring of a man and his wife, or of a man and his slave girl; any other offspring cannot be legitimate.

The second way in the establishment of parternity is the child's mother being an ummul walad to her master, and the effect of her being so is that the paternity of her child is established from her master without any claim on his part, that is, if she were in such a condition that he might lawfully have had intercourse with her, as Qur'an referred to them in many verses as "whom your right hands possess." When the paternity of a child is established, its legitimacy is also established.

a. Presumption of Legitimacy

Under Islamic Law, the presumption of paternity from marriage has the origin from the Prophetic tradition which was narrated by A'isha and reported in almost all the Hadith Books. That "al-Walad lil firash" wa lil ahir al haraj" which can be translated , the "child belongs to the lawful wedlock and the prostituties to be stoned." This tradition according to Ibn Rushd is recognised by all jurists. This means that the paternity of a child

born in lawful wedlock is presumed to be in the husband of its mother if certain conditions are satisfied no count of the conditions attached to legitimacy are more strict under Islamic Law than under any legal system, but it is very reluctant to legitimise a child and no presumption is drawn against its legitimacy as far as possible. It refuses to declare a child a bastard except on the clearest and most positive proof of illegitimacy and refuses to admit illegitimacy when legitimacy can be inferred. Islamic Law considers a child to be the legitimate offspring of a person in every case when it is humanly possible that the main can be the father of the child in fact and that there might have been a marriage between him and the mother of the child.

The first thing to be considered in determining the legitimacy of a child is to see if it was at all possible that it could have been conceived during the subsistance of a valid marriage of the child's mother with the person alleged to be its father. It is an essential condituon of legitamcy under Islamic Law that the child must have been conceived in wedlock or, in other words, the person who is responsible for its conception should be the lawful husband of the child's mother at the time of its conception. To determine this, Muslim jurists laid down some general rules for guidance. They have given the periods of time both minimum and maximum during which a fully developed child

can be born. These rules are mostly based on their experience. They based these periods on possibility and not on probability. Their aim is to save a child from the stigma of illegitimacy and so they have tried to bestow legitimacy on every child when it is physically possible though not probable that the child could have been the result of lawful union between a man and his wife. They thus, apply the rule to every conceivable case including rare and abnormal cases.

b) Minimum Period of Gestation

The shortest period of gestation, according to all the schools of Law is six month. This is as a result of two Qur'anic verses which have been construed as determining this period. In one verse, the Holy Qur'an says:-

> "The carrying of the child to his weaning is a period of thirty months."[109]

And in another verse it says:

> "The mothers shall give such to their offspring for two whole years, if the father desires to complete the term, but he shall bear the cost of their food and closing on equitable term."[110]

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109. Qur'an 46:15.

110. Qur'an 2:233.

In the first verse the combined period of gestation and weaning is given at two and a half years while in the other the period of sucking is mentioned at two years, that leaves 6 months as the minimum period of gestation, after which the child is known to be viable. Therefore, if a man has married a woman and she delivered a child in less than six months, its paternity is not established from the father, but if she delivered at exactly six months or more its paternity is established from him. All jurists made it a condition that both parents must be adults and capable of conjugal relations. On the other hand the jurists tolerate five days less than six months."[111]

Although the jurists agreed as to the minimum period of six months of gestation, they differed as from what time does that period will start counting. According to Maliki, Shafi'i and Hambali schools, the period will start counting as from the date of consummation, while according to Hanafi school, the period will start counting from the date of the marriage.

Maximum Period of Gestation

There is a difference of opinion amongst the Muslim jurists about the maximum period of gestation.

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111. Damuqu, Hashiyat al-Dasuqu, Vol.II p. 459.

Thus the Hanafi law defines this period as two years. They have based their doctrine on the maximum attributed to 'A'isha:

> "The period of pregnancy can never exceed two years even by as much as the move of shade of the spindle."1

Another version reads:

> "A foetus may not remain in the womb for more than two years."2

The maximum period of gestation, in the Maliki school, is a highly controversial issue; hence there are at least five opinions, However; when one attempts to answer the questions: Who holds which opinion, it at once becomes apparent that the Maliki authorities are conflicting. Thus according to Ibn Rushd, Imam Malik himself fixed five years as the maximum period of gestation; and seven years is laid down by some of his diciples (baad Ashabihi)[3] Dasuqi on the other hand, believes that six and seven years as the maximum period is attributed to Imam Maliki. He says: "It is reported from Maliki that the maximum period of bearing should be six; and seven is also reported from him."[4]

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1. Ibn Abidin, Radd al-Muhtar, vol.3.p.54 - Also see Al-Sarakhsi, Al-Mabsut, vol.6, p.44; also Al Mirghimani Hadayat, vol. 2,p.181.
2. Ibid.
3. Bidayat al Mujtahid, vol. 2, p.327.
4. Hashiyat ul Dasuqi, vol. 3, p. 474.

Both Ibn al Qassim and Sohnon are of the opinion that the maximum period is only five years."[1] Dasuqi adds that according to Ibn Arafa this period should only be four years."[2] The only Maliki jurist who has been more realistic in his approach to this issue is Muhammad Ibn Abdullah Ibn Abdul Hakam, the leader of Maliki jurists in his time. According to him the maximum period of gestation should not exceed one year (santan bayda). After citation of the various views on the maximum period of gestation, Ibn Rushd comments as follows:

> "This question should be determined in the light of experience and usage prevailing thereat. Hence the statement of Ibn Abdul Makam and the Zahiris is more identifiable with custom and usage. Indeed judgement should be given based on customary practice rather than upon rare occurrences that are close to impossibility."3

Now the immediate question is: which of these views represents the official rule of the Maliki school? The question is also debatable. According to Ibn Juzaiy the dominant view (al-Mahshhur) adopts five years. To Dasuqi four years should be the official view. Since Dasuqi's Hashiyat, is believed to be highly placed as an authoritative restatment of the Maliki law. One can venture to say that Dasuqi's view should represent the Official rule. It is also submitted that Ibn Abdul Hakam's view, which is almost consistent with modern medical opinion, should be the better one. Indeed it is hardly

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1. Ibid.
2. Ibid.
3. Bidayat al Mujtahid, vol.2, p. 268.

surprising that modern reformers have adopted Ibn Abdul Hakam's view."[1]

It remains to know that the foundation of the doctrine of both Malikis and also others who deny the dictum of 'A'isha and insist that the bearing can exceed two years, is the story naratted by Malik Ibn Anas who says this:

> "My neighbour, the wife of Muhammad Ibn Ajlan, is trustworthy, as is her husband; within twelve years she gave birth to three children, each having remained for four years in her womb."

When Imam Malik was told about the saying attributed to 'A'isha, he categorically rejected it, exclaiming.

> "O God who could say so."[2]

Basing themselves on the same authority as that of the Malikis both Shafi'i and Hanbali law dictated that the maximum period of gestation should not exceed four years."[3] The Hanbali authorities suggest that Imam Ahmed has also fixed only two years."[4]

The dictinctive feature of the Zahiri law is that it is the only Sunni law that prescribes the shortest term. According to them, the maximum period of gestation should not at all (la ya jooz) exceed nine months. The basis of their doctrine is a maxim attributed to Umar the second Caliph and also some of his decisions purporting that the maximum period of gestation should only be nine months. This view is exactly as that of

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1. P. infra.
2. Ibn Qudama, al Mughni, vol. 8, p. 84.
3. Al-Shafi'i al Um, vol.5, p. 197 al Hamish, al Shuab pl.16 of al Um, Al Shirbini, Mughni al-Muhtaj, vol. 3, p. 388 al-Sharwani & Wassim, Hawashi, vol. 8, p. 239, Ibn Qudama al-Mughni vol. 8, p. 84 - 90.
4. Ibid.

English Law.

Maximum Period of Gestation in English Law

The maximum period of human gestation required by English Law has been variously stated It may range from two hundred and seventy to two hundred and seventy five days. It may also range from between two hundred and seventy three and two hundred and eighty days. The latter figure is said to be the average period of gestation, but the courts - shall only accept this as a fact if expert evidence is produced.[1] In the light of medical evidence received in Gaskill v. Gaskill, the court took the view that a period of three hundred and thirty one days was also possible. But a lapse of three hundred and sixty days between the last matrimonial coitus and the birth of a child was rejected as impossible by the House of Lords when Lord Mac Dermott said:

> "The Law of England has not fixed limits of deviation from the normal period in the sense that more than a certain period is to be deemed impossible; or impossible until the contrary is proved."

He then went on to note that:

> "a time must come when, with the period far in excess of the normal the court may properly regard its length as proving the wife's adultery byond reasonable doubt."

Finally he advised:

> "If a line has to be drawn I think it should be drawn so as to allow an ample and generous margin, for it may be difficult for the wife to prove a freak of nature as for anyoneelse."

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1. Lord Simonds in Preston John v. Preston John, (H.J.) 1951.

ACKNOWLEDGEMENT

6.11.2 Acknowledgement, means to confirm or to establish. But in Law, it is defined as giving of information for the establishment of a right in favour of another against oneself. Acknowledgement of a man is valid with regard to five persons, his father, mother, child, wife and slave, because in all these cases he acknowledges an obligation, and it is not valid except for these. The acknowledgement of a woman is valid with regard to four persons, her father, mother husband and slave.

Where the paternity of a child, that is his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Islamic Law recognizes acknowledgement as a method whereby such marriage and legitimate descent can be established as a matter of substantive Law for purposes of inheritance.

The Islamic Law of acknowledgement of parentage with its legitimating effect has not reference whatsoever to cases in which the illegitimacy of the child is proved or established, either by reasons of zina between the two parties, or by reason of marriage necessary to render the child legitimate being disapproved. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurance with reference to the legitimacy of the acknowledged child, is not proved in the sense of the Law as

distinguished or disproved. In other words the doctrine applys only to cases of uncertainty as to legitimacy, and in such cases acknowledgement has its effects, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

An acknowledgement need not be expressed. It may be presummed from the fact that one person has habitually and openly treated another as his child, that is as his legitimate child. In order to render an acknowledgement valid and effective the following conditions must be fulfilled.

1. The acknowledgement must be not merely of a ponchip but must be made in such a way that it shows that the acknowledger meant to accept the other not only as his son, but as his legitimate son.

2. The ages of the parties must be such as to admit of the acknowledger being the father of the person aknowledged. If the child is at the age of understanding he should conform and agree with the acknowledgement.

3. The person acknowedged must not be the offsuring of zina, as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother at that time the wife of another man or had been repudiated by the acknowledger and the legal bar to remarriage had not

been removed or was within prohibited degrees of the acknowledger.

4. The person acknowledged must not be known to be the child of another man.

5. The acknowledgement should not have been refused or denied by the person acknowledged.

No presumption of marriage arises from long cohabitation if the woman was a prositute when she was brought to the home of the man whose wife she claims to be. But if the man acknowledges his children by her as his legitimate children, marriage with her will be presumed. For a marriage with a prosititute is not prohibited as she could have been his lawful wife when the children were begotten. But if it is definately proved that there was no marriage at all between the parties when the children were begotten, in otherwords, if the marriage is disproved the issue would be the issue of fornication, and they could not possibly be legitimated by acknowledgement.

If an acknowledgement is of legitimate sonship, and the relationship is possible in fact and in Law, it raises a presumption of marriage between the acknowledger and the mother of the person acknowledged, and unless rebutted, gives such person the right of inheritance to the acknowledger as his ligitimate child and a similar right also to the mother as the lawful wife

He will sell from movable property to what is necessary for the maintenance of the child. But he is not allowed to sell any immovable property of the minor without the permission of the court.

A poor guardian is allowed some reasonable renumeration but if he is rich he is expected to do it free of charge See v. G; 10:4 Guardianship of a minor may be terminated when a male child becames matured and the female when she marries and consummates the marriage and continues to live with the husband for at least 2 years according to Maliki but according to other jurist as sonn as she is matured the period expires.

LEGITIMACY UNDER GENERAL LAW

6.11.3 In discussing legitimacy under General Law one would be faced with three problems.

1. CHILDREN OF A VOID MARRIAGE

Cildren of a void marriage who are regarded as illegitimate except where the statutory marriage is preceeded by a customary marriage. In Nigeria as in other countries it is allowed for the parties to be married first under customary law before contracting a statutory marriage. If the subsequent statutory marriage is therefore void, it is submitted that a child born to them should be treated as legitimate, since he was born during the existence of a valid

statutory marriage may be regarded as legitimate.

In England a child of a void statutory marriage is regarded as legitimate under section 2 of the legitimacy Act of 1959. This section shall not apply to children born before the commencement of the Act. [114]

6.11.4 CHILDREN OF A VOIDABLE MARRIAGE

Section 38 (1) of the Matrimonial Causes Decree 1970 legitimized children of a voidable marriage who under normal circumstances are illegitimate. Under Common Law a decree of nullity of a voidable statutory marriage was retrospective, thereby bastardizing the children of the marriage. But the Matrimonial Causes Decree now says that.

> "(1) A decree of nullity under this decree of a voidable marriage shall annul the marriage from and including the date on which the decree becomes absolute.
>
> (2) Without prejudice to the operation of subsection (1) above in other respects, a decree of nullify under this decree of a voidable marriage shall not render illegitimate a child of the parties born since, or legitimated during the marriage." [115]

Consequently, this decree expressly provided that any child born of the marriage should be legitimate notwithstanding the annulment of the marriage.

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114. 29th October, 1959.
115. Section 38 of the Matrimonial Causes Decree, 1970.

6.11.4 PRESUMPTION OF LEGITIMACY.

A child born to a married woman is presumed to be legitimate, in accordance with the maxim Pater est quem nuptiae demonstrant, though the presumption refuttable"[116]. The presumption applies also in the case of a child born to a widow with nine months of her husbands death and whefe she has married within that period, the child is presumed to be that of the first husband"[117]. A child born between decree nisi and decree absolute in divorce is presumed legitimate, and so is a child born within nine months of a decree absolute of divorce. This is in conformity with section 147 of the Evidence Act"[118]. According to the section, a child born during the continuance of a statutory marriage or within two hundred and eighty days after the dissolution of such marriage is presumed legitimate. But this Law now has been altered by the Matrimonial Causes Decree of 1970.

> Section 115(3) of the Decree, provides that: "Without prejudice to section 84 of the Matrimonial Causes Decree 1970, where a person was born during the continuance of a calid marriage between his mother and any man hundred its dissolution, remaining un-married, the court shall presume that the person in question is the legitimate son of that man."

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116. Banbury peerage case (1811) 1 Sim. & St. 153 (H.L.); See also Egwunwoke V. Egwunwoke (1966)2 ALL NLR 1, 304 (1966) NMLR.

117. Re Overbury (1955) ch. 122. In such a case there is no doubt about the legitimacy of the child, the question being which husband must be presumed to be the father.

118. Cap.62 Laws of the Federation of Nigeria, 1958.

CHAPTER SEVEN

CONCLUSION AND SUGGESTION

Unlike positive Law, the Sharia to the pious Muslim is still, as it has always been, a divine Law. But like some positive Laws it reflects the character of society. Sharia is an Arabic word which means the track to a water-hole. In its technical sense, it is the path of behaviour which a Muslim ought to follow if he is to live in accordance with the principles of his faith. Sharia is usually 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 women and the rest of the univers."[1] It may be compared in certain respect to some denotations of the western concept of "natural Law." Accordint to the classical view, "it is the basis for the moral judgment of actions as good or bad, and thus it came only from God."[2]

Islamic Law is "evolutionary" in that its full growth took centuries and passed through various phases. It begun with general principles stated in the basic sources of Islam namely, the Qur'an and the Sunna of the Prophet (S.A.W.). At first, it dealt with simple practical problems of every day life, but as time went on it grew complex and inclusive.

To every Muslim the Qur'an, is the primary and sovereign source of Islamic Law, which enunciates the basic norms

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1. Al Mudawwanat al Kubra.
2. Ali, Abdullahi Yusuf (1975) Text, Translation and Commentary of the Holy Quran.
3. Al-Adawi, Hashiyat al Adawi.

and the fundamental principles of Law valid for all times and places; and provide the solution to every problem. The Prophet, Muhammad (S.A.W.) during his life time remained the sole interpreter of this divine basic norm of the Islamic Legal System. Thus, the Prophet (S.A.W.) built up, on its foundation, the superstructure of a comprehensive code of conduct embracing all facts of human life. During this period of the revelation which he received from Allah - the record of the sum total that is known as the Quran often contained rules of conduct and behaviour for his community. Because of the limited legal material of the Qur'an and because of the death of the Prophet, the living source of inspiration terminated and a reference to him being no longer possible, legal problems had to be decided by supplementing the provision of the Qur'an by facts from the life of the Prophet and from his sayings. These facts and sayings are known as the sunna and hadiths or practices of the Prophet (S.A.W.), the function of which is to explain, interpret and extend the Qur'an.

After the death of the Prophet (S.A.W.) the task of the interpretation fell upon his companions in the first place and then the jurists - theologians; who had to interpret and apply the Qur'an and the Sunna of the Prophet by way of ijtihad. But as these companions and the jurist theologians were not divinely inspired, they had to apply reasons which was bound to be influenced by urf, (the custom and general practice of the society around them). This, it is suggested, accounts for the doctrinal and

legal differences among the various schools and jurists, which came to be accepted by the "Ijma" (consensus of the Muslim jurists). Ijma, was the agreement of Muslim jurists on any particular principle of law, such an agreement could be based on the Qur'anic text or the Sunna of the Prophet (S.A.W.). This also became the third source of Islamic Law. To cope up with the growing needs and requirements of the society, the jurists had to resort to reasons, logic and opinion in order to supplement the Qur'an, the Sunna and the Ijma for the development of the Law. This new source took the form of reasoning or deduction by analogy from the aforesaid three sources. Qiyas, is, therefore, based on a very strict, logical scientific and systematic principles and opinion."

The other principles of legislation recognised by the jurists are:-

(i) Istihsan, (Juristic preference) adopted by the Hanafi school.

(ii) Masali al-Mursalah (Public Interest) expounded by the Maliki school.

(iii) Istidla, (Logic or reason) applied by the Shafi'i school.

(iv) Custom (urf). While custom is not officially accepted as a source of law, it has achieved the force of law in some measure listed above. The Qur'an and practices of the Prophet (S.A.W.) embodied and ratified many rules of customary law of the Arabs, e.g., the law of inheritance which over laid the basic principles of succession obtaining in the pre-Islamic period. In the old customary Law both

> Old and children could not inherit from the property of their deceased relatives because they could not wield arms. The Qur'anic legislation modified that customary rule by granting them a right of inheritance as long as they were closely related to the parepositus. Women, because of their sex were disqualified from having a legal right of inheritence. The Qur'an reformed the Law by introducing nine beneficiaries, and by analogy three more were added to them, most of whom were women and to whom specific fractions were allotted.

Now going back to the difference in interpretation of the divine texts, as noted above, it is interesting to note the harmonization of the two apparently conflicting traditions of the Prophet (S.A.W.) viz:

(i) "My community will never be unanimously in error". and

(ii) "Difference of opinion among my community is a sign of bounty of God".

These two traditions simply means that the community can agree to or to disagree. In otherwords every jurist strives to interprete the will of God in the light of his own understanding of the divine norm. Although he is absolutely bound to interprete correctly he can only do what is humanly possible. He cannot, therefore, be absolutely sure that he interpretes the will of God with exactitude. Perfection is the attribute of God and it belongs to him alone. Human nature is not free from making mistakes. Even in his genuine mistaken interpretation of the will of God he is rewarded. For he has discharged his duty in good faith. Islam, infact, condones genuine mistakes and forgetfulness.

MARRIAGE IN SHARI'A

One of the most distorted institution of Islam is the real meaning of marriage. Marriage in Shari'a is not a business deal negotiated by two partners, nor is it a secular contract whereby material benefits and obligations are evaluated in contrast to one another. It is something Solemn and sacred. It is a contract involving a man and a women in which they pledge themselves to live together as husband and wife and their co-existence will be governed by the rules of Sharia. It is never seen as the enslavement of one partner by another. More charity, spiritual elevation, social intergrity, human stability, peace and mercy constitute the major elements of marriage. It is a contract to which God is the first witness and the first party, it is concluded in His Name in obedience to Him and according to His ordinances. It is a decent human companionship. Authorized and supervised by God. It is a sign of His blessings and abundant mercy as He clearly says in the Holy Qur'an.

> "And among His signs is this, that He ceated for you mates from among yourselves, that you may dwell in tranquility with them. And He Has put love and mercy between your (hearts). Verily in that are signs for those who reflect".[4]

It is evident, therefore, that marriage in Islam is a means of permanent relationship and continues harmoney not only between man and woman but also between them and God.

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4. Qur'an 30; 21

To realise this, Islam has laid down certain regulations that will make marriage serve its purpose fully. Among these regulations are:

1. The two parties should acquire a fair knowledge of each other in a way that does not involve any immoral or deceptive and exploitative behaviour. Acquiring fair knowledge here does not mean Western idea or modernization, as some refer to boy-friend and giril-friend relationship. Where the two parties have canal knowledge of each other before actual legal contract and agreement that they want to marry each other. This is un Islamic and unlawful and it is refered to as adultery or fornication.
2. Shari'a gives a woman the right and duty to choose her husband worthy of her respect and love, and capable of making her happy. Her parents have the duty to counsel only. The sunna of the Prophet (S.A.W.) does not give the parents the power to give their daughters in marriage to whoever they like against the wished of the daughters. It goes further to state that such a forced marriage is void and not valid. By this she is acting within her own rights if she rejects the imposition of a husband on her by her parent especially in our society in which custom gives the parents the rights to sell their daughters out to business men or to seek favours from powerful men on the pretex of kindness and fairness. This does not imply blind submission to the wishes of the girl

in such an important matter as the choice of a life - partner, when it is quite clear that they are not acting in the interest of their daughters.

3. A woman has the right to demand a dowry from her suitor according to her standard and also according to his means. If she wished, she may disregard this right and accept him with a little dowry or to return it to him after receiving it. Therefore the practice whereby a father would give away his daughter to somebody as "sadaka" is wrong and un Islamic. This is because his daughter is not his property so he can not give her away the way he likes. Both of them are servants of Allah; and by the way, the right of dowry blongs to the daughter exclusively. The injunction of dowry on a man is to ensure the woman that she is wanted, needed, and that the man is prepared and willing to undertake his responsibilities, financially and otherwise. Dowry is also a symbolic gesture indicating that, the woman will be secured, and that the man is not looking for amy material gains as his motive for entering the marriage.

4. The Sharia makes it a duty for a husband to maintain his wife. She is entitled to it by virtue of marriage. If she happens to have any property or possessions, that will be hers before and after marriage, the husband has no right whatsoever to any protion or share of his wif's property. This is to restrict marriage to its noble purposes and disentangle it from all unworthy objectives.

From all t'ese, it can be seen that Islam has taken all care to make marriage a happy companionship and a solid foundation of continuous harmony and permanent peace. But in view of the fact that human behaviour is changeable and sometimes unpredictable, Islam takes a realistic look on life and makes allowances for all unexpected events. Marriage, as has been said, has decent and bobel purposes which must be fulfilled. Islam does not accept or recognized amy marriage which is not functional and effective. There can be no nominal or ideal marriage. There must be a successful marriage or no marriage at all. Marriage is too solemn a contract to tbe stationary or ineffective. So if it does not serve its purpose or function properly, it may be terminated by divorce with the preservation vation of all rights of the parties concerned. This is because there is no point in keeping a nominal or worthless contract, and to save human kind from being tied by vows which cannot be honoured.

When an Islamic marriage in all ramifications, doest not function properly, there must be some very serious obstacles in the way, something that cannot be overcome by reconcialiation. In a situation like this, divorce is allowed.

However, it has to be the last resort, because it is described by the Prophet (S.A.W.) as the most detestable of all lawful things in the sight of Allah. But before taking this final and desperate step, some attempts must be made in the following order:

1. The two parties involved must try to settle their disputes and solve their problems between themselves.
2. If they fail, two arbiters one from the husband's relations and the other from the wife's, must be commissioned to try to make peace between them and s settle their differences. Qur'an says:

> "And if you fear a breach between them twain appoint two parties, one from his family and the other from hers. If they wish for peace, God will cause their reconciliations, for God Has full knowledge and is acquainted with all things."[5]

3. If this attempt also fails, divorce may be applied Divorce, is therefore a remedy, a cure, an exceptional rule which chooses the lesser evil and avoid the greater one. Divorce opens a way for either party to seek for a more agreeable partner in order to lead a more comfortable life in a new home. Qur'an reads:

> "But if they disagree and part, God will make them richer out of his abundance; for God is that who care for all and is all wise".6

After the divorce has taken place, there is a waiting period during which the divorcee is completely supported and maintained by her former husband. She cannot marry another

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5. Qur'an 4;35
6. Qur'an 4;130

man before the expiration of this period. The waiting period is another chance for both to reconsider their attitudes in a more serious manner and deliberate on the reflections of their separation. If they desire during that period to reunite, they are permitted to do so. In fact they are encouraged to reunite because separation in this way usually helps them appreciate one another more. When the waiting period expires, the divorce is free to marry another man. They are no longer obligated to one another.

TO MAKE PROPER CONTRACT OF MARRIAGE.

The Islamic Law is a believers' Law for it is binding primarily on those who believe in it. It therefore rests on faith and conviction. The Law is clearly outside the realm of academicians or secular authorities. Academicians live outside this realm /for they live in a dream world, unrelated to the people. The secular authority also live outside this realm for it is bent on furthering secularism and discouraging all religious beliefs. Its responsibilities lies only on the generality of the Muslims. They are the subject of the law, they represent the law and the law represent them of. They are loyal to the Law for the Law atticulates their beliefs, ideals and aspiration, and sets forth their duties and rights.

As a law that rests on faith and conviction, it follows that Islamic law can only operate when the believers consciously decide to implement it. A more proper observance of the injuction of the law is Islam depends on the willingness of the the Muslims to obey and follow the dictates of Islam. The injunctions of Islam as presented in the preceeding chapters,

can be fully observed in line with their spirit, not by the imposition of reforms in terms of restriction of marriages and divorce as done in some muslim countries. By inculcating in the minds of the Muslims the fear of God and accountability in the last day in all their actions. If that is inculcated in the minds of Muslims, and a popularly acceptable Islamic authority emerge, Islam will be reformed and stronger.

LAXITY IN THE OBSERVANCE OF ISLAMIC LAW.

Laxity in the observance of Islamic Law started with the imposition of colonialism on our people. There was a systematic and at times brutal suppression and removal of Islamic ideas and this was substituted with Western ideas of life, education, government and civilizations. This is what is responsible for the present situation of confusion in the family. That is why there are those Muslims who are devoutedly allegiant to the Western fashion of life, others to materialism, and there are few others who are staunchly allegiant and desirous of having the proper shari'a as a regulator of therir lives. However, those that are allegiant to Secularism and western way of life should not that material life would take them to no where. Those youths who are totally disoriented and wasternised are the hardest hit. It is only after marriage that they come to grip with reality. All those love stories they have been reading in English books, are mere fantas that are

not realistic particularly in a society which has different socio-cultural values to the Western society like our own.

THE ROLE OF THE JUDICIARY

Our local courts or Area Courts, in the Northern States of Nigeria, have been allowed, even during the colonial era, to apply and administer the Islamic Law of Maliki School (initially in all matters but now it restricted to only matters of personal status where the parties are Muslims). This is subject, of course, to the repugnancy clause. From this humble work, one can really seen nothing repugnant to natural justice, equity and good conscience, if the courts can strictly apply the rule of law in all its basics as it is contained in the federal constitution and other statutes.

In Northern Nigeria, Area Courts, Upper Area Courts and Sharia Courts of Appeal have since 1960 been given jurisdiction rights in the areas concerning Muslims personal laws. Section 242 of the 1979 Federal Constitution and First schedule, Part II of the 1967 Area Courts Edict both provided the same right. But from the works of these courts one sees alot of room for improvement especially in personal issues. Judges should be screened properly so that only those learned in Islamic Law should be appointed. The Area Courts forming the bulkiest portion of all the law courts in the North and treating the greatest number of cases, both civil and criminal, it is said to be redevoted with corruption and legal malpractices. This is despite the fact that majority of them are Muslims who are supposed and expected to be the upholders of justice.

They are those who are also supposed to be knowledgeable and trustworthy. But surprisingly, they are the very people who are destroying it. For instance, it is not a new story to hear of a Judge demanding bribe or to squander property of orphans.

Generally speaking at present all cases relating to marriage and other areas of personal status are tried in Area Courts as ordinary civil suits. This creates an immense amount of unnecessary and avoidable litigation. Hence the law and procedure followed in these courts need overhauling not only to the majority of grievancies of the litigants, but also to create security and stability, harmony and happiness, peace and progress in family realations.

I, basically being a teacher of Islamic Law, and also having served in courts and conversant with realities of life, and the requirement of the Nigerian society, feel that the major areas of reforms in Islamic marriage relates to the marriageable age, marriage guardianship, registration of marriages and control of polygamy in conformity will the true spirit and fundamentals of Islamic Law.

The States in the North are predominantly an Islamic territory. This is because with the exception of a few states, the bulk of the population in the various states are muslim. This notwithstanding, the Governments of these states are non-muslims. Therefore the provision of Islamic Law especially the one that relates to personal status is not applicable. And even where these provisions are allowed, deviation

are found between theory and practice. This is also found in other religious undertakings. The cause of this, is the general laxity of Muslims generally. This laxity has been brought about by the utter loss of hope by Muslims. They do not seem to know their rights, nor do they care to know.

For centuries, other cause include the fact that Islam has been a victim of deliberate distortion by Muslims. This gave room for various misinterpretations of Islamic doctrines by the wes.

The saddest thing about the issue is that it is not only non-muslims that harbours gross misconceptions regarding Islam but a great number of the followers of Islam themselves. Ever since Islam came under the impact of western civilisation, Muslims have been unable to comprehend the essence of this exquisite, all embracing code of life.

The western society, standing on the exaggreated idea of equality between man and woman, has intead of improving the status of women actually degraded her to the status of a concubine, a mistress and a society's butter-fly who is employed as a mere tool of pleasure and sex-machine hidden behind the colourful screen of art and culture. Women, in their unnatural desire and effort to be equal to men, have forgotten that motherhood is their greatest privilege and highest honour. This can only be achieved through a valid and legal marriage.

Western civilisation claim to liberate, woman, but it only exploits her as the means for destroying

the home and family. Every effort is made to lure the woman away from hom by making the role of the housewife and mother to be unattractive, unsatisfying and unrewarding. Modern thinkers in all shades of opinion, now think that western society is becoming an awful place to live in.

Prof. Arnold J. Toynbee proclaims that:

> "In history the ages of disintegration were usually the ages in which the woman has left the hom"8. The author of the article on "Feminine Influence in politics" arrays a wealth of detail form the history of Greece, Rome, England, France, etc, to prove his theme that the disintegration of civiliazation has always coincided with beneful feminist movements and their influence in social and political and that:
>
> "The hey-day of their (i.e., the women's) power happened to coincide with greatest degree of degeneracy among the male population."9
>
> Prof. E.C.M. Joan, once an enthusiastic supporter of the feminist movement and the leader of the "men's political union for women's enfranchisement" now repents over his mistakes and declares that the real place of woman is not the social circus but the hom"10.

These are the views of some of the leading thinkers of the West. Their reaction against their own sex-culture is now manifest. They are baffled at the meanance of sex-anarchy-the natural offshoot of the so-called movement of feminine emancipation which instead of restoring woman to her natural status "liberated" her by driving her out of the hom and the family life, by aunctioning her feminity on the streets and the bazaars and by making her a society's toy. Since it is clear that the wsterners, whose life

auctioning her feminity in the streets and the bazaars and by making her a society toy. Since it is clear now the westerners whose life style we are imitating started realising the folly, what are we (the westernised Muslims) is still doing. It is high time for every body to wake-up from his sleep and reconstruct our society before it is toolate. This is a duty on every Muslim.

Finally I wish to emphasize the important fact that the moral and spiritual state of a given society or civilization, which in turn determines its over-all internal strength and longevity, is dependent upon the status that society or civilization gives to its women. This is so because of women's considerable influence over the basic and fundamental pilloars of the society as well as their natural influence over men.

A society whose women are sufficiently inttlectually developed, and morally and spiritually sound, is bound to move fast in the pace of development and quest for happiness. But a society consisting of ignorant and enslaved women will continue to move backwords until it left behind by other societies. The deplorable state of the Muslim society in Nigeria today which manifests itself in spiritual decadence, ignorance, political blindness and aimlessness, does have a strong connection with the chaining of women to certain customs that are not only oppressive to them, but destructive to the general welfare of the entire society.

The paramount duty of the Muslims today is to strive to reconstruct the society and to establish a new order in accordance with the principles of shari'a. Allah has described the Muslim Ummah as the best of Ummah evolved to lead the rest of the human race; this leadership role can only be carried out when the Muslims are guided by the Law of Allah. The construction of the society, however, must begin with the reassessment of the role of the Muslim women: a re-assessment that must reconsider their present status in the light of Sharia. It is to be noted here, that any emergent social order, be it Islamic or non-Islamic, has to undertake bold and energetic steps to raise the status of women and free them from the chains of custom and tradition invented by men for their own gratification.

OBSERVATIONS

The family today, in most parts of the world, is in a state of disintegration and needs redemption. Marriage which is the basis of family life in all religious set-up is being discarded and its place is being taken over by free-love, moral depravity and licentiousness that stinks to high heavens. In his book The Religion of Islam, Muhammed Ali said:

> "Marriage is being discarded not on account of any inherent defect in it but simply because it entails certain responsibilities that are shirked in avoiding marriage....."

When men and women even succumb to family pressures especially from responsible religious homes to the marital knot, within months the marriage crumble leading to divorce. The upsurge in the rate of juvinile delinquency, drug addiction among the youth, prostitution and homosexuality is linked by sociologists to the rate of divorce and the disintegration of family life. Many reknown criminals have been found to be products of broken homes or those whose parents abandoned their responsibilities and put them in care of other people not emotionally concerned about their welfare. The disturbing rate at which crimes are being committed by Youths is traceable to lack of parental discipline at an early age was also confermed. The root-factor of all these may be:

i. ignorance of the womenfolk especially about their rights under Islamic Law.
ii. some identified abuses of certain male privileges in family relations as in the practice of poliygamy and marriage dissolution by falaq.

iii. escalation in the amount of dower (sadaq) and other customary courtship and betrothal gifts.

iv. docket congestions in probate matters and judicial insensitivity to some of the male abuses referred to above, and

v. muslims juristic and general intellectual inertia.

Having identified these problem areas, the only solution to free the society from these multifarious family problems is to return to the Qur'an and sunnah as the foundation and essence of law and as a guiding principles in matters of legislation, public policy and in all other aspects of life. Islam insists that all human actions should find their justification in a set of absolute principles which a given people regard as binding on them. Islamic tradition makes it obligatory on Muslims to undertake this kind of reform whenever the human element in Law operates outside the guidance of the Qur'an and Sunnah, or whenever pretexts are invented or stuations are created to frestrate the comprehensive operation of the Law. The family system designed by shariah is basically valid for all times and the Islamic legal system is capable of self-modification and reproducing itself to meet the exigencies of times and changing circumstances of Muslims.

Reforme of Nigerian Legal System.

One basic remedy to the inadequacy of the legal system in Nigeria might come by entending equal treatment and unrestricted internal autonomy to each of the three

legal systems operating in Nigeria. Such an exercise would entail, among other things, the elevation of the Islamic and Customary legal systems to the same status as is currently enjoyed by General Law throughout the Federation. This also calls for the maintenance of three separate final courts of appeal, and three set of lower courts having autonomous jurisdiction, power, composition and set of rules and procedure. With this, the higher Shari'a Court of Appeal should be vested with legislative powers to make regulations, issue circulars such as would be suggested below to regulate the formation of unreasonable polygamous unions and prevent some of the abuses of talaq processes by husbands.[6]

The Grand Mufti for the purposes of the smooth running of these additional responsibilities may create a division under each states shari'a Court's of Appeal to be known as Family Affairs Council to be presided over by a Grand Qadi or a Qadi of the Court. The Council will be vested with powers to resolve family disputes, monitor the implementation of the reform measures and in many other ways help make the regulatory orders introduced workable. The family council should be empowered to modify the existing "Arbitration Council" by creating an ad-hoc, community-based arbitration councils. By regulation, it can be required that all matrimonial disputes should be submitted to such councils either as a

6 For example in Sudan a Country similar to Nigeria with the set up of legal system, the Grand Mufiti is vested with the legislative powers to make what they called legal circulars

Substitute for or a supplement to adjudicative resolution which does not and cannot by its nature get to the roots of the disputes. Such councils shall consist of one representative each from either spouse's side and a chairman who shall be a respected Imam of the community. The council's main function shall be to try to reconcile the parties, where the parties failed to reconcile, then the council refers to the Holy Quran where it is stated:

> "If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation. For God hath full knowledge and is acquainted with all things "8.

This Quranic provision has clearly provided an excellent plan for settiling family disputes, without too much publicity or mud-throwing; or resort action to the chicaneries of Law. The Latin Countries recognise this plan and included it in their legal systems. It is a pity that Nigerian Muslims do not resort to this very important and useful method, because the arbiters guardians of the two parties they know better about the parties, and therefor in a position, with God's help, to effect a reconciliation. The society denys women their right of knowledge simply because they want to continue to manupulate them. MMost of women think that their duties and responsibilities stop at cooking and procreation of children and nothing else. This is what Sheikh Usman Bin Fodio vehemently condemed in his book Nurul-Al-Beb where he said:

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8. Qur'an 4:35.

> Most of our educated men leave their wives, their daughter and their captives morally abandoned, like beasts, without teaching them what God prescribes should be taught to them, and without instructing them on the articles of law which concern them, Thus, they leave them ignorant of the rules of ablutions, prayer,fasting, business dealings and other duties which they have to fulfil, and which God commands should be taught. Men treat these beings like household impliments which become broken after long use and which are then throwun out on the dung-heap. This is an abominable crime. How can they shut up their wives, their daughters and their captives, in the darkness of ignorance, while they impart knowledge to their students daily in truth, they act out of their pupils, that is nothing but hypocrisy and vain ostentation on their part....

He says further, addressing women:

> Muslim women! Do not listen to the speech of those who are misguided and who sow the seeds of error in the heart of another; they deceive you when they stress obedience to your husband without telling you of obedience to Allah and His Messenger..... Yes, the woman owes submission to her husband, publicly as well as in intimacy, even if he is of the humble people of the world, and to disobey him in a crime, at least so long as he does not command what God condemans; in that case she must refuse, since it is wrong for a human creature to disobey the creator."7

The family Affairs Council, or an agency to be created under it will continually educate the public about their matrimonial rights and obligations under Islamic Law especially on marriage. The Councilor or its agency have to work in collaboration with other Govern-ment organs concerned with public elightment, public

educations, formal schooling etc. It may also from time to time organize refresher courses to acquint judges of lower courts and community Imams about the Family Council's activities.

Divorce and the Future of Youths.

In this research I have tried to show the correlation between divorce, broken homes and juvenile diliquency in Nigeria, God in His divine Wisdom of the Peculiarities of homsapiens has seen this and makes divorce the veery last resort in the life of muslim couples. In Islam, a man or woman cannot just wake up and decide to divorce his partner. Several efforts must have been made to ensure that the relationship does not break and if eventually the continuous relationship between the two would have a more devastating effect on their lives, Islam allows divorce. The law of divorce unfortunately is being jettisioned in many muslim secties. To save family life from this degradation or disintegration, a way of curbing divorce rate must be evolved. The Family Affairs Council, in addition to its powers of arbitration may

a) adopt the Hambali School's view and issue circulars making it permissable as well as enforcable the mutual understanding of spouses in a marriage contract which either preceeds a husban from taking a second wife, and/or giveer of such a wife to have power in the matter.

b) to borrow a leaf from pakistani reform which requires that no divorce will be valid until after expration of 90 days from the day it is filed with the designated authority. In Nigerian situation, it will be modified to read that no divorce is effectige or may be given in evidence until after 90 days of its filing with the local Imam in the community.

Other important issues to be taken into consideration by the Council, include the fellowings:

1. EARLY MARRIAGES

One of the greatest solutions that Islam evolved for preventing sexual immorality in the socicty is that its discourages earlys marriage. Islam does not prescribe a certain age for marriage but immediately a man or woman feels he or she cannot stay without a partner, the Islamic solution is marriage and nothing else. When a matured man or woman is emotionally charged and the sexual urge could not be met legally, it would be met illegaly and the result is promiscuity, abortion, veneral dieseases, AIDS etc.

2. Prohibition of Pornographic Materials.

Ponographic materials have done alot of damage to the morality of youth. Unfortunately nothing is being done to discourage it from the society. Most young persons in this country, especially students, encounter immorality through the pornograpic film on television, pornographic magazines, cinema and novels. This has a lot of negative impressions on them.

They arouse their sex urge. And immediately a man is sexually aroused the next thing is for this animalistic pr pensity to be satisfied. If it is not satisfied legally, it will then be satisfied illegally.

The other contributory factor to immobility in our society is the irresponsible ways women dress in our society. In Islam both man and woman are supposed to dress with modesty. In places where Islamic morality is jealously guarded indecents sexual practices are either non-existent or rare to come by. Therefore it would be the responsibility of the council with the help of the authorities concerned to universally ban pornographic materials if morality in our society is to be improved for the sake of our future generation.

SUGGESTIONS

In this study we have shown that Nigeria is characterized by a multiplicity of judicial organizations:

1. Islamic Law (Sharia), as discussed above.
2. Customary Law which is a blanket term for the vast array of relatively distinctive but inter-related ethnic systems of law.
3. General Law, which was introduced by the British at the beginning of this century. This system is regarded as the "Formal National Law" for Nigeria as a whole. It looms over the other two systems, even though it has recurrently been modified by internal Nigerian enactments, legislations, and court decisions. It is currently administered mainly through the district, magistrate, high and supreme courts. We have shown that the co-existence of these legal systems may be attributed to two major reasons.

First, ethnic heterogenedity: Nigeria is populated by numerous ethnic groups, each characterized by lingustic, legal, political, economic, and social distinctiveness. The country is ethnically and institutionally complex long before the coming of Islamic religion and the British rule. The country for centuries supported various populations of migrants, traders and rulers or conquerors who interact through various ways[1]. This results to the multiple adaptation and growth of a differentiated social and thenic units.

Secondly, the introduction of Islamic religion and the conquest of the country by the British in the nineteeth and twentieth centre respectivel, created room for muslim administration and the incorporation of non-believer communities and dhimmis (tributaries) to Nigeria. The British policy of indrect rule also considerably served to promote and sustain pluralistic legal and social systems. Retention of the Pre-existing judicial systems of the indigeneous ethnic groups vis-a-vis the introduced of Islamic and English Laws has undoubtedly added to the complexity of socio-legal systems in the country today.

The interection of these different systems of law has given rise to processes of both mutual legal adaptation and internal conflict. Admidtedly, each powerful, new politico-legal system had attempted to suppress, if not eliminate, the Pre-existing one. But this, as we have shown, has not been wholly successful, Rather, the interaction has resulted in an exchange of jural elements between the three different bodies of Law. It has been shown, for example, that Islamic

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1. For example, when rules of inheritance was introduced by Islam, it has also allowed the customary legal heirs (Residuaries) to also, inherit together with the newly introduced set of Qur'anic heirs.

Law has been adjusting itself through the application of ijtihad, istih san, urf, istidlah to some pre-existing ethnic legal system by tolerating, and at times even enforcing, certain traditional practices[1]. Various customary laws have also been adapting themselves to sharia, especially the ethnic groups of the Northern States of Nigeria. Therefore it would be seen clearly, that legal adjustments have been greater between Islamic and customary Law than between General Law and either of the other two systems.

We have also illustrated that judicial organisation and the rules of substance and procedure vary remarkably from one body of law to one another. According to Islamic Law most if not all animist and British (Christian) Legal institutions are repugnant to the basic principles of Sharia and must therefore be rejected. Similarly, the British and their Western trained successors consider a great proportion of Islamic and customary judicial institution to be inferior to and incompartible with English concept of justice. This struglle persists today with each jural system, symbolized by courts and judges, vying to displace the laws and customs of the other systems. Such competitions has frequently resulted in the General Courts complete reversal or alteration of definitive decisions delivered by either the Islamic or Customary Courts.

What should be realised of these three legal traditions (Islamic, Customary and English Law) is that, the most widely utilized systems is the Islamic and Customary Laws(1)

1. See S.Kumo, Application and Organisation of Islamic Courts in Nigeria(unpublished Ph.D.Thesis 1974), see also Yusuf,A.B., Legal Pluralisin in N. Nigeria, Conflict of Laws in multy -

which reflected societal norms. With reconciliation as the basis of the two Laws, they are simple, informal, genuine, inexpensive and above all less time consuming. These are valuable assets absent in English law or (General Law) so to say. In what way are these Laws then inferior? We should not be blinded by the administrative tectics employed by the colonial powers to render the two laws inferior to th[illegible]rs. It was in the attempt to govern their new territory using their own conception of justice and equity that the colonial power introduced the General law with the primary aim of protecting their interests. To colonial administrator anything African was considered inferior.

UNIFICATION OF FAMILY LAW

Any policy aimed at effecting a uniform legal system for this country, has to bear in mind the integration of Laws governing family, marriage, inheritance and other compulsory institutions is bound to be difficult if not impossible in any multi-ethnic society. In particular, the parallel enforcement of monogamous and polygamous unions is likely to cause a serious problem. Native christians are, for instance, enjoined to practice monogamy. For such persons and those who marry according to the marriage ordinance, taking another wife is considered to be bigamy(1), a crime under the curfent matriononial causes Decree, 1970.

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1. See, for example, R. V. Bartholomew Princewell(1963), N.L.R. 54, and (1964) J.A.L. 36.

Why the unification is not possible is, even though, all the three Laws aim at protecting life and property, maintenance of peace and up holding human honour and liberty the way they try to acheive these goals are different. For example, under Islamic Law, a muslim is called upon to refer every act of his being to a comprehensive Divine Charter, his declaration to faith which enjoins upon him to say:

> "Say, Truly, my Prayer and my service and sacrifice, my life and my death, are(all) for Allah, The chariser of the Worlds: No partner hath He: This am I commended, and I am the first of those who bow to His will"(2).

The General Law (Common Law) is said to be secular and therefore more suitable for a multi-ethnic country like Nigeria. How ever, common Law should be judged on merit and not because of its alleged secular character. It is a christian Law in a thin secular garb. That the English Common Law has always been a christian Law, affirmed and reaffirmed by the British Legal Luminaries and British house of Lords which is the highest court of Appeal in Great Britain, is not in doupt. Lord Summer frankly admits this when he says:

> "Ours is, and has always been, a christian state. The English family Law is built on christians ideas, and, if the national religion is not cristian, there is none. English law may well be called a christian Law, but we apply many of its rules and most of its principles, with equal justice and equally good government,

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2. Quran, 6; 162 and 163.

> in heathen communities, and its sanctions, even in courts of conscience, are material and not spritual"(1).

Also in Nigeria, Justice Karibi Whyte a supreme Court Judge, while commenting on a paper titled "politics of the judiciary", has this to say:

> "The claim of the Holy Qur'an to divine revelation is not peculier to it. The Holy Bible which appears to contain the fundamental basis of the common law, claims to have been derived partly from the Ten Commandments God gave to Moses on the mountain, the several books of the Holy Bible are said to have been written on inspirations. The Roman Twelve Tables, the Laws of the Greeks, and the Laws operating in many civilised countries are founded on divine revelations"2.

It is for this, and many other reasons, I would submit that, the question of unification of these laws in Nigeria is an impossible task. Because, as it has been clearly shown above, there would be no Muslim who would accept to abondon his Islamic Law and accept the Christian - inspired English Common Law; similarly no Christian or animist would agree to abondone his law for an Islamic Law, and therefore, the only solution is to allow the three Laws to continue existing side by side. Both the 1979(1) and 1989(2) Constitution of Nigeria contain provisions which make the High Court, the Sharia Court of Appeal and Customary Court of Appeal Parallel as state superior courts of records with equal status and rank. This position should be allowed to prevail in order to allow the three legal systems of law to grow and develop so as to cater well for the multi-religious state of Nigeria. Let us not allow ourselves to be deceived by the gimmick of uniformity and National Unity.

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1. Bowman V. Secular Society Limited,(1917) All E.R Rep. 237; 86 L.J.P. 140.
2. Paper Presented at the All Nigerian Judges Conference held at Abuja 4th to 11th September, 1988.

What Nigeria requires is unity in diversity and that is why Nigeria has consistently retained the Federal System of Government.

In the course of our endeavour to obtain unity in diversity, we must not deceive ourselves by telling ourselve to forget our differences because we know we cannot and never forget them. We cannot forget our differences because doing so will render some of us losing their identities. The wise thing to do, in the course of our endeavour to obtain unity in diversity, is to recognise our differences, accept them and respect them so that we can make provisions to accommodate them for the satisfaction of all. This is the only wise way to follow unless it is our desire to continue to deceive ourselves. The National conference on Law development and administration in Nigeria Organised by the Federal Ministry of Justice 1987 also recommended the retantion of the three legal systems in Nigeria. It says in its communique that:

> "Any reform of Nigerian Law must recognise the existence of three parallel systems of law in the country, namely, the Common Law, Islamic Law(Sharia), and Customary Law"(1).

In a Communique issued at the end of the fourth. All Nigeria Judges' conference also resolve and recognise that "there are three sources of Law among others in our legal system. They are common law, Sharia and Customary Law and each should be allowed to continue to grow and develop."(2)

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1. The Conference was organised by the Federal Ministry of Justice between 21st and 25th September, 1987 at the Nigerian Law School.
2. The Conference was held between 4th to 11th Sept., 1988 at Abuja.

UNIFICATION OF THE VARIOUS CUSTOMARY FAMILY LAWS.

Having discussed the impossibility of the unification of the three legal systems in Nigeria, the various customary family laws., there arised a fundamental questions as regards unification of customary family law; whether it is desirable and practicable. With the present pace of national development unification of customary family law will be desirable for the following reasons.

First, with growing communication and intensification of mobility, members of the various ethnic groups have became dispersed over wide geographical areas. This territorial dispersal of people means increase in degree of contact and interaction, a stuation which in turn is resulting in the rise of intermarriages. When a legal issue arises in these type of cases, the customary Courts are required either to apply the Customary Law Prevailing in the area within the jurisdiction of the court or the law binding between the parties(1). In practice and in most cases the first alternative is applied. This means that when members of different ethnic groups intermarry, there may raise problems of ascertainment in legal proceedings (i.e. in mixed cases for example), that which one of the two laws is to be applied.

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