MAINTENANCE OF WIFE UNDER ISLAMIC LAW: ITS APPLICATION IN THE NORTHERN STATES OF NIGERIA

BY

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This is to certify that MUHAMMAD, Ibrahim Tanko, a student of the LL.M., Faculty of Law, Ahmadu Bello University, Zaria, Nigeria, has worked under my supervision and completed his thesis on, "MAINTENANCE OF WIFE UNDER ISLAMIC LAW: IT'S APPLICATION IN THE NORTHERN STATES OF NIGERIA".

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D E D I C A T E D T O:

SEINI ALI DOGUWA who reared and brought me up, paved and made it possible for me, the way to learning from Primary to Law School.

He passed away as ALLAH willed in the Night of Tuesday the 21st day of February, at about 11.45 p.m. 1984. May Allah have mercy on him. Ameen.

A B B R E V I A T I O N S

1.	All E. R.	=	All English Report
2.	H. H. S.	=	How High Soever
3.	H. L. S.	=	How Low Soever
4.	L. L. R.	=	Lagos Law Report
5.	P. B. U. H.	=	Peace Be Upon Him
6.	Q. B. D.	=	Queen's Bench Division
7.	S. A. W.	=	Sallal-Lahu-Alaihi Wa-Sallam
8.	S. L. R.	=	Shari'ah Law Report
9.	S/T	=	Subhanahu-Wa-Ta'ala

A B S T R.A C T

The treatise seeks to treat the subject of NAFAQAH in Islamic Law and its practical application in the Northern States of Nigeria, which by and large, is a Muslim dominated territory.

It is because of the practical value of the topic and the misapplication by the subjects of this Law in these states that obliged the author to select the topic.

By way of an analytical introduction, the topic falls entirely under Islamic Family Law (Ahwal-al-Shakhsiyyah) which is the basis of a tranquile mutual existence in a society. And more particularly, Maintenance (Nafaqah) is the core and kernel of a marriage because no marriage can exist without maintenance, hence, the author has confined his writing on maintenance of wife only.

Seven chapters, excepting the Introductory chapter have, all in all been written. The introductory chapter, as the name suggests, is an eye opener$_f$ It introduces the reader to the General Principles of the Shariah vis-a-vis maintenance. It treats the objectives of selecting the subject. It further introduces the reader to the Geographical, sociological and religious set-up of the Northern States.

In chapter one, preliminaries before maintenance can accrue have been discussed and these are the legal requirements of marriage under the shariah.

Chapter two treats the Rights and obligations imposed by the shariah on the spouses on their getting married. Such rights include the Rights of Allah on each of the

spouses; the Rights of the husband which are correspondingly the obligations of the wife and the Rights of the wife which are the obligations of the husband. The basis of such rights under the shariah have also been discussed along with them.

Chapters three, four and five consider, separately the concept and meaning conditions. Necessaries and quantum grounds of forfeiture of maintenance. Comparison between the a law and the actual practice in each case has been considered.

In chapter six, maintenance under non-Islamic Laws in the Northern States has been briefly considered and it is contrasted with the provisions of Islamic Law. And whether Islamic Law is a customary law, as claimed by some Nigerian Statutes has also been looked at.

Chapter seven, the final chapter brings the conclusion and suggestions. There are suggestions as to how to rectify the present anomalies between the law and the practice. Some examples of modifications introduced by some Muslim countries have also been highlighted.

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بسم الله الرحمن الرحيم

INTRODUCTORY CHAPTER

1. SHARIAH: THE FOUNTAIN HEAD OF MAINTENANCE

Islamic Law popularly and originally known as 'SHARIAH' is a legal system which regulates the conduct of all human affairs of its subjects i.e. Muslims. It is not merely a religious law but a law of universal application. It provides a complete code of life. Its provisions govern social, moral, commercial legal and cultural life of Muslims. Even in certain circumstances it regulates the affairs of non-Muslims. It was revealed by God to His Prophet Muhammad (S.A.W.) for the propagation of Islam among all peoples Arabs and non-Arabs, Easterners and Westerners, from every walk of life and irrespective of their customs and history. It is a system of legislation relevant to each family, each tribe, community, each state, so it was not revealed for limited application to a specific age and not any other. It is a system of legislation for every age and time. It is forcifully valid and shall continue to be so, till the end of this life on earth. It's injunctions were coined in such a manner that they are not affected by the lapse of time.[1]

In its essence however, Islamic Law is religious, Divine in origin and moral in scope.[2]

---

1. Audah: Islam between ignorant followers and incapable scholars.
2. Abdul-Ati - The Family Structure in Islam.

It is thus the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. It is an all embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all aspects; it comprises on an equal footing laws regarding worship and ritual, as well as political and legal rules. It is impossible to understand Islam without understanding Islamic Law. It is a phenomenon so different from all other forms of law.[1] The Shariah therefore cannot be assessed in complete isolation of Islam nor is the converse. And Islam is far more than a religion in the actual sense but is a complete way of life with it's sets of rules/laws guiding even the minutest aspect of that life. Sequelly, complete fairness and justice could not be done to this study if it were taken in isolation. Not only that, the study would have both practically and theoretically been impossible.

The known primary sources of this law are four:-

(a) The Holy Qur'an

(b) The Sunnah or Traditions of the Prophet (S.A.W.)

(c) The 'Ijma' or consensus of opinion

(d) The Qiyas or anological deduction.

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1. Schact: An Introduction to Islamic Law

Other supplimentary sources comprise of:-

(a) Al-Istihsan, or the deviation on certain issue from the rule of a precedent to another rule for a more relevant legal reason that requires such deviation.

(b) Al-Istislah: or the unprecedented judgment motivated by public interest to which neither the Qur'an nor the Sunnah explicitly refers

(c) Al-Urf: or the custom and usage of a particular society, both in speech and in action.[1]

Thus whatever a Muslim does has to have its basis from one of the above sources of Law. Sequelly, family law generally and maintenance in particular has had its basis from these sources.

Thus the Holy Qur'an states:-

اسكنوا من من حيث سكنتم من وجدكم ولا تضاروهن لتضيقوا عليهن وان كن اولات حمل فانفقوا عليهن حتى يضعن حملهن .

"Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they happen to be with child, then spend for them till they bring forth their burden.[2] It is further stated:

" لينفق ذو سعة من سعته ومن قدرعليه رزقه فلينفق مما اتاه الله لا يكلف الله نفسا إلا ما اتاها .

---

1. For details see: Said Remadan: Islamic Law It's Scope and Equity.
2. The Holy Qur'an Cahpter 65:6.

"Let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him: God does not burden any human being with more than He has given him.[1]

During the farewellpilgrimage, the Prophet (S.A.W.) warned the gathering in the following words:

فاتقوا الله فى النساء فإنكم اخذ تموهن بكلمة الله واستحللتم فروجهن بكلمة الله ولكم عليهن الا يوطئن فرشكم احدا تكرهونه فان فعلن ذلك فاضربو من ضربا غير مبرح ولهن عليكم رزقهن وكسوتهن بالمعروف.

"Fear God in the matter of women for you have taken them (from their parents) by word of God and you have legalised having sex with them by the word of God.

Your rights over them are that they should not bring into your houses whom you do not like and if they do that beat them lightly. Their rights over you are that you feed them and clothe them in kindness.[2] Another tradition states:-

وعن معاوية القشيرى رضى الله عنه قال: قلت يارسول الله ماحق زوجة احد نا عليه قال: تاعمها اذا طعمت وتكسوها اذا اكتسيت، ولاتضرب الوجه ولا تقبح ولا تهجر الا فى البيت.

"From Mu'awiyyat al-Qushairi who asked the Prophet: "what are the rights of one's wife over him?" The Prophet said; "Feed her if you fed yourself and clothe her if you clothed yourself. Do not beat her on the face, do not maltreat her and migrate not from her except at the home".[3] Thus to maintain a wife is an obligation upon any Muslim who has got married.

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1. The Holy Qur'an Chapter: 65.6
2. Muslim relates this Hadith
3. Narrated by Mu'awiyyat al-Qushairi

2. THE MEANING AND CONCEPT OF MAINTENANCE UNDER SHARIAH

The corresponding Arabic word for maintenance is NAFAQAH (نفقـــة) and Nafaqah is thus defined in the Arabic language as:-

" ما يلـزم من المال للمعيشـــــــة "

"Means of support or sustenance."[1]

In the legal parlance however, it connotes all those things which are necessary to the support of life, such as food, clothes, and lodging, although many Jurists confine it solely to food.[2] To be on the safest side however, the writer prefers its general meaning.[3] The main causes of maintenance as acknowledged by Jurists are three:

(i) Marriage

(ii) Blood Relationship and

(iii) Slavery; or as put by others, property.

3. BRIEF EXPOSITION ON THE ISLAMIC SCHOOLS OF JURISPRUDENCE

The schools of Islamic law sprang up during the periods (132-656 AH) (750 - 1258 AD). Outstanding among such schools are four which have been named after their founders: Abu Hanifah, Malik bn Anas, Shafi'i and Ahmad Ibn Hanbal. It should however be noted that those four famous schools are by no means the only schools in the history of Islam. But the fact still stands that other private schools of law such as that of Ibn Shibrimah, Ibn Abi Layya Al-Layth Ibn Sa'ad, Daud al-Zahiri, Abu Ja'afar Tabari, Ibn Hazm and many others were overshadowed by the strong influence of the four famous schools.

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1. Elias-Modern Dictionary Arabic to English.
2. Sharh al-Mayyarah ala Tuhfatil Hukkam pg. Durrul Mukhtar, p. 288
3. See Chapter 3 infra for further details.

Let us consider briefly a little history of each of the four famous Sunni Schools in their descending order:

1. THE HANAFI SCHOOL:

The founder of this school was Nu'man Ibn Thabit, known more popularly as Imam Abu Hanifah. He was born in the year 80 AH (699 AD) in Kufah (Iraq) and died 656 AH (1258 AD). He possessed remarkable power of reasoning and formulated a theory called ISTIHSAN (Juristic preference) which has come to be regarded as a secondary source of Islamic Law.

It is said on the Imam that "the way he preached was more a method of learning. Whenever a problem was brought to him, he used to place it before his students and then join them in opining on its solution. Each one was free to present his opinion, which sometimes contravened Abu Hanifa's. This sometimes led to hot discussions and even to shouting. Not until the issue became clear before them did Abu Hanifah present the resume of this collective study and suggest what he himself thought on the subject. The fact that Abu Hanifah had been applying this method of learning until his death made him always a student whose knowledge continued to grow and whose thought continued more and more to flourish."[1] The main features of this school include inter alia:-

(1) Flexibility - The school generally is flexible and broadminded. Rigidity, which is natural with sacred laws had been considerably removed by Abu Hanifah.

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1. Ramadan: Islamic Law its Scope and Equity, Quoting Abu Zahira on Abu Hanifah.

(ii) Utility - The school also has a principle of utility which renders it a dynamic and adaptable legal system.

(iii) Convenience - Another notable feature of the school is that it is most convenient and easily practicable.

(iv) Less reliance on traditions:- Abu Hanifah did not deny the authority or force of traditions but he adopted a very strict criteria for the scrutiny and authenticity of the traditions. Whichever is found having no authenticity was rejected.

(v) Reliance on Qiyas - the school relies very grately on Qiyas. It was Abu Hanifah who elevated the institution of Qiyas and developed his jurisprudence on its authority.

(vi) Doctrine of Istihsan: Abu Hanifah was the Chief exponent of istihsan or juristic preference or equity. Istihsan was always productive of a logical and synthetical approach o for the removal of hardship and to provide convenience.

Among his distinguished desciples were Imam Abu Yusuf and Imam Muhammad Shaybani.

11. THE MALIKI SCHOOL

Malik Ibn Anas, called simply Imam Malik, was born at Madinah in the year 95 AH (713 AD). He had his early training at Madinah. And he was looked upon as the highest authority in Hadith. He leaned more upon traditions and the usages of the Prophet and the precedents established by his companions and the custom of people of Madinah.

He developed a source of law (subsidiary) called, al-Masa-lih-al-Mursalah (public interest).

The main distinctions of Imam Malik are as follows:-

(i) Special aptitude towards traditions - Imam Malik had a special aptitude to traditions. His attitude however was so devoted that he easily decerned the genuine from the spurious.

(ii) Acceptance of the custom of Madinah Malik attached great weight to usages, customs and practices of the people of Madinah relying that they were the best exponents of the life of the Prophet. He even preferred customs over traditions of weak authority.

(iii) Reliance on Ijma - Imam Malik relied on ijma of the companions of the Prophet.

(iv) Doctrine of Istislah - He is the chief exponent of the doctrine of Istislah i.e. public interest or public good whose role was to promote the welfare of the people by securing them advantages and averting them from injury.

The Imam made his golden contribution by compiling traditions in his famous book Muwattah.

(III) THE SHAFI'I SCHOOL

Imam Shafi'i is by name Muhammad Ibn Idris Al-Shafi'i. He was born in Palestine in the year A.H. 150 (A.D. 767) and died in the year A.H. 204 (A.D 819). He was a student of Imam Malik. Shafi'i theories are noted for moderation of views and balance of judgment. His treatise on jurisprudence under name of the RISALAH is a monumental work which indicates his clear vision and full grasp of legal knowledge.

He always tried to follow a middle course between two opposite tendencies and his principle was to accept only well authorised traditions that are projected back to the Prophet.

The main features of the school are as follows:-

(i) Shafi'i accepted the four primary sources of Islamic law.

(ii) He also made use of a source unique to his school known as Istidlal (reasoning)

(iii) He rejected both the Hanafi and Maliki doctrines of Istihsan and Istislah (public interest)

(vi) His school is a compromise between the Hanafi and the Maliki schools.

His main contribution is the book of risalah and the Kitabul Umm.

(IV) THE HANBALI SCHOOL:

Imam Hanbali or properly called Ahmad Ibn Hanbal was born in the year 164 AH (AD 780) in Baghdad and died in the year 241 A.H (AD 855). He too, is a traditionalist He adhered strictly to the traditions and his interpretation was literal. He, unlike the other Imams, allowed a very narrow margin to the doctrines of ijma and Qiyas. Divine revelations of the Qur'an and the Sunnah of the Prophet (S.A.W.) were to him the only authoritative sources of law. He did not accept human reason as a source of Law. He was a student of Imam Shafi'i.

The main features of Hanbalis school are:-

(i) Reliance on the Qur'an and Hadith

(ii) He collected traditions in his famous book Musnad Ahmad.

These are the extant schools of Islamic jurisprudence in the Muslim world, though others add the SHIA school.

The followers of the Hanafi include countries such as Lebanon, Syria, Iraq, Turkey, Soviet Union, Afghanistan China, India, Pakistan.

Followers of the Maliki school comprise of Tunisia, Algeria, Morocco, Libya, Mauritania, Northern Nigeria and some adherents in Egypt, the Sudan Bahrain and Kuwait.

The Shafi'i's are dominant in Egypt, Malaysia, Indonesia, Ceylon, East Africa, the Philliphines and Singapore. It has traces also in the Sudan, Iraq, Syria, Lebanon, India, Nepal and Pakistan.

Hanbali followers are dominant in the kingdom of Saudi Arabia and the state of Qatar.

4. BRIEF GEOGRAPHICAL, ECONOMIC AND SOCIO-RELIGIOUS DESCRIPTION OF THE NORTHERN STATES.

"The Northern Nigeria",[1] or the "Northern Region"[2] or formerly known, "the Nigerian Sudan,"[3] as variously described covers an area of approximately 511,267.20 square kilometres. And throughout the whole length of the North, the climate is more sub-tropical than tropical.

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1. Federal Ministry of Information: Nigeria Hand Book, 1977.
2. Nigerian Year Book, 1966.
3. Crowder: The Story of Nigeria.

There is a long dry season from about November, to normally April bringing the harmattan winds blown from the desert. Rainfall varies but is as little as 50.8 cm a year in some parts of the region.

The main subsistance crops of the North are guinea corn, bulrush millet, beans, cassava, sweat potatoes, ordinary potatoes maize and some specialised crops including tomatoes, onions, sugar cane, wheat and etc.[1] But the main economic resources of the North, on the other hand are: groundnuts, cotton, tin, columbite, iron-ore cowpeas, livestock, fisheries zinc, lead, silver, gold, coffee and marble.[2]

In many of the urban cities of these states, thereaare emerged new industries apart from the local small scale ones. The more recognised industrial areas are: Kano, Kaduna, Plateau, Borno and Kwara. Such states have in many of their main towns such factories or Industries as the Zaria cotton Seed Crushing Company, the Katsina Oil Mill; Shoe Factories, Nigerian Canning Company Limited, Sugar Companies, Glass Industries, Cotton Ginneries and Textiles etc. So opportunities for industrial and agricultural investments are many and varied in the North.

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1. Crowder: The Story of Nigeria
2. Nigerian Year Book 1966 and Nigerian Hand Book, 1977 (Federal Ministry of Information).

Many of the state capitals and urban centres have the modern infrastructures. Good roads and air services connect the states with the other parts of the country. Telecommunication services are also extensive.

In his Geographical Regions of Nigeria, Reuben K. Udo had an unbiased mind in objectively assessing the religious texture of the Northern States and he thus states:

> "Islam is the predominant religion in the far North but the south is predominantly christian, although Muslims outnumber christians in parts of Yoruba land."[1]

The Northern States of Nigeria therefore, in terms of religion were and are still predominantly Muslim states. It is a fact corraborated by history that this region before the advent of the British with their colonial rule, was an Islamic state rather than as it now is, a region with Muslims in greater percentage. The antecedents leading to such a change of name and status of this region have left indullible scars in the minds of those Muslims who are seriously committed hoping to have a complete return to the status-quo.

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1. Udo: Geographical Regions of Nigeria, 1970.

The antecedents however deserve, at this juncture a concise review.

There was a time when the traditional legal system of Islam exclusively regulated all aspects of human conduct in this part of the country; Commercial, Contractual, Criminal, Civil Laws and Procedures, Judicial Administration were all governed by rules of Islamic Law. It however yet remains to be properly perceived how the Muslims, who form more than 80% of the population of these states allowed these virtuous rules Laws and, regulations with Divine authenticity to be rendered dormant in the jurisprudence books. More painfully still, the few enumerated areas of civil litigation including personal status of family affairs centering specifically on marriage, divorce, legitimacy, guardianship, intestate and testate successions and etc which we have accepted in order to settle any dispute arising therefrom in accordance with the Islamic Law/rules as applicable in these states are treated with uttermost lavity and disdain! Perhaps this is largely due to either: (a)(i) gross ignorance exhibited by the Muslims of the substantive as well as procedural laws of Islam and (ii) Professional misconduct on the part of most of our present day Islamic Law Judges or (b) that the litigants have utterly lost every hope in the Islamic Law Courts.

Consequently therefore, the status of Islamic Law has, here, been relegated and confined to a law of personal status.

And as mentioned earlier we suffer the ailments of Gross Ignorance not only in terms of the religious obligations but also in understanding and realising our God-given-rights and privileges under the Shariah. That is why we have lost such rights and it can hardly be reasonably foreseen when such lost glories will be regained.

How often do we see women flooding such courts seeking for divorce on small, flimsy and unimportant issues? How often do we also observe practically, a revocably divorced woman remaining in the matrimonial residence to observe the iddah? How often also do we see a wife dragging her husband to the court for non-maintenance but hardly can the allegation be established? How often too, do we note wives embarking on temporary separation on non-issues such as buying the kolanuts, the lip stick or changing for the wife new dress on particular ceremonies? These have all been attributable to the total lack of adequate Islamic Jurisprudence. To advance the reasons, as many have done, while interviewed, that most of the Islamic literature is in the Arabic language and which is not generally understood but only by a few and thereby making the studies difficult is nothing but a scape goat. If so, one would have thought that other literary works in equally, foreign languages such as English, which, I believe came to this part of the country later than the Arabic language, would have posed the same, if not greater problems. If all of us were fully literary and aware of our religious duties, the colonialists could

not have imposed their venemous, corrupt and aimless, systems of Law and education.

Lastly, in this treatise, most of the emphasis and references are confined to the MALIKI school of jurisprudence. This is for the obvious reason that the school, in the ten Northern States, is the officially applicable Law. This however does not impart the idea that casual references, comparisons and objective criticisms on the other jurisprudential schools are completely excluded in this piece of work.

5. ESSENCE AND DESIRABILITY OF THIS STUDY AS IT PERTAINS TO THE NORTHERN STATES OF NIGERIA

It was the intention of this writer to have undertaken a comprehensive study of the three causes of maintenance mentioned earlier. At first however, and for the purposes of this thesis, intensive chapterisation on the first two causes i.e. marriage and blood relationship had been framed. But in the course of data collection, the second cause, blood relationship, which entails maintenance of the descendants, ascendants and other relatives had to be dropped in order to allow a much fairer treatment of the first cause i.e. maintenance as a result of marriage tie. It should further be observed that anything relating to maintenance of slaves, domesticated animals and birds has completely been omitted in this writing. This is primarily due to the fact that:-

(i) In a writing of this nature one has to guard against verbosity and copiousness.

(ii) Slavery, enen-though not categorically wiped out by the Shariah but is highly discouraged, Hardly can one find, in the Muslim world of today, its practice, so previous writings on the topic have already provided the historical perspectives on the issue and laid down the guiding principles therefor;

(iii) As for the domesticated animals, birds, it is thought that when people hardly secure what to eat at the time of this writing as it is evident in all the Northern States in particular and the country in general, it is more relevant to address our minds to what is necessary for our responsive existence and not to animals or birds which are, on a number of instances, kept as a sign of leisure or assets.

Taken on its general terms the study of Islamic Family law relating to maintenance is a very important subject, not only in the Northern States but in the whole country as well. It is neither a pride nor an appraisal to assert that till the time of this writing, there has never been at least in these states, any English writing on the Islamic law which has in a greater detail reduced the subject of maintenance, both theoretical and practical in writing. And looking at the rate at which what they call 'modern literacy' goes, it is essential to cope up with both time and demand, it is thought that this piece of writing, though claiming no perfection will help a little way in providing source materials for those conversant with English writings but non conversant with the

Arabic writings. Even this humble attempt had faced alot of hinderances: for instance, about 100 questionnaires were distributed to some courts administering Islamic law cases but hardly had ten been filled in. Further, when individuals were confronted, even with the softest approach if they could allow us know how they maintain their families, most of them regarded that to be a private family affair. They were thus unwilling to reply to answers put to them. However some gave maximum co-operation.

It is such type of queer and unexploitative attitudes and the kind of shoddy and unproductive attitude of the Muslims generally and of most of our local ulema' in particular that form part of the motives for this writing. The Northern States are universally acknowledged to be a region of Muslims. It is however ironic to find that many of the Muslims arenot conversant with the law that regulates their lives activities in general and their family affairs in particular. It is not a surprise therefore to find a Muslim elite who has undergone the normal university life, fully learned in the English Family Laws but ignorant of the Islamic Family Laws. It is incumbent at any rate, for a Muslim to, if not generally, at least specially, know the laws that govern the relationship between him and his wife or Family.

SCHEME OF CHAPTERISATION

This writing has been divided into seven chapters excluding the Introductory Cahpter. Contents of these chapters are as summarised hereunder:

Chapter one deals with the legal requirements of marriage under Islamic Law. Here, the essentials of a marriage contract such as substratum of the marriage, the marriage guardian, the sadaqa, the witnesses, the sigha and absence of any legal impediment to a marriage have been discussed.

In chapter two, the general rights and obligations of the spouses under Islamic Law have been spelt out. And broadly, they entail the basis of such rights and obligations spelling out the Rights of God upon the spouses which none of them has the right to waive, the rights of the husband and obligations of the wife and the rights of the wife and obligations of the husband. For instance, the rights of the wife to visit or receive visitors her rights to inheriting the husband's property in case of his death and the husband's right to get obedience from his wife have all been discussed under this chapter.

Under chapter three, which appears to be the core and kernel of this writing, maintenance, its general and special meaning, concept and nature have been discussed. Conditions such as the validity and subsistence of the marriage, consumation of the marriage, ability of the wife to tolerate conjugal relations; accessibility of the wife for conjugation, obedience to the husband have all been discussed. Discussed further are the incidents of maintenance. And these include cases where the husband is having difficulty in maintaining his wife, the position of a sick wife vis-a-vis her entitlement to maintenance and accumulation of maintenance, the mode of paying maintenance are

discussed. Then under the chapter again, the conditions and incidents of entitlement to maintenance have been contrasted with the local practices and discrepancies therefrom have been highlighted.

In chapter four, NECESSARIES considered inevitable for maintaining a wife, or wives are discussed. Principally the primary ones such as food and its required quantity or quality; matrimonial residence and its standard; clothes and their quality have been discussed along with the general practices in the Northern states.

Chapter five spells out the grounds of forfeiture of Right to maintenance both during the coverture of the marriage and even after the marriage dissolution. Aspects such as minority of the wife, sickness of the wife; release; apostacy, recalcitrance of the wife and indigene of the husband, are brought to the fore of discussion. Circumstances where the wife has to forfeit after dissolution of the marriage have all been stated. Further, when can such a lost right be regained is also discussed. Discrepancies between these set of guiding principles and the local practices are highlighted too.

Chapter six contrasts the beauty of Islamic Law provisions for maintenance with non-Islamic Laws in force in the Northern States which comprise of:- The English Laws i.e., English Statutory Law, English Common Law and Equity; The Nigerian Statutory Law principally the 1970 Matrimonial causes Decree and the Customary Laws of which a handfull selection of the Igbirra, the Angas the Natives of Biu and their provisions and practices relating to maintenance of their wives have been looked into. Later these Laws were contrasted with Islamic Law especially to see whether if Islamic Law is properly defined and classified as a Customary Law.

Finally, chapter seven brought up the rear of this treatise. It summarises the general attitudes of the Northern Nigerian Muslims, both the learned and the ignorant, the institution which supervise the 'enactment' and implementation of Islamic Law. How could the general relapse be rectified? The chapter then looks at the modern reforms introduced in many Muslim countries and some suggestions are humbly made at the end.

C H A P T E R O N E

1. LEGAL REQUIREMENTS OF MARRIAGE UNDER ISLAMIC LAW:

In Islam, societal fabric rests on family unit and a family unit is, by and large, arrived at through a valid marriage. For a marriage to qualify as valid and legal in Islamic Law, it has to pass through some criteria; namely:

(i) Mahal i.e., Substratum or basis of marriage, (ii) Sighal Formal Engagement, (iii) Sadaq i.e., Dowery, (iv) Absence of legal impediments, (v) Shuhud i.e. witnesses (vi) Wali i.e., Marriage Guardian.

Once all the above elements are fulfilled without any deformity, the marriage so concluded is, in the eyes of Islamic Law, valid and legal.[1] However, for one to ascertain the validity and legality of each of the above listed essentials, it is imperative to cast a glance, at least briefly, on each of these essentials.

(i) MAHAL i.e., Substratum or basis of marriage.

First and foremost of the essentials of a marriage is the pysical existence of the would-be-spouses. Not only that both parties must be legally able to marry without any hinderance but must also have the capacity to enter into such a contract. This, therefore, necessitates a closer examination and scrutiny by each of the would be spouses. The examination and scrutiny, it is suggested, could be centred more particularly, on the

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1. Not all the schools of Islamic Jurisprudence are agreed upon these elements. For instance in the Hanafi school of Law the presence of a marriage guardian is not essential in all cases.

physical and mental fitness, general behaviour and religious devotion of each of the would be spouses. The most proper means of realising these qualities is by having a glance by each of the suitors to one another for self contentment.[1] The Jurists are almost all agreed on the propriety of looking at the woman whom a person intends to marry. Conversely, it would seem proper, since the civil contract is concluded only by the consent of the two parties, the man and the woman where the former has been expressly implored to satisfy himself about the latter by looking at her, that the latter enjoys the same right to satisfy herself before giving her assent.[2]

The assent of both the man and the woman is essential under the Hanafi Law. The Malikis however, do not treat it as an essential ingredient of the marriage. But by far, the view held by the Hanafi seems in this respect to be more cogent, concrete and convincing. It even enlines more with the authorities when marriage is taken in contrast with other civil contracts or transactions where agreement, in whichever form forthcoming from the concerned parties, is essential. As for example under the contract of sale the Prophet (S.A.W.) is reported to have said:

"إنما البيع ان تـــراض"

"Verily a sale should be based on the mutual assent of the parties."[3]

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1. For a proper discussion on such issues reference could be made to any written work on the subject of KAFA'A (i.e., equality between spouses).
2. Note the Malikis doctrine of IJBAR
3. Al-Muhadhab, Vol.1 pg. 257.

The Holy Qur'an too, is not silent on such issues and it states:

"يايها الذين آمنوا لا تأكلوا أموالكم بينكم بالبلطل الا أن تكون تجـارة عن تـراض منكـــــــم....."

"Or ye who believe: squander not your wealth among yourselves in vanity, except it be a trade by mutual consent..... ."[1]

Though marriage contract is not and is never treated as a contract of sale yet the Qur'an has made a categoric pronouncement on such mutual consent and it states:

" واذا طلقتم النساء فبلغن اجهن فلا تعضلوهن أن ينكحن أزوجهن إذا تـراضـوا بينهم بالمعروف.

"And when ye have divorced women and they reach their term, do not prevent them from marrying their husbands if it is agreed between them in kindness....."[2]

So by glancing at the Maliki's doctrine of Ijbar, it would not amount to an overstatement if it is asserted that the Malikis have stretched the law too far, though they may have their valid reasons. That law states that the father or his accredited executor has the power of matrimonial constraint to marry his daughter to a person of his choice. (This point is discussed beneath under the wali mujbir). And the provision has thus deprived the spouses more particularly the lady-to examine the would-be-husband let alone consenting to the marriage and once the marriage is cohcluded in such a manner, a

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1. The Holy Qur'an Chapter IV Verse 29
2. Ibid - Chapter II Verse 232.

court of law cannot annul the marriage solely on that ground. It is in the amplification of this doctrine, it is believed, that the practice has grown in the Northern States where some parents deem it proper to marry their daughters to a person whom they (the daughters)have never seen or even heard of. This practice seemed for a long time to have been well groomed when many of the ulama began to misinterprete the juridical phrase-sadaqatun jariyatun,[1] to mean a free gift of a woman in marriage; and they continue to give the hands of their daughters in marriage irrespective of whether the newly joined spouses love each other or not. The ultimate fate of such a marriage is that it ends up in chaos denigration and dissolution. How can, taking the realities of nature and life, a girl of tender ages, say 14 - 17 years, live in love, harmony and satisfaction with a septuagenarian husband? In what capacity do the couples find themselves? Do they actually live quo - spouses?

Granted that age limit is not and never abbarrier for one to take another in marriage as there are precedents right from the Prophet (S.A.W.). Has the Prophet specifically and himself necessarily sanctioned that as a rule to be unilaterally applied by fathers on their daughters? There are traditions of the Prophet which favour the marrying of a virgin girl. And through the

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1. A gratutious gift with religious connotation which fetches perpetual rewares to its maker even after death e.g., building of a public utility institution. Mosques, Schools Orphanage, digging of wells or rivulates, planting a tree which grows to supply shade or fruits to people freely.

doctrine of Istihsan (equity and fairness) these traditions could be construed to imply that virgin girls should be permitted to marry from among the row youths or adults to whom they consent.

So the institution of KAFA'A is also an important part of the substratum of marriage. The institution does not mean to inflict mental torment or plant the seed of disunity among the Muslims, rather it seeks to level differences based on colour or race, language, pride by family status riches or poverty among Muslims. It should be well noted that this affair of one person being the husband or wife of another is the basis of human existence and therefore important and should not be treated with any levity. Hence it is intended to create a perpetual relationship between the spouses and their families. It is thus equally important to allow, within the limit of the law, the would be spouses to have free hands in selecting their partners. This will, it is believed, augur well for the betterment of the Muslim Ummah.

(ii) SIGHA - (FORMAL ENGAGEMENT):

A marriage is not concluded except by formal engagement. Formal engagement connotes the normal legal procedure involved in effecting a contract - and this includes inter alia:

(a) The doctrine of Ijab (offer) and Qabul (accept (acceptance) and

(b) The doctrine of Majlis al-'aqd (the meeting place for effecting the contract). These two doctrines deserve some skeletal treatment for elucidation.

A. THE DOCTRINE OF IJAB WAL-QABUL (OFFER AND ACCEPTANCE)

Man expresses himself in different ways. Each mode of expression, so long as it is commonly known and clearly understood by the people concerned, is validly acceptable in the making of sigha. Offer and acceptance are commonly made verbally especially when the contracting parties are making a deal in the presence of each other.

For example, in a contract of sale one person verbally offers to sell his house, hire his stores or pledge his land while the second contracting party makes his acceptance in a similar manner. The formation of offer and acceptance in this manners is quite acceptable to the jurists. The jurists due to changes brought about by time and circumstances could readily accommodate offer and acceptance in this regard, verbally made through some complex and sophisticated modes between people in different places such as through telephone exchange, telex and etc; and such is deemed as if the verbal exchange was made in the presence of each other. In a marriage contract the formular used are those words employed by the husband or his representative seeking the woman's hands in marriage from her marriage guardian and the answer from him that he has given the woman in marriage to the husband or his representative on the husband's behalf constitutes offer and acceptance. E.g., "I give you (A) as a wife (B) "Or "I give her unto you upon condition of a dower of so much." The suitor then answers, "I accept" The common practice here in Northern Nigeria is that the suitor or (in most cases) his representative asks the woman's marriage guardian for her hands in marriage.

For instance, "I seek the hands of B in marriage for A" "and the marriage guardian of the woman answers, "I have given unto A in marriage the hands of B." This is immediately followed by the acceptance, "I have accepted for and on behalf of A the hands of B in marriage."

Regrettably enough however, it has been observed that on the majority of occasions, some of the representatives, especially that of the bridegroom are unable to accept the offer correctly. This happens where the offer is pronounced with a particular bridegroom in mind but his representative who purposely goes there to accept the offer for the bridegroom simply acknoweledges acceptance in the following way, "I have accepted." The use of this phrase, without further clarification is beclouded with ambiguities and uncertainties. Does it in any way connote that the acceptance is done in a representative capacity or on personal basis? If the former, the correct thing is for the representative to categorically and unambiguously indicate that he has accepted the offer for and on behalf of so and so. But if it is the latter, than one would like to question the validity of such a marriage.

At any rate, rules of Islamic law require that:-

(i) the conditions of the marriage contract (if any) must be understood by the contracting parties.

(ii) each of the contracting parties, if of full capacity, must give his/her consent to the contract;

(iii) there should be no doubt as to the identity of the husband and the wife;

(iv) the offer and acceptance must indicate clearly that the marriage has been contracted as there is no intention to marry at a future date in Islamic Law;

(v) there must be no lapse of time between the offer and acceptance;

(vi) the marriage must not be suspended upon a contingency and;

(vii) the marriage must not be a mut'a marriage.[1]

B. THE DOCTRINE OF MAJLIS AL-AQD (MEETING PLACE FOR THE FORMATION OF THE CONTRACT).

The doctrine of majlis al-aqd is perhaps one of the peculiarities of Islamic Law for which the law has adequately formulated a simple and operational forum. Offer and acceptance which are legally engineered to express the free will of the contracting parties to create a binding agreement ought to take place and hence coincide with each other in one and the same meeting place for the purpose of constituting a contract. Majlis al-aqd is the time and place factors within which offer legally operates and finally culminates into a contract which is either accepted or rejected instantly or in due course.

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1. Marriage contracted for the sake of enjoyment only and for a certain limited time. Contrast with the other schools especially the Shi'a schools.

For a marriage, the majlis al-aqd is the actual sitting where the marriage contract is entered into by the parties. At this session, the law requires that the offer and acceptance must be completed and one should not take place in a session different from the other. Opinions however differ as to whether the agreement which is constituted by the offer and acceptance, must be concluded in one and the same session.

The Maliki's opine that although there should be no interruption or delay between the offer and acceptance, yet a reasonable delay or interruption which does not take away the minds of the parties from the contract is allowed. The Hanafis are of the view that since an adult woman can give herself in marriage, an intermediary or letter can be used to conclude a marriage contract. Shafi'i and Hanbali, insist that agreement must be concluded in one and the same majlis al-aqd. Here too, out of the four Imams, the Hanafis appear more liberal and broadminded. This is because their provision has taken adequate care of the modern technological advancements and complexities. The insertion of the words "intermidiary" and "or letter" could be interpreted to mean not necessarily a natural intermediary e.g., a human messenger but can include an artificial intermediary such as the modern means of communication telephone, telegram, telex exchange, wireless and etc.

At this juncture, it is pertinent to review what obtains at the majlis al-aqd during a marriage contract in most of the Northern States. Before touching on that however, it is essential to point out that the fact that alot of people have given much prominence to matters of customary practice which are in no sense legal such as the invitation of the Imam or a religious 'Malam' to offer a marriage du'a (prayer). The essence of such a du'a is that it helps the publicity of the marriage and at the same time serves the dual purposes of giving it a sacred character and making it an occasion for the education of the community. The du'a (if at all involved) must expartiate and explain to the audience the mutual rights and duties of husband and wife. So the du'a is by no means made a necessary component of the marriage contract, as is presently misunderstood by many of the Muslims. This failure to understand the proper position of the marriage du'a could be attributable to the ulama; and more often than not they woefully fail in delivering the message of the du'a, primarily enlightening the Muslims at the majlis al-aqd in the least by explaining to them the rights and obligations put now on the spouses by Allah; thus thereby defeating the essence of the majlis al-aqd as a forum of enlightenment. And the evil consequences of this is the the leaving of the newly joined couples to remain in utter ignorance of what right or obligation is for who. Worst of it all, the person leading such a du'a has to be paid a stipulated amount of money.[1] For

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1. This type of money is popularly called as "Kudin Liman" or "Kudin Malam." Such other types include also "Kudin Mai Unguwa" (The ward-head money); "Kudin Wali" (money

what? It is not known! Still, the majlis is popularly beclouded by a number of professional beggars to suck some pockets and echoe out alot of noisy speeches. This is seriously lamentable!

(iii) S.O.Q (MAHAR): DOWER (DOWERY)

Mahar or dower is defined as a sum of money or other property promised to be paid or delivered to the wife in consideration of the marriage. It is imposed on the husband by Law, as a mark of respect for the subject of the marriage the wife; and even where no dower is expressly fixed or mentioned at the marriage ceremony the law confers the right of dower upon the wife.

Dower can be paid out of anything lawful and valuable. It may be in cash, movable property, crops, animals or other tangible property which must be ascertainbale.[1]

Although dower is essential and is a condition, it is not necessary to be mentioned in the marriage contract. Islamic law does not regard any marriage conducted without a dower as invalid. But if it is however stipulated in the marriage contract that there shall be no dower; than ab initio such a marriage contract is void. However, this situation differs from where the parties kept silent over the issue of dower. Such kind of silence over dower is well deliberated under the topic of 'Nikah al-tafweedh' (i.e.,

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for the marriage guardian) and etc. These pieces of money must be paid to the respective individuals before the marriage contract is effected. What is the justification or legality of such payment. What part of the marriage do they form?

1. The concept of property in Islamic Law does not contemplate things like pork, wine musical instrument however expensive. They are treated as legal property only for the benefit of non-Muslims.

a marriage contract entered into with no specified dower). In such circumstances, the father or marriage guardian of the bride has been permitted to stipulate how much would be paid to his daughter as dower after the contract has been concluded.

In case the dower is specified, it only becomes due when:-

(a) There occurs consummation of the marriage;

(b) There occurs death of one of the spouses before consummation or;

(c) When valid cohabitation is presumed to have taken place. This occurs where the couple stay in a secluded place where no legal, moral or physical obstacle exists to prevent them from having sex if they desire. Here, the specified dower is further divided into (i) prompt; (معجل) and (ii) deferred - (مؤجل). In case of the prompt dower the wife has the right to refuse herself to the husband if it is not paid; but half of it may be paid to remove this recul-citrance. And in respect of the deferred dower, it is the unpaid part of the specified dower deferred to be paid at a later stage of the marriage and the wife has no right to refuse herself to the husband if this is not paid before consummation.

(a) ADEQUACY OF SADAQ

There is no prescribed legal limits for dower which is payable to the wife by the husband at marriage, The quantity of the dower is always fixed according to the customs prevailing and the important element is the financial position of the husband and the social position of the wife. A man is entitled to give what he can as a dower. This is due to the fact that none of the sources of law has fixed a limit as to what is payable as Sadaq. However, social considerations have as for instance pushed the Malikis to prescribe a minimum payment for the Sadaq and they unanimously fix ¼ (3 dirhams) of a dinar. The analogical computation as to what amounts to ¼ of a dinar in Northern Nigeria has over the years been carried by the Jama'atu Nasril Islam which now corresponds approximately to N10.00 (Ten Naira)

(b) THE INDISPENSABILITY OF SADAQ IN MARRIAGE CONTRACT

As a quintessence of marriage under the Maliki School, it is essential that the husband gives dower to the wife either at the time of the contract or later. This, by no means, indicates that marriage concluded without a dower, unless it is stipulated that none payment of the dower is a condition, a marriage does not become invalid simply because no express provision is made for it in the contract. But at any rate, the dower, whether in whole or in parts, has to be paid to the wife. This is in consonance with the Qur'anic stipulations; as for instance:-

" واتـو النساء صـدقـا تهن نحلـة ....."

"And give the woman (on marriage).[1] Their dower as a free gift -

" واحل لكم ما وراء ذلكم ان تبتغوا باموالكم محصنين غير مسافحين فما استمتعتم به منهن فأتوهن اجورهن فريضـــة ."

"Except for those prohibited all women are lawful for you provided you seek them with your property and give them their dowers as appointed."[2]

" .... والمحصنين من المؤمنات والمحصنين من الذين اوتوالكتب من قبلكم اذا تيتموهن اجورهن محصنين غيرمسافحين ولا متخذى اخـدان ."

"Lawful unto you 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 desiring chastity not lewdness nor secret intrigues."[2]

It is thus clear from the above verses that the giving of dower to a wife is mandatory and cannot be done away with completely. It is the wife and she alone who is entitled to retain or dispose of the dower in any manner she deems appropriate as it is her sole property. This calls for a contrast with what obtains in our society. Immediately the dower is handed over to the marriage guardian whether in full or just a small portion of it, the present

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1. The Holy Qur'an; Chapter 3 Verse 1.
2. Ibid - Chap.
3. Ibid.

writer learns that it is later handed over to the bride to satisfy herself by counting and confirming that it is the said amount that has been given in full or in partial fulfilment of the Sadaq. The ridiculous part of it however is that the parents take back this Sadaq from the newly married daughter with a view that this Sadaq (normally payable in cash) will be used to purchase something beneficial to the daughter (bride). The truth of it however is that alot of the parents consume this money instead of investing the said amount for the daughter.

On rare occasions do parents note that this sadaq belongs solely to the bride and to nobody else and ipso facto must be given to the newly engaged daughter and she is free to utilise it the way she likes. It really offends the law for whatever reason, the way some parents deprive their newly married daughters from enjoying their dower and this is irrespective of whether the daughter is virgin or otherwise, as it serves as a return for their sacrifice.

(iv) ABSENCE OF LEGAL IMPEDIMENTS:

Impediment means hinderance or obstacle. In the Islamic Family Law, there are some obstacles or restrictions which disallow inter-marriage between persons. Some of these impediments are of permanent nature whereas other are of a temporary nature.

KINDS OF IMPEDIMENTS:

Impediments are of two kinds:-

(i) Permanent Impediments; and

(ii) Temporary Impediments.

(I) PERMANENT IMPEDIMENTS:

These include: (a) Consanguinity; (b) Affinity; (c) Fosterage.

(II) TEMPORARY IMPEDIMENTS:

These include the following cases:

(a) Simultaneous marriage of more than four wives by a Muslim.

(b) Simultaneous joining of two sisters as co-wives

(c) A woman under iddah

(d) A woman having no religion.

(e) A woman undergoing the activities of Hajj

Each of the above grounds needs a perusal glance for clarification.

(i) (a) Consanguinity (Blood Relationship)

Where there exists a blood relationship between A (a male) and (b) (a female) A cannot take B for a wife on that ground. The impediment is however restricted to the following classes of persons:

(i) A's ascendants or descendants: e.g. his mother or grand mother (h.h.s), his daughter or ground daughter (how low soever h.l.s.)

(ii) A's father's or Mother's descendants. e.g., his sisters, niece, aunt whether paternal or maternal.

(iii) The sisters or brother's of any ascendant.

(b) Affinity (Relationship through Marriage)

A Muslim is prohibited from marrying certain relations by marriage such as:

(i) His wife's mother or grand mother (h.h.s.).

(ii) His wife's daughter or grand daughter (h.l.s.)

(iii) The wife of any ascendant or descendant (e.g., wife of his father or paternal grand father (h.h.s.) or the wife of his son or daughter's son (h.l.s.). But by way of example, a man is permitted to marry the descendant of his wife (e.g., her daughter or grand daughter) with whom the marriage has not been consummated.

(c) Fosterage (Relationship through Suckling)

A "Foster child" is that child who has been suckled by a woman other than his natural mother. By the reason of such suckling, the woman has now become an artificial mother to such a child and she is by that virtue known as a "foster mother." A Muslim is prohibited from marrying his foster mother or foster sister (a sister with whom either before him or after him have been suckled by the same woman).

(d) Divorce

After the husband has pronounced three (3) Talaqs (tripple divorce) against his wife, their marriage is dissolved thereafter irrevocably and they are prohibited from marrying each other. The prohibition is however removed if the woman is later married, consummated and divorced (at the husband's instance) by another husband.

(e) Unlawful Conjunction:

Where a relationship exists between co-wives (e.g., sisters) whether by reason of consanguinity, affinity or fosterage, to the extent that if one of them were a male, they could not inter marry, such a marriage is void. So a man cannot marry two sisters at the same time but this impediment is removed if the sister he is now married to is either divorced or dead.

(f) Difference of Religion:

Under Islamic Law, a Muslim male may marry a (Kitabiyah) a non-Muslim woman but from amongst the people of the Book. (conversely, a Muslim female cannot marry anyone else save a Muslim.[1]

(g) Number of Wives:

The legal limit of wives allowed for a Muslim by Islamic Law is four (4). A Muslim cannot therefore marry a fifth wife at the same time. If he does so, he has committed an irregularity which can be regularised by divorcing one of the wives.

(h) Iddah:

'Iddah', is the period or term during which a woman whose marriage has been dissolved by divorce or death is required to remain in seclusion and abstain from marrying

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1. The Holy Qur'an - Chapter 2 verse 221

another husband until after the expiration of the Iddah period. There are different kinds of Iddah and the periods for each differ one from the other.

Any marriage contracted during the Iddah period of a woman is null and void and of no legal effect whatsoever.

(i) Pilgrimage:

Where a Muslim wears the Ihram whether for the purposes of Hajj or Umra, he is prohibited from contracting a marriage either for himself or on behalf of another person. The prohibition however ceases immediately he takes off the Ihram

(j) Illness:

Marriage during illness is temporarily prohibited if there is a fear that death might result from the illness. The prohibition is removed if the sick recovers.

(v) Shuhud (Witnesses)

ولا نكاح الا بولى وصداق وشادى عدل ."

"There is no marriage unless there is a marriage guardian, dower and two unimpeachable witnesses."[1]

Such is a typical phrase usually found in the Maliki texts. And it is thus established under the Maliki Law that two witnesses of sound character (عدليـــى) should be present at the marriage session (majlis-al-aqd) to witness the formal engagement as husband and wife of the two parties involved.

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1. Abi Za'id: Risalah: Vol. II p.220.

QUALIFICATION

The qualifications attached to the office of a witness require that the witness must be:-

(a) a Muslim (b) Male (c) Adult and (d) Sane. Other supplementary requirements are that the witness must see, hear and understand who the contracting parties are; be trustworthy.

It can be observed that under this school of law, the witnesses have to be males, be present at the place of concluding the marriage contract. Alternatively, where two males of proven integrity cannot be found the law has relaxed the number of witnesses to be increased to such a multitude of e.g., thirty (30) and above even though all of them may be wanting in integrity, uprightness and tr trustworthiness as required of a witness. Each of the other schools however, is having different opinion as to the integrity or composition of the witness. As for example in the Hanafi school, less emphasis is laid as to the credibility of the witness and the presence of just a male and two females suffices. In the Shafi'i school, though credibility of a witness is a necessary condition, the witnesses presence at the majlis-al-aqd is essential too.

So all the schools, apart from the Hanafis, do not accept the presence of a woman (women) to conform with the valid requirement of testimony in a marriage. But on critical examination of the mandatory presence of males and only males to witness the conclusion of a marriage contract, it appears more appealing to the writer that the

Hanafi's view, taking the generality of circumstances holds better. The rule is that if a contract of marriage is entered into without witnesses such a marriage is avoided before consummation; but if it is consummated in that manner, and adequate publicity is given to the marriage either through wedding walimah (party) or drum beating, such a marriage holds good and shall continue to subsist. Hence the essence of witnesses is to bear testimony that the marriage has been validly concluded in accordance with Islamic Law, it is contended that, in the absence of the required number of the trustworthy men, the witnessing of women together with men can be accepted. Now contrasting this position with the Islamic law of evidence, one would have thought that the other schools would allow the testimony of a male and two females required by the Qur'an:-

" ..... واستشهدوا شهيدين من رجالكم فإن لم يكونا رجلين فرجل وأمر
أتان ممن ترضون من الشهداء أن تضل إحداهما فتذكر احداهما الأخرى ولا
يأب الشهداء إذا ما دعوا

"And call to witness from among your men, two witnesses. And if two men be not at hand then a man and two women of such as you approve as witness, so that if the one errs(through forgetfulness) the other will remember and the witnesses must not refuse when they are summoned."[1]

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1. The Holy Qur'an Chapter 2 verse 282.

WALI (MARRIAGE GUARDIAN)

'Wali', or marriage guardian/representative, means that person who has the right and power to conclude a marriage contract on behalf of the person he represents. The rules of representation in this respect provide that it is the feminine side which - requires such representation. And the person to be appointed as a representative has to possess certain qualifications which include inter alia:-

(a) That he has to be a male,

(b) Adult

(c) Muslim

(c) Sane

(e) Not Mahrim (i.e., a person not engaged at the time of concluding the marriage contract in activities of either Hajj or Umra), and

(f) Must be free from servitude.

Suffice it so to say, the general practice here in the Northern States is that one very rarely finds, even on the masculine side that the would-be-bridegroom attends the majlis al-aqd of the marriage let alone accept the offer by himself. Rather, a representative is, in most cases, appointed to accept the offer of the marriage for the groom. General result of the research had on this issue shows that the basic reasons for the groom's absence at the majlis al-aqd of the marriage to accept the offer of the marriage for himself are mainly two viz:

(i) That he feels shy of presenting himself before the momoth crowd-which comprises of both his parents, the brides parents and their friends, other relatives and invited guests from far and near distances who are there to witness the occasion and

(ii) it is considered 'improper' for a son to ... accept such an offer whereas his parents or other elderly relatives or friends are present.

The propriety of this sort of representation however is highly questionable. It is questionable to the present writer because he has had lots of opportunity to witness hundreds of marriage contracts where the groom is represented. What actually happens, is more appropriately related under SIGHA (which is treated supra).

In a bid to analyse the positions of the schools and for the sake of convenience, it is pertinent to look at the classifications of the Wali and later, see what each school holds as it's official view. The general classifications of the Wali are as follows:-

(i) Wali Mujbir; and

(ii) Wali Ghair Mujbir.

(i) Wali Mujbir:

He is defined as the marriage guardian who has the power of matrimonial constraint (ijbar). He may validly contract his ward in marriage at his discretion and regardless of the ward's choice in the matter. Generally speaking, the exercise of this power is restricted only to the following persons:

(a) the father,

(b) the father's father,

(c) the ward's testamentary guardian.

In the latter's father case however he cannot exercise this power unless the below conditions are met:

(i) that the father of the ward has specifically pointed out to him who the husband shall be,

(ii) that the father has categorically informed him of the time the marriage is to take place i.e., whether before or after puberty

(iii) that a dower of her equal (sadaqul mithili) is given by the bridegroom.[1]

The Wali Mijbir may impose his power on the under-mentioned daughters:-

(i) the virgin daughter;

(ii) young daughter who has lost her virginity either through marriage or otherwise

(iii) the adult virgin daughter until she is an Anis

(iv) the adult thayyibah - i.e., one who lost her virginity outside wedlock whether through accident, illness or through illegal union,

(v) the adult daughter who has completely become mad even if she has given births or has been divorced,

(vi) young son provided the marriage will confer some benefits to him.

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1. Imam Shafi'i has discarded the idea of reposing the power of ijbar in a testamentary guardian and he prefers the father's father.

The golden condition however laid to limit the indiscriminate use of such a power is that the Wali mujbir can not conclude the marriage contract of any of the above listed daughters with a person suffering incurrable disease such as enunch impotence, leprosy, insanity and etc.

The precise extent of the use of ijbar power varies between the schools as classified below:-

(a) The Hanafi School

Under this school, the capacity of a woman who is adult and of sound mind to contract herself in marriage, is absolute. The same school also explicitly lays down that a woman who is adult and 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, and this, whether she be a virgin or a 'Thayyibah'. On the same principle, the marriage of an adult woman under compulsion, has been held to be invalid. But the marriage of a minor under compulsion of her father or grand-father, holds good, on the assumption that a marriage thus contracted is prima facie in thebest interest of the child and therefore she cannot annul the contract of marriage when she attains majority age, unless there be good grounds for such a step. If however she was given in marriage by a guardian other than the father or grand-father, she can exercise, if she likes, the option of puberty and ask the court to set aside the marriage.

The power of ijbar under this school vests in any "proper" marriage guardian i.e., the person who has qualified to act under the rules of priority in marriage guardianship. And thus, the power is conferred on:-

(i) Male agnates but the father preceding the paternal grand-father and the latter is followed by

(ii) The nephews, uncles and cousins. In the absence of any of the above agnates the power falls on the shoulders of

(iii) Cognates and

(iv) other non-cognate relatives.

From this, it is inferred that the Hanafi school does not recognise the wali-general e.g., the Qadi or the Chief of the area.

Waves of the modern reforms introduced into many Muslim countries have found their ways into countries whose official law is the Hanafi Law.

For example, the modern legislation relating to marriage age has almost completely as in Syria, Jordan, Iraq, Egypt, abolished the right of the wali-mujbir to contract a valid marriage by constraint. But in India, Pakistan, under the Indian child marriage Restraint Act of 1979, and the Pakistani Muslim Family Laws Ordinance, 1961, a guardian may still validly contract his minor ward in marriage by constraint notwithstanding the punitive sanctions attached to the marriage of minors. However, a girl so conctracted in marriage during minority may repudiate the marriage even if contracted by her father or paternal grand father.[1]

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1. On the whole Imam Abu Hanifah bases his theory of a woman's capacity to conduct her marriage by herself from the following authorities:-

(i) Al-Qur'an - 2:230
(ii) Ibid - 2:232 and
(iii) Ibid - 2:234.

(b) The Other Schools:

The Maliki, Shafi'i and Hanbali schools of law, on the other hand, maintain that a maiden cannot personally consent to her own marriage, nor is she allowed to enter into marriage contract on behalf of another person. According to them the Wali's consent, in the case of a maiden, is one of the essential factors of marriage, though not in the case of Thayyibah. The distinction seems to have been derived from the idea that a Thayyibà's judgment is naturally more reliable than a virgin's, and that she is expected to understand better the nature of the marriage contract. The great majority of the girls being quite innocent of the nature of the contract, it is therefore necessary that the guardian of the girl should intervene and protect her from being duped by interested persons, or from the evil consequences likely to follow from the choice of the girl, when injudicious or against her own interest.

As to the power of ijbar, Imam Maliki and Imam Ahmad Ibn Hanbali restrict it to the father or his executor. In case of the former's adult virgin daughters and minor daughters whether virgin or not. The mad daughter is also included here. Imam Shafi'i on the other hand restricts such a right to the father and the grand father. He ruled out the question of an executor in cases of virgin daughters, minors or adults. But he further extends this power to the mad daughter but excluding non-virgin daughters even if they are not adults.

Where the marriage is conducted in respect of the above classes of daughters by any other person than the actual father or his accredited executor; or where the father is absent but could be contacted with minimum difficulties when the journey is embarked upon the said marriage is regarded as null and void and of no effect whatsoever, even if the father later consented or the daughter gave birth. In case where the father resides at a different place, the following conditions apply:-

(a) That before the father left, he had been maintaining the daughter;

(b) the road to the father's present domicile is safe and

(c) that the daughter might not misconduct herself.

But where any of the above conditions is lacking, then the Qadi is empowered to subrogate the father.

The above provisions in the Maliki Law appear cubersome. This is because, as it appears to the present writer that the absence of a Wali-Mujbir puts a number of persons, the married couples and their children or other family, into jeopardy. In the first instance, the mere fact that the daughter was once married and begot a child or children devalues her, and her chances of getting a husband of her choice is not completely ruled out but apparently remote and she thereby suffers psychological demoralisation. Again, she may have to unnecessarily spend a considerable length of time before getting another suitor.

The question of misconducting herself cannot either completely be ruled out, human nature being what it is full of temptations and passions. The father too, has to suffer some economic loss in that he has to now provide maintenance for her and her issue(s) instead of these liabilities remaining upon the husband of the woman and father of her issue(s). The second point is with regard to the issue(s) of this annulled marriage. What is the status of issue(s) of such marriage? The implication, within the Maliki's declaration of such marriage as null and void, is that there was no substratum in the marriage and hence the couples entered into illegal relations and issues of such a marriage are ipso facto out of the wedlock and therefore illegitimate. It is further asked, who then shoulders the responsibility of the 'illegitimate' issues? Would it not have been better in safeguarding the dignity and honour of such a family by leaving the already concluded marriage undisturbed or in the least treat it as an irregular marriage which can later be regularised?

(ii) Wali Ghair Mujbir (i.e., Marriage Guardian who has no compelling power)

Wali ghair mujbir is one defined as a marriage guardian who lacks power of matrimonial constraint or, in other words, he is the one who represents the would-be-wife while her marriage contract is to be concluded. He is just an instrument for concluding the contract upon the consent of the woman.[1]

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1. El-Imeri - Person Status In Islamic Law.

Before a Wali ghair mujbir, hereafter referred to for convenience, as 'wali ordinary' can conclude a marriage contract for a woman, he has to fulfil the following ditions:-

(i) The would-be-wife has given her consent to the marriage;

(ii) the would-be-husband-equals the would-be-wife and

(iii) th t the dower of the would-be-wife is equivalent to that of her equals.

The wali ordinary is classified mainly into four; viz:

(a) (i) The agnates- including the son of the woman's legitimate father and his male descendants,

(ii) the woman's legitimate father,

(iii) the woman's legitimate brother and his male descendants

(iv) the woman's paternal grand father
(v) the woman's paternal uncle
(vi) The woman fathers paternal grandfather

(b) The supporter of the woman. By supporter here it means that person who has taken the care of that woman up to her marriageable age.

(c) The ruler - who is normally referred to as the judge

(d) The general Wali in the person of any Muslim who can make representation to a woman lacking any of the above persons mentioned above.

The Wali ordinary can make representation for any of the following women:-

(i) Adult woman who lost her virginity through marriage 'Thayyib'

(ii) the prudent daughter

(iii) the adult virgin daughter who had been with a husband for up to a year but denied that husband access to herself;

(iv) the young orphan daughter if she is ripe for conjugal relation and likely to misbehave. She has to however agree with the equality of the suitor, at the same time accept the dower of her equals.

(v) the young daughter whose father is absent or has not been maintaining her and she is feared of misconducting herself. In case of a conflict as to the selection of husband between a woman and her wali ordinary, the opinion of the former prevails.

On the whole, once the above legal requirements are complied with, a marriage shall be considered in Islamic Law as perfect and can confer rights and obligations on the spouses.

C H A P T E R T W O

GENERAL RIGHTS AND OBLIGATIONS OF THE SPOUSES UNDER ISLAMIC LAW INCIDENTS OF MARRIAGE

1. BASIS OF THE RIGHTS AND OBLIGATIONS

It is pertinent while analysing the rights and obligations binding upon the spouses by virtue of their having gone 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:-

(i) In the Holy Our'an, Allah (S.W.T) states:

"ولهن مثل الذى عليهن بالمعروف وللرجال عليهن درجة...."

".....And wives shall have rights similar as the husbands have on them but men are a degree above them."[1]

Thus, as human beings, women are the equals of men in their rights. But man, being the active partner has been justly regarded by Islam as superior to women. The Qur'an further states:

"الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما انفقوا من اموالهم فالصلحات قانتت حفظت للغيب بما حفظ الله والتى تخافون نشوزهن فعظوهن واهجروهن فى المضاجع واضربوهن فان اطعنكم فلا تبغوا عليهن سبيلا ان الله كان عليا كبيـــرا.

"Men shall take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and what they may spend out of their possessions. And the righteous women are the truly devout ones, who guard the intimacy which God has ordained to be guarded. And as for those women whose ill-will you have reason to fear, admonish them, (first); then leave them alone in beds;

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1. The Holy Qur'an chapter; 2 verse 228.

then beat them and if thereupon they pay you heed, not seek to harm them. Behold, God is indeed most high great!"[1]

(ii) In the Sunnah:-

The Prophet (S.A.W.) is reported to have said, in this connection:-

"The man is the ruler over his wife and children, and is answerable to Allah for the conduct of their affairs."[2]

"When a woman steps out of her house against the will of her husband, she is cursed by every angel in the heavens and by everything other than men and jinn by which she passes till she returns.[3]

In his maiden address to the pilgrims, the Prophet (S.A.W) at his last pilgrimage delivered a master-piece sermon which establishes the very foundation for a just humane society with golden principles of co-existence. Amidst the august crowd he stated:-

"People Hearken to me. It may be I shall not see you after this year in this place----------"

The Prophet (S.A.W) then continued, laying emphasis on a number of principles such as that of unity of God; unity and equality of mankind; respect for the rights and property of others; the prohibition of adoption of children; riba (usury) and of certain other evils of the pre-Islamic practices.

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1. Ibid chapter iv verse 34
2. Al-Bukhari-Sahih al-Vol. vii
3. Sharh - Kashf-al-Ghumma"

The Prophet was particularly emphatic on the subject of mutual rights and obligations between spouses. He, in this connection, stated:-

> "Well then, people! verily there are rights in favour of your women which are incumbent upon you, and there are rights in favour of you which are incumbent upon them. As to what is incumbent upon them in your regard is that they should not let your beds be trampled by others than you, should not allow those to enter your houses whom you do not like without your authorisation and should not commit turpitude. If they do commit that, then God has given you permission to reprimand them, to separate yourself from them in beds, and to strike them but not hard. If they abstain and obey you, then it is incumbent upon you to provide their food and dress in accordance with good custom. And I command you to treat women well, because they are like captives in your houses possessing nothing for themselves, and you, on your part, take them as deposit from God, and permit yourselves the enjoyment of their persons by means of a word of God. Have therefore the fear of God, with regard to women, and I order you to treat them well--------"[1] Below is some part of the text of the address:

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1. Reported by Ibn Majah, Tirmidhi, as quoted in al-Targheeb, Vol.iv p. 51.

عن عمرو بن الأحوص الخسمي رضى الله عنه انه سمع رسول الله صلى الله عليه وسلم فى حجة الوداع يقول : بعدان حمد الله واثنى عليه، وذكرو وعظ. ثم قال : ألا واستصوا بالنساء خيرا فإنما هن عوان عندكم ليس تملكون منهن شيئا غير ذلك إلا ان يأتين بفاحشة مبينة ، فإن فعلن فاهجروهن المضاجع واضربوهن ضربا غيرمبرح ، فان اطعنكم فلا تبغوا عليهن سبيلا ، ألا ان لكم على نسائكم حقا ولنسائكم عليكم حقا ، ولنسائكم عليكم حقا ، فحقكم عليهن انلالا يوطئن فرسكم من تكرهون ،ولا يأذن فى بيوتكم لمن تكرهون ، ألا وحقهن عليكم ان تحسنوا إليهن فى كسوتهن وطعامهن ....."

Again, the Prophet (S.A.W) is reported to have said in another hadith:-

وعن ابن عمر رضى الله عنهما قال : سمعت رسول الله صلى الله عليه وسلم يقول : كلكم راع ومسئول عن رعيته ، الإمام راع ومسئول عن رعيتهوالرجل فى اهله ومسئود عن رعيته ، والمراة راعية فى بيت زوجها ومسئوله عن رعيتها والخادم مراع فى مال سيده ومسئود عن رعيته، وكلكم راع ومسئود عن رعيته (رواه ابخارى ومسلم)

All of you are sovereigns and you shall be questioned about your trusts. The Chief is the sovereign over his subjects and he shall be questioned about how he managed their affairs. The head of the family is the sovereign of that family and he shall render account of how he conducted their affairs and a wife is sovereign over her husbands house and she shall be accountable to God as to how she run the affairs (e.g., treatment of children overseeing his property whenever absent) and a servant is sovereign over the property of his master and he shall render account over it."[1]

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1. Quoted in Al-Targheeb Wal,Tarheeb Vol. iv P. 48.

Transmitted by both Bukhari and Muslim).

A'isha, the wife of the Prophet (S.AW) reported from him that:-

"One of the best qualities of a believer is that he be of good character and mind to his family." (Reported by Tirmidhi and Hakim).[1]

وعن عائشة رضى الله عنها قالت: قال رسول الله صلى الله عليه وسلم ان من اكمل المؤمنين ايمانا احسنهم خلقا والطفهم باهله (رواه الترمذى والحاكم)

From the above host of authorities it can be seen that the co-existence of a husband and a wife is not only meant to postulate the principles of harmony, tranquility and felicity between the spouses but far excels that and enumerates the boundaries of each of them. Above all both are bound by the rights of their Creator- God.

2. CLASSIFICATIONS OF THE RIGHTS AND OBLIGATIONS:

A. THE RIGHTS OF GOD

This series of rights is completely for the Almighty God. None of the spouses has the right to waive such a right. They are co-extensive and include inter alia:-

(i) Paternity or Legitimacy of Children of the Marriage

The word 'Nasab' in Arabic and in its general term means 'Family' 'race' or lineage. In its legal sense however, with which we are very much particular, it is restricted to the descent of a child from his father, and it is sometimes applied to descent from the mother.[2]

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1. Ibid p. 49.
2. Hughes; Dictionary of Islam

This shows that every child has to have a placement somehow in the society. So every child has to have a father and it has to be the one real father whose father hood once established, would be irrevocable. The methods of establishing such a lineage can be done by marriage acknowledgement or evidence.[1]

On the other hand, if the child in question was conceived out of wedlock, the child is not considered as legitimate, and its descent will derive from the mother only. It is on the strength of this that the Prophet (S.A.W) is once reported to have said: "a woman who misplaces a child's legitimacy by relating its descent to someone who is not responsible for its conception has committed a grave offence, alienated herself from God, and will be denied the bless of eternity, Likewise, a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted himself universal disgrace."[2]

This right of legitimacy therefore is both for God and the child and a corresponding obligation upon the father or mother. It is the basis on which various legitimate claims may be made by either the child or any of his parents.

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1. For further details cf; to El-Imeri's personal status in Islamic Law.
2. Abdul Atti - The Family Structures in Islam

The institution of adoption is however non-existent in Islam;[1] it neither confers any right on the child nor obligations. And where no man claims a child, it remains the TRUST of the finder, who will be responsible for its upbringing.

The Baitul-Mal (public treasury) shall supply the funds necessary to raise the child unless the TRUSTEE volunteers to undertake it at his expense and privately.[2] Where the public treasury has no enough funds the duty falls on the Muslim community generally.

(ii) Prohibition by Affinity

There are some categories of women whom a Muslim, for one reason or another, has been prohibited from marrying. This prohibition is classified into two viz:

(i) Perpetual prohibitions; and

(ii) Temporary prohibitions

(i) Perpetual Prohibitions:

A Muslim is perpetually prohibited to engage as a wife any of the following women:

(a) His ascendants including his natural mother and grand mother how high soever,

(b) His descendants starting from his first daughter(s) and the daughters of his male children and their offsprings how low-soever.

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1. The Holy Qur'an: Chapter 33 Verse 4 - 5.

2. Abdul Ati. The Family Structure in Islam, 1982 Edition.

(c) His direct sister(s) and her issues and the female issues of his brothers how-low-soever. This is irrespective of whether the sister or brother is germane or consanguine.

(d) His grand parents descendants. These include the aunts, paternal or maternal. This prohibition however is restricted to the first degree only, it does not extend to their issues any how.

(e) His wife's ascendants, i.e., the wife's mother or grand mother (paternal or maternal) how high soever and irrespective of whether the marriage between him and his wife has been consummated or not. His wife's descendants. If he has consummated the marriage between him and the wife; whether she comes directly from him or not. Likewise it is a prohibition for him to marry the daughter(s) of that wife's son, how low soever.

(g) His descendants wife. This means the wife or wives of his son or the wife or wives of his daughter's son how low soever. This also is irrespective of whether the marriage has been consummated or not. The defination of the word 'son' herein used connotes a direct son from the father's loins. It excludes an adopted son. The restriction stops on the wife or wives of one's descendants excluding that wives ascendants or descendants. The wife of

a foster son is included here.

(h) His father's or grand father's wife, paternal or maternal how-high-soever. This is irrespective of whether consumption has taken place or not. The prohibition is restricted to the ascendants wife only and his ascendants or descendants.

(i) His ascendants through fosterage i.e., he is prohibited from marrying the woman who suckled him (foster mother) and her mother or grand mother.

Likewise the mother or grand mother of the foster mother's husband (foster-father).

(j) His descendants through fosterage i.e. the foster daughter and foster son's daughter how-low soever.

(k) His foster parents descendants i.e. daughters and son's daughters of the foster parents how-low soever.

(l) Descendants of his foster grand parents but restricting the prohibition to the first degree only.

(m) The wife's foster ascendants how high soever. This includes wife's foster mother, grand

mother or the mother or grand mother of the wife's foster father.

(n) The wife's foster descendants; i.e., a girl suckled by that wife how low soever. The marriage between him and the wife must have however, been consummated.

(o) The wife of his foster father or the wife of his foster grand father how-high-soever.

(p) The wife of his foster son or wife of his foster daughters son how low soever.

(ii) Temporary Prohibition:

There may arise a situation or situations which temporarily prohibits a Muslim from marrying a particular woman. But the desiring parties are at liberty anytime the obstacle prohibiting them from getting married is removed. Such situation may include:-

(a) A married woman. No Muslim is permitted to marry a woman already married to another. This prohibition ceases if she is voluntarily divorced by the husband and the waiting period elapsed.

(b) Woman in Iadda period:- Howsoever a woman gets her marriage dissolved, she has to undergo the waiting period. Within this

time she cannot be married until she has finished observing the said period.

(c) Woman who does not profess any revealed religion.

A Muslim is prohibited from marrying a woman without a revealed religion. But he is free to do so if she takes any of the revealed religions.

(d) Muslim woman NOT to marry a non-Muslim male.

A Muslim woman is temporarily prohibited to marry a male of non-Muslim faith. She is however free to do so if he accepts Islam.

(e) Marriage of an adulterer or adultress:

A chaste Muslim male or female is temporarily prohibited to marry an adultress or adultrer. But he/she is free to do so if the accused refrains.

(f) Unlawful conjunction: (See supra)

(g) Thripple divorcee

(h) When in the state of wearing the Ihram

(i) When ill. (All these are discussed supra).[1]

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1. For a more detailed discussions see El-Emeri's Personal Status in Islamic Law.

(iii) Iddah: (Waiting Period) on Dissolution of Marriage

In the event the marriage contract has come to a terminal point by whatever means and where there has been consummation, the divorcee is required by law to undergo a waiting period known as iddah. The duration of the iddah varies from one type of dissolution to another.

(i) Iddah as a result of Death of Husband

Where the husband dies leaving back his wife or wives, the wife or each of the wives will have to observe a waiting period of four months and ten days. This is an order from God the Almighty:

" والذين يتوفون منكم ويذرون ازواجا يتربص بأنفسهن اربعة اشهر وعشـــــرا ."

"And if any of you dies and leave wives behind, they shall undergo, without re-marrying, a waiting period of four months and ten days....."[1]

If by the time of the decease the wife is pregnant and she delivers any time before the expiration of this period, then the waiting period terminates with her delivery.

Where a revocably divorced woman is serving the waiting period of the three quru (period)[2] and the husband

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1. The Holy Qur'an, Chapter II verse 234.

2. The Jurists differed as to this period which is referred to as quru قـــرو، This word is the plural of Qur. This word is an Arabic word and there is difference as to its meaning in the Arabic language .....some understood it to be the time of blood (Hayd حيـــض)i.e., when the woman is menstruating and some others take it to be the time of purity (طهـــر).

dies, then her waiting period changes to that of death. But where the divorce is irrevocable, the waiting period does not change.

The spouse relict has to start reckoning the period from the time of death.

(ii) Iddah for a Non-Consummated Woman:

Where a wife is divorced by her husband before the marriage is consummated, that divorcee has to undergo no waiting period whatsoever and in she is free to marry another person from the moment of the divorce. 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 divorcee would be meaningless and of no benefit either to her or to her former husband (Rationale of Iddah is discussed infra).

The Holy Qur'an makes the position much clearer as it states:

"يايها الذين ءامنوا اذا نكحتم المؤمنات ثم طلقتوهن من قبل أن تمسوهن فما لكم عليهن من عدة تعتدونها....."

"O you who have attained to faith! If you marry believing women and then divorce them ere you touched them, you have no reason to expect, and to calculate, any waiting period on their part.[1]

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1. The Holy Qur'an Chapter 33 verse 49.

It should however be noted that where the husband dies and the marriage not consummated, the wife has to observe the waiting period of a wife whose husband dies leaving her a back.

(iii) Iddah for a Consummated Woman:

Where the wife and the husband consummate their marriage and the wife usually menstruates, and she happens to get divorced she has to observe waiting period of three quru' (three periods). This as pointed out above, connotes three blood gush (hayd) or three purities. 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.[1]

And where the former husband dies while the divorcee is serving the three purity-term, and where the divorce is revocable, the waiting period changes to that of whose husband dies. This does not apply where the divorce has been irrevocably effected.

(iv) Iddah For a Pregnant Woman:

All the four schools of Jurisprudence are in complete agreement that the waiting period for a pregnant woman expires when she delivers. This is irrespective of how the marriage becomes dissolved.

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1. Al-Khirshi Volume 3 page. 383.

ان الحامل المتدة من طلاق او وفاة تنقض عدتها بوضع حملها كله
بعد الموت او الطلاق ولو بلحظة لابعضه واحدا كان او متعددا وللزوج
رجعتها قبل خروج باقية او الاخر على المشهور.

(v) 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 passed the age of menstruation.

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 now will convert to three periods of hayd.

" واللائى يئسن من المحيض من نسائكم ان ارتبتم فعدتهن ثلاثة اشهر واللائى لم يحضن.....".

"As for such of your women as are beyond the age of monthly courses, as well as for such as do not have any course, their waiting periods shall be three calendar months----------"[1]

THE PRACTICE OF OBSERVING IDDAH IN THE NORTH

Every Muslim woman divorced in the Northern States observes, the Iddah in obedience to God's injunction. The noticeable discrepancy however is that a lot of confusion arises in differentiating some of the technical aspects of the Iddah. For instance, it is generally regarded that Iddah connotes or covers a period of three months and it applies to all divorcees except those whose husbands died or those who happen to be pregnant.

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1. The Holy Qur'an chp. 65:4

Also problems arise though rarely, where a pregnant divorcee delivers a set of twins or tripplets at intervals. The period from which to reckon is not appreciated by most of those who experience such a birth.

The true position under the Maliki school is that delivery connotes complete delivery of the pregnancy. And if the pregnant is carrying a set of twins or tripplets and she delivered one and still labours for the remaining she is deemed to be serving the Iddah. Where also part of the foetus is out and the other part is still in the womb, she is deemed to be under Iddah until complete delivery is achieved.

Others still do not know the period to reckon from where the Iddah is for death and there happens to be complete delivery. The true position of the law here too, is that her term expires immediately she delivers even if her former (deceased) husband's corpse has not been burried.

اتفق الائمة الأربعة على ان وضع الحمل تنقض به عدة المتو فى عنها زوجها ولويمد وفاته بلحظه ولوقبل د فن زوجهـــا ٠

"All the Imams are agreed that delivery concludes the waiting period of a woman whose husband dies even before he is burried."[1]

Very hardly also can one differentiate between a consummated and menstruating woman and a non-consummated menstruating woman undergoing the Iddah period. This is because very few of the women do understand the proper concept of

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1. Abdurrahman al-Jazyari: Kitabul Fiqh alal Mazahibil Arbiat Vol.IV P. 529.

of iddah. They all take it to cover a period of three months as pointed out above. But this period of three months affects only those minors and adults who do not menstruate for one reason or the other.

All other menstruating and consummated women have to undergo the period of three hayd or purity whereas those non-consummated have no iddah to observe at all.

The writer is also reliably informed that some persons, due to gross ignorance of the law, try to contract a new marriage within the iddah period of a divorcee. This practice is a void one. The law permits no one to marry the other while in the condition of iddah: The Qur'an is categoric on that:-

" ولا جناح عليكم فيما عرضتم به من خطبة النساء او اكننتم فى انفسكم علم الله انكم ستذكرونهنا ولكن لا تواعدوهن سرا الا ان تقولوا قولا معروفا ولا تعزموا عقدة النكاح حتى يبلغ الكتاب اجله ..... "

"But you will incur no sin if you give a hint of an intended marriage offer to any of these women, or if you conceive such an intention without making it obvious: for God knows that you intended to ask them in marriage. Do not however, plight your troth with them in secret, but speak only in a descent manner; and do not proceed with tying the marriage knot ere the ordained term of waiting has come to its end..."[1]

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1. The Holy Qur'an: Chapter 2 verse 235.

The above passage relates to a marriage-offer-or to an intention of making such an offer to a newly widowed or divorced woman before the expiry of the prescribed waiting term. And this means that a woman serving iddah before talaq should not even be proposed at all. A woman serving iddah after death should not be explicitly proposed, but may so be proposed impliedly.

Further, if then, a woman serving iddah contracts a marriage inspite of all these, the marriage so contracted is void ab-initio. If however the spouses consummate such a marriage, the marriage is a subject of nullity and the couple be separated forthwith, and a permanent prohibition, according to Imam Maliki crops up between the partners:

" والحكم فى من خطب وعقد فى العدة الفسخ بغير طلاق لانه مجمع على فساده ولو تزوجها بعد تمام ما هى فيه من عدة او استبراء اذا لم يحصل منه وطأ ولا تلذذ بها قبل الفسخ والا تابد التحريم عليه

"The (position of) law on him who proposed or contracted a marriage during the waiting period is a nullity and not (even) a divorce. This is because it is a consensus of the (Imams) that (such a marriage) is a nullity even where he has married her after completing the iddah or Istibra' (purity) on the condition that there has not occured consummation or its ancillaries before the nullity of such a marriage, but, if consummation or its ancillaries occur, then there arises a permanent prohibition between the parties.[1]

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1. Ashalul Madarik, Vol. II pg.83. You may also cf: with Figh al-Sunnah Vol.II pg. 27.

(iv) Inheritence:

"للرجال نصيب ماترك الوالدان والأقربون وللنساء نصيب ماترك الوالدان والأقربون ماقل منه اوكثرنصيبا مفروضـــــــــا."

"Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind, whether it be little or much a share ordained by God."[1]

The above Qur'anic verse speaks for itself. This is a direct command from God. It is therefore His sole right. Any attempt therefore to pervert the effect of this command shall attract Allah's wrath. However each of the beneficiaries has to have the requisite qualification for entitlement to the share.[2]

So each of the spouses on becoming a spouse relict will have to take his/her due share from what the deceased has left behind, as he or she has become entitled to inherit the deceased through the marital tie.

It is pertinent to look at the position of each of the spouses briefly vis-a-vis his/her entitlement to inherit one another.

(i) Position of the Husband:

The husband, on his wife's death, has no power to exclude totally any of his deceased wife's relatives; he is neither totally excluded by any of such relatives. He must therefore take a portion of the net estate at any rate.

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1. The Holy Qur'an: Chapter IV verse 7
2. These qualifications as to who is entitled to take what can be found in any Islamic Book on succession.

He has two status while inheriting:-

(a) He enjoys a maximum of one half of the net estate left by his deceased wife where the latter has left no issue(s) either from the former or any other previous husband; or

(b) He takes one fourth of the net estate left by the deceased wife where he co-exists with an issue(s) of her's whether from him or from any other previous husband.

This is what is provided in the Holy Qur'an:-

" ولكم نصف ماترك ازواجكم ان لم يكن لهن ولد - فان كان لهن ولد فلكم الربع مماتركن "And you shall inherit one-half of what your wives leave behind, provided they have left no child; but if they have left a child, then you shall have one-quarter of what they leave behind....."[1]

(ii) Position of the Wife:

Where the husband dies, leaving back the wife, she excludes totally none of the deceased's relatives. Conversely she is not excludable totally by any of her deceased husband's relatives.

The wife therefore enjoys the following status:-

(a) She takes a maximum share of $\frac{1}{2}$ of the net estate left by her deceased husband where the latter left no issue either from the former or from any other wife;

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1. Ibid.

(b) She takes a maximum share of 1/8 of the net estate of her deceased husband where he left an issue or issues either from her or any other wife of his.

It should well be noted that where the number of wives exceeds more than one they have to share the prescribed shares above.

The Qur'an states:-

"..... ولهن الربع مما تركتم ان لم يكن لكم ولد فإن كان لكم ولد فلهن الثمن مما تركتـــم ....."

".....And your widows shall have one-quarter of what you leave behind, provided you have left no child, but if you left a child, then they shall have one eighth of what you leave behind ....."[1]

THE PRACTICAL:

The general practice adopted by the Islamic Law courts or any other qualified person in distributing the of a deceased to the legal heirs is that the whole net estate estate/is converted into imaginary monetary value, irrespective of whatever property is left behind by the deceased, in liquid cash or tangible properties. This is done by VALUATION. To this effect, property valuers/assessors (experts) in determining prices for various commodities are invited to come into the picture. Each property is valued according to its dimension, quality and the obtainable local prices in the markets.

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1. Ibid

This is adopted so as to simplify the distribution of the estate. And depending on the number of the heirs, some property may, by its nature, be indivisible and it has to therefore go to one or more heirs who share common interest e.g., farm lands or buildings. The distribution is then effected in accordance with the laid down rules of succession.

However it is pertinent to note that where it comes to the question of inheriting farm land or a dwelling house, the courts or persons distributing the estates rely heavily on customary practices. This is because farm lands, houses or any land pact, is specially left aside for the males. Consequently, wives, daughters, mothers or any other female heir is ex-facie disqualified to inherit such landed properties. Perhaps few examples might suffice to illustrate the above assertion:-

> "In Kano, the Islamic Laws of inheritence were modified to the extent that only males normally succeed to the user of land and houses."[1]

In Katsina, land may be sold, bequeathed and is a subject of inheritence though every effort is made to limit inheritence to one heir, who should compensate the rest.[2] In Sokoto and Gwandu the Islamic rules of inheritence to land are said to be applied except that local custom normally prevails at least to the extent that females are excluded from succeeding to rights in land.[3] In Borno

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1. Anderson Islamic Law in Africa pg. 185

State, land in the neighbourhood of Lake Chad is privately owned and is subject to the Islamic rules of inheritence and females have only rights in produce, not to a division of the land.[1] In Bauchi State however, land is ... plentiful, alienation is virtually unknown and the eldest son or senior member of the family group usually continues to cultivate after his fathers or brother's demise and the same is true of family houses. So from the totality of the above least examples it can be seen that in the Northern States, till now, inheritence to land goes by custom rather than Islamic Law, for normally, either the senior member of the family, or the male agnates collectively take over any land farmed by the deceased. But gradually however some noticeable changes have started rearing heads in favour of the application of Islamic Law in some places. This is largely due to two factors:

(i) Dynamism of some of the judges and

(ii) Land is now a highly valuable commodity, so every heir is alive to his entitlements.

B. MUTUAL RIGHTS AND OBLIGATIONS

(i) RIGHTS OF THE HUSBAND
OBLIGATIONS OF THE WIFE

The main obligation of the wife as a partner in a marital relationship is to contibute to the success, blissfulness and happiness of the marriage as much as possible. She must be attentive to the comfort and well-being of her husband. She is to neither offend him or hurt his feelings.

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1. Anderson; Islamic Law in Africa p.185

It is therefore obligatory on her and her children to obey him as he is responsible for earning a living for the family and providing them with the necessaries of life. This is perhaps best illustrated by the following authorities:-

"الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما انفقوا من أموالهم فالصالحت قانتات حافظت للغيب بما حفظ الله..."

"Men are the protectors and maintainers of women because God has given the one more strength than the other, and because they support them from their means. Therefore, the righteous women are devoutedly obedient and guard in the (husband's) absence what God would have them guard....."[1]

In some Prophetic traditions, it is reported that:

"If a woman prays the five prescribed daily prayers, observes chastity of herself and obeys her husband, she shall enter paradise." Reported by Abu Hurairah.[2]

Ibn Abbas also reports that:

"One day a woman came to the Prophet (S.A.W) and said to him: "I have been delegated to you as a women representative; that Jihad is a duty imposed upon men by Allah. If they

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1. The Holy Qur'an Chap. 4 verse 34.
2. Abdurrahman al-Manzari Al-targheeb wal tarheeb v.iii p. 46 - 61.

succeed they be rewarded and if they are killed they remain alive in abundance with their Lord. We the womenfolk do stand for them, then what is our position?" Then the Prophet replied her: "Communicate to any woman you meet that obedience to husband and acknowledging his rights is equal to the Jihad. But only few of you do that."[1]

In another tradition, Anas bin Malik reported the Prophet to have said:-

"Where it permissible for a human being to prostrate before another, I could have ordered a wife to prostrate before her husband whenever he enters unto her for the rights given by God to the former over the latter."[2]

From the totality of the above authorities, it can safely be concluded that the Shari'ah has imposed obedience on a wife to her husband.

WHAT IS OBEDIENCE?

"Obedience", in the ordinary use of the English language connotes "the act or habit of obeying, submission or compliance."[3]

For a person to be obedient to another he has to comply with the commands or be under the governance of, be ruled by or submit to the direction, control or wish of that other person. The Islamic Law, thus has imposed

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1. Ibid
2. Ibid
3. The lexicon Webster Dictionary vol. one,

obedience upon a wife to her husband for a number of reasons including inter alia:-

(a) That the husband is now the protector of the wife,

(b) He has taken her away from her parents on trust from Allah,

(c) He has paid for her dower

(d) He has to provide maintenance for her and her issues of the marriage and

(e) He has to educate and supervise her issues on all aspects of life.

The wife is sequelly not expected to unnecessarily be repulsive or refractory on lawful matters more especially on matters relating to sexual relation, and her outings.

MANIFESTATION OF OBEDIENCE

The wife's obedience to the husband is however qualified by these conditions:-

(i) That the obedience is required only if what the husband asks or expects from the wife is within the limits of law - i.e., the permissible categories of actions. If the husband has asked the wife to carry into action an illegal deal which contradicts text of the Holy Our'an or Sunnah of the Prophet or any known authentic convention of the companions the wife has the right of refusal. This is because:-

(a) "Obedience is obligatory only in what is good and lawful."[1]

(b) "None should be obeyed in the disobedience of Allah."[2]

(c) "Do not obey the person who does not obey Allah."[3]

(ii) The obedience must be maintained only with regards to matters that fall under the husband's rights.

Sheikh Abdul Ati, in a nice and clear analysis has summarised how this obedience can be manifested as follows:-

"(1) She must not receive male strangers or accept gifts from them without his permission. Nor must she lend or dispose of any of his possessions without his approval.

"(2) The husband has the legal right to restrict her freedom of movement and prevent her from leaving her home without his permission.
She must comply with this right unless there is a necessity or legitimate advantage for her to do otherwise.
However, it is his religious obligation to be compassionate so as to relax his right to restrict her freedom of movement. If there arises a conflict between this right of his and the

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1. Hadith transmitted by Al-Bukhari
2. Hadith transmitted by Ahmad
3. Hadith transmitted by Ahmad. You may wish to constrast these with chapter 29 verse 8 of the Holy Qur'an.

wife's parents right to visit and be visited by their daughter, his right prevails. Yet it is religiously recommended that he be considerate enough to waive this right and avoid estrangement within his conjugal family or between any member of his family and close relatives, e.g., the wife's parents.

"(3) A refractory wife has no legal right to object to the husband's exercise of his disciplining authority. Islamic Law, in common with most other systesm of law, recognises the husband's right to discipline his wife for disobedience.

"(4) The wife may not legally object to the husband's right to take another wife or to exercise his right of divorce.

The marital contract establishes her implicit consent to these rights. However, if she wishes to restrict his freedom in this regard or to have similar rights, she is legally allowed to do so. She may stipulate in the marital agreement that she, too, will have the right of divorce, or that she will keep the marriage bond only so long as she remains the only wife; should he take a second wife the first will have the right to seek a divorce in accordance with the marriage agreement.

"(5) Finally, if the husband insists on patrilocality or neolocality, the wife must comply."[1]

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1. H.A. Ati - The Family Structure in Islam

(ii) RIGHTS OF THE WIFE (حقوق الزوجة)
AN OBLIGATIONS OF THE HUSBAND

In general, the Shari'a has accorded a woman (wife) such rights as (i) Marital Rights (ii) Economics Rights and (iii) Social Rights.[1]

(i) Marital Rights:

A marital right is that interest recognised and protected by the law, respect for which is a duty and disregard of which is a wrong imposed upon a husband with reference to his wife or wives. So the husband should not feel that by providing for his wife such rights he is doing her a favour. Nor shall he cause her injury or grief by way of boasting or arrogance.

Such rights primarily include the following:-

(a) The Giving Out of a Dower to the Wife:

This topic has been treated in chapter one with particular reference to the Holy Qur'an chapter iv verse 4;

A comparative analysis of what obtains in the Northern States vis-a-vis this Sadaq (dower) has also been discussed.

(b) Right to Maintenance:

This is discussed infra in chapters three and four. Other ancillary rights to the wife may include:-

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1. Refer to basis of the Rights and obligations particularly chapter 2 verse 228 discussed supra.

(c) Kind Treatment to the Wife:

The Holy Qur'an and the Sunnah of the Prophet (S.A.W.) are replete with exhortations that a husband has to treat his wife or wives in a kind manner. It is inconsequential whether the wife is a Muslim or non-Muslim, richor poor, and according to many authorities, minor or adult, healthy or sick. She is entitled to this right by virtue of the fact that she is

devoted to the husband's companionship and she is confined to his household, or by the very reason of marriage i.e., being his wife and "trust"."[1] Guidance has already been given to us by the Holy Qur'an and the Sunnah at the beginning of this chapter. Other traditions of the prophet in this respect are:-

"Admonish your wives with kindness."

"He is the most perfect Muslim whose dispositions is best; and the best of you are they who behave best to their wives."

The practice here in the North reveals that some of the husband put up their uttermost ability to see to the better treatment of their wives despite some of the economic or circumstantial incapacitations. Others however do not take

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1. 'Abd Al'Ati: The Family Structure in Islam.

to heart even though they are quite disposed to do kindness, the issue of treating their wives in a kind manner.

(c) Right to Visit

The wife has to be allowed some rights to pay a visit to some near relatives or receive some near relations at the matrimonial residence. In case of a wife who has children with any previous husband, the children who are minors, should visit her once a day, or if they are adult, once every Friday. Likewise her parents.

They should be accompanied however with his trusted female representative.[1]

" وقضى لأولاده من غيره الصغار بالدخول لها من غيره الكبار بالدخول لها كل جمعة مرة كالوالدين فيقض لهما بالدخول لها كل جمعة مرة ومع مرأة أمينة من جهتـــــه ....."

In contrasting the above provisions of Islamic Law with our customs, one would find a colossal abuse. This is because, rarely one finds complete adherence to the Law. For instance I happened to come across a situation where entry of the wife's child from another husband caused dissolution of the marriage. The latter husband found that there arose a fight between this child and other children of his from the other wife. This gradually hatched into a fight and quarrels between the co-wives which arose alot of disagreements and ill-feelings within the family.

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1. Sheikh Khalil: Jawahirul Iklil Vol. I

Inevitably the husband has to divorce the newly married wife.

With regard to the visits by parents of a wife this very rarely is resorted to. One hardly gets one out of ten sets of parents who consider it a responsibility to pay a visit to their children-in-marriage.

The wife's mother only ventures to go to her daughter's matrimonial residence either immediately after the wedding ceremony is over for "room-seeing" or if any special eventuality happens. As for the father, he hardly goes to his daughter's matrimonial residence on any occasion. Perhaps they consider such a visit to attribute shame to them! There are some exceptions however. Some parents now begin to realise the impropriety of relying upon the customary practice that it is the daughter who has to pay them a visit at all costs. Even if they do not go themselves they delegate close relatives to go and see the daughter. This, however, is not enough..

The provision of attaching a third person i.e., a trusted woman of the husband's choice is also completely obliterated. This is but very important because it allows for a fair representation of the husband. It also does not allow for much gossip or back-biting of the husband; rather it foils all attempts to insinuate the wife to be rebellious to the husband. It is therefore gratifying if these descent and well intentioned rules shall be resorted to while visiting a married woman. Also, parents should

not regard that it is the responsibility of their married daughters to visit them and should at the same time henceforth stop sending for their married daughters to come to them or for a certain ceremony at home or in the neighbour's house as this is not recommended by the Shari'ah.

(d) Right to Equal Treatment:

Under the Shari'ah, a Muslim has been permitted to marry more than one wife but not exceeding the limit of four simultaneously.

The Holy Qur'an States:-

"وان خفتم الا تقسطوا فى اليتامى فانكحوا ماطاب لكم من النساء مثنى وثلاث وربع فإن خفتم الأتعدلوا فواحدة او ماملكت ايمانكم ....."

"And if you have reason to fear that you might not act equitably towards orphans, then marry from among other women such as are lawful to you, two or three, or four, but if you have reason to fear that you might not be able to treat them with EQUAL FAIRNESS, then only one or from among those whom your right hand possess....."[1]

The above verse shows clearly that plurality in marriage is a permissible act in Islam but "it is neither an offence, nor an injunction, nor an article of faith."[2] And the important point to be carefully noted about the above verse is that the verse DOES NOT ENJOIN polygamy.

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1. The Holy Qur'an Chapter iv verse 1.
2. Hammudah Abdal Ati - The Family Structure in Islam

It only permits polygamy and that permission, too, is given on a very strict condition, i.e., if one can be equitable between the wives.[1] On the other hand however, once a Muslim has found himself to be a polygamist, he has to maintain equal and equitable treatment of the co-wives.

Now it is this equity and equality between the wives that is the most concern of this subtopic. And before going much further, it is imperative to bring to the fore that the above verse quoted, is usually interpreted in conjunction with the following verse:-

" ولن تستطيعوا أن تعدلوا بين النساء ولوحرصتم فلا تميلوا كل الميل
فتذروها كالمعلقة وان تصلحوا وتتقوا فإن الله كان غفورا رحيما."

"And it will not be within your power to treat your wives with equal fairness, however much you may desire it; and so do not allow yourselves to incline towards one to the exclusion of the other, leaving her in a state, as it were of having and not having a husband. But if you put thihgs right and are conscious of Him, God is All Forgiving All Compassionate."[2]

That being the case then how does one strike a balance between the two verses? It is obvious that a man, who is fully conscious of his moral responsibility might feel, drawing conclusions from the first verse above, that he is committing a sin if he loves one of his wives more than the other or others. So to alleviate this fear, the second verse

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1. M.M. Ali Khan Polygamy in Islam. A paper presented at a seminar on Muslim Personal Law held at Alighar University, September, 1968.

2. The Holy Qur'an Chapter iv verse 129.

above, provides for him what may be regarded as a "judicial enlightenment," that FEELINGS are beyond a human being's control. And the justice" referred to in the first verse is the absolute equity which demands the husband to have the same indiscriminate 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. This is humanly impossible to achieve! What the Qur'an requires is what is humanly possible or attainable relating to the husband's behaviour towards and practical dealings with his wives. And this may be in terms of companionship (Qasm) provisions, considerateness, and such controllable aspects of the family life. However, in view of the fact that a man's behaviour towards another person is, in the long-run, almost inevitably influenced by what he feels about that person, feelings 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 if they be his children, wives or close friends.

In practice, the Northern Nigerian concept of the above two provisions, has alot of misgivings:-

Firstly, alot of men go into polygamy for ostentation not that there arises a genuine need for it;

Secondly, alot of women in a polygamous home, do not understand the concept of the adala referred to by the Qur'an. 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 irrespect of howsoever the husband treats them or their children.

This practice bites harder and is more oftenly noticed in a family where discrimination, in terms of food, clothing or residence has to conspicuously be shown between the co-wives in compliance with the Maliki principle of marrying a SHARIFAH to live together with a non Sharifah

Thirdly, some husbands do get married to more wives so as to belittle the other wife or wives for simple misbehaviours by physically and conspicuously discriminating her/them. 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, the Shariah does not allow a husband to leave any of his wives in suspension.

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

عن ابى هريرة رضى الله عنه ان النبى صلى الله عليه وسلم قال : " من كانت له امراتان يميل لإحدهما على الأخرى جاء يوم القيامة بجراحد شقه ساقطا او مائلا

Abu Hurairah reported that the Prophet (S.A.W) 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 paralysed on the Day of Judgment."[1]

The inclination in this tradition is defined to prohibit inclination to one of the co-wives on principal issues

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1. Imam Al-Shawkani Naylul Awtar Vol. vi pg. 371.

within the control of the husband such as the provisions relating to dressing, food and equal division of company-ship (i.e., spending equal time with each) not things outside his control e.g., love and etc.

رواه الخمسة وقوله "يميل لإحداهما" فيه دليل تحريم الميل الى احدى الزوجتين دون الأخرى اذا كان ذلك فى امر يملكه الزوج كالقسمة والطعام والكسوة ولا يجب على الزوج التسـوية بين الزوجات فيما لا يملك كالمحبة ونحوها .....

And as for things outside the control of the husband, e.g., love or other emotions, the husband should try his best to contain their outward manifestations so as to maintain the polygamous tempo of his family. The Prophet is also reported to have commented on this:-

روى عن عائشة رضى الله عنها انها قالت كان رسول الله صلى الله عليه وسلم يقسم فيعدل يقول: "اللهم هذا قسمى فيما املك فلا تلمنى فيما لا املك." الخمسة الا احمد.

"It is reported from A'isha, May Allah be pleased with her that the Prophet (S.A.W) used to divide his time equally and used to say: "O God, I do justice over things which I can control, But for that which I cannot I hope I could not be blamed": (All the five reporters except Ahmad reported this tradition."[1]

(ii) Economic Rights:

The Shariah grants a wife (woman) economic rights as granted to her husband. The Holy Qur'an states:

" ولا تتمنوا ما فضل الله به بعضكم على بعض للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبـــن ..... "

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1. Imam Al-Shawkani Naylul Awtar Vol. VI.

"Do not covet the bounties which God has bestowed more abundantly on some of you than on others. Men shall have a benefit from what they earn, and women shall have a benefit from what they earn....."[1]

So, all the wealth that a wife gets is entirely her own property. She possesses full proprietory right over it without any right of interference by her father, husband, or any other person. And if she invests her money in business, or earns with her own hand, she is the sole owner of the fruits of her labour.

This is suggestive to the fact that all legal avenues opened to a husband (man) for acquiring wealth are equally made available to his wife (woman). These include inter alia, all forms of legal business, trade, commerce and other forms of employment, through gifts or inheritance and etc.

This brings to the discussion, the controversial question of whether a married woman is permitted to leave the matrimonial residence for a certain work or trade outside the matrimonial residence.

Generally speaking, the Shariah does not prevent a wife or woman to engage in any legally permitted work outside provided she "guards her chastity, casts down her looks, covers her body properly and behaves herself decen-decently."[2] This is because, entering into a marital

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1. The Holy Qur'an Chapter IV verse 32.
2. Sheikh H.T. El-Imairi, Personal Status in Islamic Law.

life is one thing which does not oust the other thing i.e., the personal rights of each of the married couples. Some conditions (which are extensively discussed under Noshuz in chapter five infra) have however been laid down by the Shariah to be met by a wife before she can be permitted to go out for a work.

Here in the Northern States, 95 percent of the married women are not afforded the chance of going out to work. That is the more reason why one finds alot of women strangers from the other Southern States or from some non-Muslim communities flooding our markets and streets transacting various trades, businesses and etc. And today, if the non-Muslim women will wash off their hands from some buying and selling, sewing, teaching, midwifery, nursing and etc, the Muslim North might suffer shortages in food, other materials and even important services. So it is high time the Muslim women realised the losses they and the society in general have been suffering.

This is perhaps due to the imaginary restriction or stigma put on Muslim women education. Formerlly, the highest standard of education to be attained by a Muslim woman was the primary seven. Later it progressed to the post primary and late in the seventies a small percentage gets it's way through to the tartiary institutions. And nowadays the Northern States start to see the face of a Muslim female Medical Doctor, Nurse, Midwife, Lecturer and Tutor, Lawyer, Economist, and from most cadres of the civil service. This is highly remarkable. But the single and very very dear question that still remains is: DOES such a

female, who meritoriously struggled her way through to climb such a ladder comply with the stipulations of the Shariah as to her outings? Or, can she work in isolation of the males or do the men conform with the Shariah stipulations? Do the sexes really behave themselves.

Another marital or legal right of the wife that must not be forgotten is that of the wife's right to dissolve her marriage. Under the provisions of Islamic Law the right to dissolve the marriage is not only enjoyed by the husband the wife has also been conferred with such a right though in a limited manner and not co-extensive with that of the husband. She can herself terminate her marriage under certain conditions or get it dissolved through the due process of law if there are genuine grounds for such a step. This process is in the Islamic Language of Jurisprudence known as 'KHUL'I K.N. Ahmad said that KHUL' in Law, "is the demission or laying down by the husband of his right and authority over his wife at her instance on accepting of consideration by means of the word "Khul'." It signifies a conditional agreement on the part of the husband entered into for the purpose of dissolving the marital relationship at the desire of the wife in lieu of a compensation paid by her to the husband out of her property.[1]

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1. . . Ahmad, Muslim Law of Divorce PP. 219-220.

C H A P T E R T H R E E

M A I N T E N A N C E

1. MEANING, CONCEPT AND NATURE OF MAINTENANCE

In its general terms maintenance connotes the act of maintaining or being maintained; the preservation or up-keeping 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.[1]

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. Texts writers take such maintenance to center around: (a) FOOD, (b) CLOTHING and (c) MATRIMONIAL RESIDENCE.[2] 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 has separately been treated in chapter four 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.

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1. Cf; The Lexicon Webster Dictionary Vol. I

2. Some text book writers do not count clothing and matrimonial residence to form part of the defination of maintenance cf: pg. 249 of Shar Al-Tuhfah.

(A) MAINTENANCE DURING COVERTURE OF THE MARRIAGE

(1) Conditions of Entitlement to 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 necessities 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 of all irregularities or prohibitions. It is the one conducted according to the Malikis, in consonance with all the legal requirements of a marriage which have been discussed in 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 Maliki school, if a woman conducts a marriage by herself, the spouses can have no rights or obligations arising from the marriage whatsoever. This is because in the Maliki 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 intercourse between the spouses. This must occur between the spouses before the wife becomes entitled to maintenance. Quere if the preliminaries of consummation e.g., kissing embracing or the wife stays for a considerable period of time yet no actual consummation takes place?

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 incumbent 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 then 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 companionship. This, therefore calls for some competence and desire to cohabit by each of the spouses. Hence a wife may not be entitled to maintenance 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 husband is unable to have sexual intercourse for any act or conduct of the wife, e.g., if she is imprisoned for debt, except at the instance of the husband, or even where she is forcifully 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 impotent 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 actual cohabitation takes place or not. The mere invitation to the conjugal roof and the wife's compliance or resistance 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 refrain 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 the wife who refused to share her husband's false beliefs 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.

(ii) 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 accessory or subordinate to the substantive event. In this regard, the incidents of maintenance are those occurances 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.

(a) Maintenance in I'isar of Husband

When an Arab says: عسر الأمر على/استعصر الامر على .

he means to say: "things are rendered difficult for me." And by 'difficulty', it is understood to include physical or psychological hardships. In the legal terminology however, I'isar connotes that type of hardship or difficulty which renders living hardly smooth. In otherwords, life at that stage is fogged by harship and misery. This may be caused by a number of factors:-

(i) Poverty,

(ii) Absence of a supporter

(iii) Sickness and etc.

In a marital life any of the above factors may rear it's head into a family and that family may begin to experience a type of hardship. The most noticeable hardship in such circumstances are the lack of food and dressing. It may sometimes involve ejection of the family if the supporter of such a family cannot settle the rent where he and the family reside in rented quarters. What then happens in such circumstance? Let us now consider the position of the law on such issues.

THE MALIKI SCHOOL

Where the marriage contract has been effected and the position of the husband, that he is a pauper, has become known to the wife and yet she agreed to the marriage, the husband is excused from maintaining that wife. Rather, she has to maintain herself and can at no stage claim for any

compensation. The position however differs where this fact was never known to the wife before the marriage or that a supervening eventuality has cropped up which renders the husband poor and cannot therefore meet the expenses of maintaining the wife. In this case the wife has the option of either remaining with the husband in that situation or she demands for a revocable repudiation from the husband.

THE HANAFI SCHOOL:

The opinion of the Hanafis is that where a husband's financial position does not allow him to discharge his obligations as to the maintenance of his wife the wife shall be supported by her relatives who would be responsible for her if she were not married but the husbands obligations still remain on him. She may also be informed that she has the option of borrowing on the husband's behalf in proportion to her needs. In either case however, whatever she spends becomes a claim or debt against the husband, which he is to pay when his financial situation improves. The school further asserts that the husband's financial inability to maintain his wife is no ground for divorce. The marriage should be preserved however, regardless of the husband's financial situation. This is because separation/divorce is more harmful than a temporary endurance in which the wife is directed to solicit the support of her relatives or to pledge husband's credit. Granted that financial hardships are harmful but more harmful is divorce or separation. The husband should be given chance to solve his problems instead of a court's order for dissolution. Things may perhaps get

easier as time goes on. Only that creditors should exercise more patience so as to await the relief of the debtor's straitened circumstances.

THE SHAFI'I SCHOOL

When a husband, during his marriage becomes insolvent that he can no longer give the minimum maintenance prescribed, but his wife, inspite of this, continues to live with him the maintenance becomes a debt due to her from him and exigible at anytime. However, if she no longer can bear such an insolvent husband, she can at once demand the dissolution of the marriage, since her husband no longer fulfils his obligations. A woman is not obliged to get from another as a gift the maintenance owed her by her husband. A degree of insolvency here is manifested where a husband is unable to give not only the provisions that constitute the nourishment but also the clothing, the condiments of the habitation that the law requires.

THE ZAHIRI SCHOOL

This is the most liberal of all the schools of law, though, perhaps, extinct, They maintain that marriage must be preserved irrespective of the husband's financial condition. If she has the means, the wife must support herself and also her poor husband, who is not responsible for repaying anything of what she has expanded on him.

(B) MAINTENANCE DURING ABSENCE OF HUSBAND

Absence, in general terms connotes the state of being absent. And to be absent means to be, in the negative, not

present; to be away; wanting or lacking; not attentive or non-existent.[1]

For our purposes however, absence means the state of being at a distance in 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 a missing person - (mafqud). This may allow a clearer understanding of the sub-topic whereas the latter 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 she can charge a trusted relation or friend with a power of attorney to effect appropriate disbursement of the maintenance.

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1. The Lexicon Webster Dictionary Vol. 1.

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 proportion to the husband's known property. If the husband 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.[1]

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 or husband's order. This was dictated by the Sunnah of the Prophet (S.A.W.)

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1. Cf: Mayyarah: Sharh al Mayyarah alal Tuhfatil Hukkam, Vol. I P.253

when a certain Hind Bint Uqbah, the wife of Sufyan went and complained 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 the property 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.[1] The official law applicable in this country is the Malikī law. In Egypt, a country which applies the Hanafi law, if a husband goes to a place where he can be

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1. Cf: S.40 & 41 of the Tunisian Code of Personal Status. (1955).

easily contacted and has left no known property from which a maintenance order could 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 [illegible] contacted or where he is of unknown destination or is missing (mafqud) and it is proved that he has left no known property from which maintenance order could be executed, the wife may, upon her claim, be granted a revocable dissolution of marriage without any delay. [illegible] This applies to a situation where the husband is serving a sentence order and therefore unable to support the wife.[1]

(c) 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 texts[2] for instance, it is shown that the husband has 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

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1. S.5 of the Egyptian Family Law, No.25 of 1920.

2. Dasuqi - Hashiyat al-Dasuqi Vol.II pg. 509; Jawahirul Iklil - Khalil - Vol.I pg.403. But cf Fiqh al-Sunnah Vol.II pg. 152.

buy her medicine or pay for the clinical charges nor even the doctor's fee;

" ولا يفرض الدواء لاحجامة ولا اجرة الطبيب " (جواهرالاكليل : ١: ٤٠٣)

" ولا دواء وحجامة: اى اجرتها ولااجرة الطبيب. (الدسوقى ٢٠: ٥١١)

The HANBALIS are in total agreement with the MALIKIS here. The SHAFI'I'S 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 on having her ordinary nourishment during her illness, both the principal nourishment and the condiments."[1]

THE RATIONALE

The jurists proffered 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 she has to be able to tolerate conjugal relations.. with the husband, but as she is sick now, she becomes obviously unable to discharge such a function. This therefore disentitles her to be maintained during the period of sickness.

(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

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1. Nawawi: Minhaj Et-Talibin pg. 384.

> house or at the 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.

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 extant, 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 fixed in accordance with his financial condition.

(D) 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 Iknlil as follows:-

" وقدرت نفقة الزوجة بحسب حاله اى : الزوج فى الإكتساب من يوم ان كان من الصناء الذين يقبضون اجرة عملهم كل يوم اوجمعة ان كان من الصناء الذين يقبضون اجرة عملهم جمعة او شهر كارباب الوظائف والجند الذين يقبضون مرتبهم كل شهر او سنة كأرباب الرزق والبساتين الذين يقبضون مراتبهم كل سنـــة....."

"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 the army who take their salaries every month; and if it is yearly, as for the farmers and those who derive their resources from like nature, it should be based on yearly basis.."[1]

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 maintenace on its due date, impossible. Example of such a case has already been observed in Iisar treated supra. Then what happens in such a situation?

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1. Khalil, Sheikh - Jawahirul Iklil Vol. 1 pg. 403.

Imams Malik and Shafi'i say that a wife accummulates arrears of maintenance from the time it becomes due until 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 MALIKIS, 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 SHAFIS however, and as stated earlier, that arrears are not recovebable unless there has been a clear agreement to that effect by the parties or a decree of the court and even after the passing of the decree, if any arrears are allowed to accummulate, they would not 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: is it 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.[1]

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1. For further details one may wish to glance at the reforms in the Sudan, Egypt, Tunisia, Iraq, Morocco and Jordan.

(iii) APPLICATION OF THESE CONDITIONS AND INCIDENTS IN CASE OF A MUSLIM WIFE IN THE NORTHERN STATES

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 consequently leads to a great many of the married couples not knowing the basic rights and obligations the shariah confers on each one of them. Some wives are unnecessarily deprived of these rights whereas others enjoy the super-fluity 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, all they are required to do are the menial 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; quarilling and fighting results from such an attempt. Others are so wield enough (i.e., the wives) to attempt injuring the husband's private part.[1]

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 traced in such a 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 youg girl to maintenance.

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1. An incidence of such nature occured around the Zaria metropolis in the early 1979 where the wife cut the genital organ of the husband with a razor blade.

Parents are anxious on realising the rapid physical growth of their daughters to get them married irrespective of their chronological age, "to avert the societal ills of corrupting the morals and chastity of the daughers", asserted one of the interviewed informants. Principally this is alright. But on contrasting the practice with the legality and convenience, how can the husband be willing or forced to provide maintenance to a wife who is not ripe for conjugal relations and whose honey he has not tasted? Or has the husband got any other option, for instance, he should continue to maintain her from the date of the marriage contract up till the time she has fallen ripe for sexual intercourse? Is it not sharking parental responsibility? Why should not, if so, the parents wait till when the daughter is properly ripe for marital responsibilities and then she be married? This was the practice in the recent past and it was very much pronounced. But now, with the greater understanding of the life variables, young girls, after the primary school period, are greatly allowed to be absorbed into the post primary institutions. This has yielded a positive result in the unconscious adjustment of the marriage ages. And now about 50% of the girls are married when they must have attained the ages of 16 - 20. After all, what is all the hurry about? Has Islam stipulated any fixed age for marriage? (This passage takes care of conditions (a) - (e) whereas discussion on (f) falls more appropriately in chapter five where the case of Nushuz (recalcitrance) is treated.

Touching on the incidents vis-a-vis a Northern 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 the 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 forthooming from the husband in that regard, the court decrees the repudiation on behalf of the husband. It is stated in the Tuhfah:

الزوج ان عجز عن الإنفاق لأجل شهرين ذو استحقـــاق
بعد هما الطلاق لا من فعله و عاجزعن كسوة كمثلـــــه
ولإجتها دالحا كميسن يجعل نى المعجزعن هذا وهذا لأجل
وذاك من بعد بثوت مايجب كمثل عسمة وحال من طلب

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 witnesses 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 the courts order.

So, the above stanza from the famous book of procedure on the Maliki law - SHARH TUHFATUL HUKAMI popularly and simply referred to as MAYYARAH - has set out three steps in providing a solution where the husband faces 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 the 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 shariah 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. If however the wife has no choice except to endure, she may become more of a liability than an 'asset' in which case deprivation may increase rather than decrease. That is why the Malikis assign the alternative choice of separation on the wife.

This right of choice of separation has some two significant; though indirect bearings on the husband:-

(a) It may motivate him to intensify his derive to improve his lots, so as to keep his family intact and proud;

(b) It may also encourage 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 AMINA GAMBO WAFIDA VS. MUSA KEMBU MUDU

The petitioner sued the defendant for total lack of maintenance and that the defendant is a drug-addict. Any time he comes back home, he keeps on shouting on the petitioner for food. But the petitioner herself was always being helped by neighbours. The defendant denied

all the allegation. He went on further to cite example that the petitioner once sued him before another area court but the court rejected her complaint 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 area court made between them an out of court settlement but yet the defendant was unable to feed and clothe 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."[1] The court cited some quotations from Vol.I of al-Mayyarch as its authority.

IN HALIMAH ALHAJI MUHAMMADU YAHYA VS. ALHAJI MUH. YAHAYA[2]

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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1. Civil Suit No.460/83, dated 12/4/83. An unreported case from Kumo Area Court, Bauchi State.

2. Shariah Law Report of the CILS, ABU Zaria, 1980 SLR 1 pg. 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 the latter also dismissed her appeal. In the Shari'ah Court of Appeal the appellant enumerated her complaints some of which include as follows:-

(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 appellant 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 alot of such case 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 you find that the petitioner, instead of relying upon the grounds of her petition gets astounded and confused. The idea of an oath discouarges also many 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 DAKO NOMI VS. DAN LAMI BAUCHI[1]

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 was 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 incurred even though she showed her unwillingness to receive the reimbursement and that the defendant should go to the petitioner's parents to get her convinced to return to the matrimonial residence. Both petitioner and defendant went back to

1. Unreported civil case No.1149/33 from the Doya Area Court Bauchi dated 20/11/83.

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 KHADIJA KUMO VS. ABDULLAHI SHUAYIBU.[1]

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 more of his whereabouts for a period of about eleven months. She prayed the court to dissolve her marriage with the defendant. Her story was confirmed by two witnesses, 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 expiry 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 judged further commented: "I have noticed that hardship is occasioned on the petitioner in that the husband has gone away for about a year

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1. Unreported civil case from Kumo Area Court, Suit No. 797/83 dated 24/5/83.

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." The Area Court judge cited his authority from al-Mayyaral 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 Malikis. This is because, a great many of the husbands have taken it upon themselves to provide for almost everything needed by a sick wife.

To me personally I consider this practice highly commendable, even though is gratutious. At the same time I dare ask, who caters for the sick wife if she has no near relation, whereas her marriage with the husband is still valid and existing and the husband is willing and capable though he may refuse to help since he is not obliged?

B. MAINTENANCE DURING DISSOLUTION OF MARRIAGE

1. DISSOLUTION AND IT'S CONSEQUENCES

Dissolution connotes the act of breaking up; coming to a terminal point; disintegration, or making an undertaking no longer binding. It also connotes a simultaneous fading out of a scene.

In applying these meanings to a marriage, one would obviously find in a number of situations marriage contracts breaking up and thus making it no longer binding upon the spouses and the marriage is said to disintegrate.

Under Islamic Law, two major circumstances bring about the dissolution of a marriage viz:-

(a) Death or

(b) Divorce.

The latter is further sub-divided into:-

(i) Talaq (unilateral) divorce by the husband)

(ii) Khul (conditional agreement on the part of husband entered into for the purpose of dissolving the marital relationship at the instance of the wife in lieu of compensation paid by her to the husband out of her property;

(iii) Divorce through judicial process.[1]

If a marriage contract has been determined through any of the above methods, the woman (divorcee) is required by shari'ah to undergo a period known as 'IDDAH' period (i.e., waiting period). The question now is whether such a woman, within such a period of time, is entitled to maintenance. The time for the iddah ofcourse varies from one woman to another and

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1. For a sutisfactory analysis on any of these methods of marriage dissolution refer to any written work on Islamic Personal Status and more particularly to: K.N. Ahmad: Muslim Law of Divorce; M.T. El-Imeiri Personal Status in Islamic Law.

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.

(ii) 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 dissolution. For that it is pertinent to view each of the known methods of dissolution on its merits.

(A) DISSOLUTION AS A RESULT OF DEATH OF HUSBAND

Where a husband dies his spouse relict(s) is required to observe a waiting period of four months and ten days as laid down by the Holy Qur'an:

" والذين يتوفون منكم ويذرون ازواجا يتربصن بأنفسهن اربعة اشهر وعشر."

"And if any of you die and leave wives behind they shall undergo a waiting period of four months and ten days....."[1]

This applies to all consummated wives of the deceased.

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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1. The Holy Qur'an: Chapter II Verse 234.

(i) Right to feeding;

(ii) Right to clothes.

This all the Imams 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 relict being one of them shall and should not be conferred with additional rights.

RIGHT TO ACCOMMODATION:

According to the Maliki 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 spouses 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 shall continue at the same rent and conditions as before, the spouse relict 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 relict has to quit and accommodate

herself 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.[1]

(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)

(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:-

"لا تخرجوهن من بيوتهن ويخرجن الا ان يأتين بفاحشة مبينة....."

"Do not expel them from their homes; and neither shall they be made to leave unless they become openly guilty of immoral conduct."[2]

So the only condition on which the husband is permitted to send her out of the matrimonial residence is when she commits open lewdness.

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1. cf: Alfawakih al-Dawwani Vol.II P. 98
2. The Holy Qur'an Chapter 65:1

RIGHT TO FEEDING:

She can only enjoy this right if she is pregnant. Otherwise it is lost. The Holy Qur'an further states:-

وان كن اولات حمل فانفقوا عليهن حتى يضعن حملهن فإن ارضعن لكم فأتوه أجورهن

"And if they happen to be with child, spend freely on them until they deliver their burden; and if they nurse your offspring after the divorce has become final, give them their due recompense."[1]

RIGHT TO CLOTHING:

While pregnant, the divorcee is entitled to a complete dress if repudiated at the commencement 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 tripply divorced woman enjoys feeding, accommodation and a set of dress if only pregnant. The pregnancy however has to be established by experts.

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 sequelly, the child cannot be maintained by that husband.

(iii) 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.

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1. The Holy Qur'an Chapter 65:6.

(iii) APPLICATION OF THESE CONDITIONS IN CASE OF A MUSLIM WIFE IN THE NORTHERN STATES.

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 a back, I consider the provisions 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 or no rationale at all 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 and sustain a leaving through which ever means possible and easier to her. 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 to 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 fact of the spouse relict now becoming an heir. Well, even if she is an heir, which she naturally and undisputably is, it is not all husbands that die to leave behind them a great heap of fortunes. She is ofcourse a Qur'anic heir, but the greatest share she can get is ¼ of the net estate. Further she might not have any relation to turn to for help in any case of necessity.

Cannot 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 Northern 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 enough to vacate the matrimonial home with the speedest immediacy. If for example, the marriage comes to an end say about 6.00 a.m. the wife can hardly wait to see 7.00 am 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 revo cable 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 becomes so much exited has 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 were seemingly the same:

(i) "That I cannot tolerate to live with my enemy" (i.e., the husband)

(ii) "The world will accuse me of heartilessness and that I prefer the husband's home even though he has divorced me than my parents home."

(iii) "Further stay ih 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 do not they 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 divorced." "How can," one of the husbands stated, "keep on maintaining a woman with whom my relation (legal)is now severed?" such and a host of others are the reasons proffered by majority of the divorced spouses on why they cannot live together until the expiration 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 unaware that this right of observing the Iddah in the matrimonial home is the right of the Almighty God. It cannot thus be waived by either of the spouses. If the husband refuses to accommodate a divorcee who is entitled ipso facto to accommodation during iddah, a court order can issue to restrain him from ejecting the divorcee 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 Shariah does not sanction for the stay to observe the iddah in the matrimonial home for the sake of inflicting mental, physical or financial tortures on any of the spouses. Far - fetched reasoned ideals are the basis. And among them are -

(i) That the waiting period shall serve as an interim period within which the husband may regret his action and God may cause him renew his iden for re-engagin her as a wife once more. In that eventhe 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 shariah and it cannot be waived.

The Qur'an states:-

" لا تخرجوهن من بيوتهن ولا يخرجن
الا ان يأتين بفاحشة مبينة وتلك حدود الله "

"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 ....."[1]

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1. The Holy Qur'an Chapter 65:1 but Muhammad Asad, in his "The message of the Qur'an" while commenting states: "This particular injunction does not imply a prohibition of a divorced woman's leaving her home of her own free will."

C H A P T E R F O U R

GENERAL NECESSARIES FOR MAINTAINING A WIFE AND THE QUANTUM OF MAINTENANCE.

This chapter seeks to treat two important issues on maintenance viz:-

A. The Necessaries of Maintenance, and

B. The Quantum (scale of maintenance)

1. THE NECESSARIES IN GENERAL

Principally, where the married couples are of full capacity, it is the responsibility of the husband to supply his wife the necessaries that will make her run a smooth marital life. The necessaries obligatory on the husband in the main, include: FOOD, MATRIMONIAL RESIDENCE AND CLOTHING AND any other thing considered reasonably necessary for the wife's existence. These however must commensurate with the husband's financial position, the wife's social status and the prevailing norms and customs of the locality. (A discussion on the quantity and quality of these necessaries comes up shortly).

In general however, the husband is obliged therefore to provide his wife with the following:-

Water for drinking and for performing the ritual cleansing; oil for culinary purposes, burning and for the making of ointment, wood for cooking with salt, meat every alternating day, more or less frequently according to the husbands earnings, a mat and bed, i.e., matress or coverlet placed on a mat as may be necessary to protect the body from poisonous insects, the midwife's charges, those cosmetics that are recognised by custom e.g., kohl.

Strickly speaking, these items, important as they are for maintaining a wife, cannot be met by all husbands due to certain disabilities. Such disabilities may include; ill-health, wilful refusal to supply or financial constraints. The first and last grounds are obvious. Further more it has been observed in a number of villages in the North that it has become the responsibility of married women to go out and fetch water for the domestic purposes, or do go to the forest to cut fire-wood and bring to the matrimonial home for the same purpose. This is to menti n but a few. This is also irrespective of whether the husband is around and able. And even where he is not around or able, the law has provided that alternative arrangements have to be made for the wife. It is not the responsibility nor is it mandatory on the wife to participate in any of the domestic undertakings of such nature unless she is the one who voluntarily consents to do so by way of assisting the husband.

It is a surprise also to see how things like bed and beddings are made a responsibility of the wife's parents. Since childhood to date, my observation shows that it is the parents, more especially the father, whether able or not who have to provide the bed and beddings for the couples whereas it is the husband's responsibility to provide for that.

And as to cosmetics for the finery of his wife, it is his responsibility. However, since the term "cosmetics" is an umbrella term, the husband has to be careful

to consider what are, at the time in question, referred to as "cosmetics" and what actually his pocket can afford to add to the beauty of his wife.

While considering the quantity and quality of what is to be provided in a wife or wives, as the case may be the normal trend according to the Malikis and some other jurists is to consider the financial strength of the husband. On general terms however, a difference of opinion evolves between the other jurists on the question whether the conditions of the husband only or both the husband and wife should be considered.

So to the Malikis, if the husband is rich he has to maintain his wife according to her position i.e., if she happens to have come from a rich/royal family, he has to maintain the status-quo. On the other hand if she happens to have come from a poor/peasantry family, he has to maintain the status-quo. Still, if the husband is poor but the wife is rich, he has to provide maintenance for her according to his capacity. If the wife is from a family where females are not accustomed to do menial services for themselves, the husband has to supply her with food ready dressed or the means of baking or cooking, and in any event should be furnished with all necessary and proper utencils. And if she has a servant it is his duty to maintain the servant for her.[1]

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1. If the husband is poor, he is not so bound and he can only maintain one for her. As to the kind of servant, the HANAFIES favour a female slave to the wife.

The normal method of estimating the quantity or quality of the maintenance thus depends entirely on the circumstances of both husband and wife and the conditions prevailing with respect to availability and costs of commodities in the local markets.

The above provisions suggest partiality in the treatment of co-wives and appear contrary to the common course of justice between co-wives. By hypothising the provisions, let it be assumed that A & B are co-wives to C. A is from a rich family and B is from a poor family. Mr. C, the husband, buys a set of les and fantastic jewelleries to A and provides a beautifully furnished residence for her. And he on the other hand, buys ordinary ATAMFA of very inferior quality, an ordinary necklace and provides a rough residence to B. Naturally, A will have to appear more gorgeous than B whereas both are co-wives of the same husband. A.& B are both human beings. Each has her sense of feeling and evaluation. Obviously B will feel some sense of inferiority and demoralisation and whether the husband loves A (who by virtue of her parental position is a first class wife) more than he does love her. And the more the practice goes on the more she feels.it. The practice is likely to create animosity and disaffection in the family and more particularly between B & C and fuels up ill-feeling and rivalry between B & A. The marital life ends up in chaos and ultimately separation rears its head into the matrimonial home. What then is the solution?

It is suggested that the whole question of maintaining a wife should be entirely left to the husband taking into consideration his financial position. And where he has more than a wife, each from a different family, they should be maintained on equal footings. Any trancendantal difference of race, colour, family or financial position must ipso facto be forgotten. The position each wife was enjoying prior to the marriage must also be forgotten since they are living now in a different position. Let the husband make equitable provisions for them all. The question of superiority or inferiority should die away on getting married. These suggestion are made having at the back of my mind the following authorities?:-

" يايها الناس انا خلقناكم من ذكر وانثى وجعلناكم شعوبا وقبائل لتعارفوا ان اكرمكم عند الله اتقكم ..... "

"O men! Behold, we have created you all out of a male and a female, and have made you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him."[1]

لينفق ذو سعة من سعته ومن قدر عليه رزقه فلينفق مما اتاه الله لا يكلف الله نفسا إلا ما اتاها سيجعل الله بعد عسر يسرا .

"Let him who has ample means spend in accordance with his amplitude; and let him whose means of subsistence are scanty spend in accordance with what God has given him: God does not burden any human being with more than He has given him (and it may

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1. The Holy Qur'an Chapter 49:13.

well be that) God will grant after hardship, ease."[1]

Further, the excellent view held by the Shafi'i jurists, that maintenance should be fixed according to the financial capacity of the husband irrespective of the wife's position is laudable.

And in a lot of the Muslim world, some reforms pertaining to these factors:-

(i) Financial position of the husband,

(ii) Status of the wife,

(iii) The prevalent local customs and condition, and

(iv) Equal treatment between co-wives,

have been introduced. For instance: The Sudan,[2] Egypt,[3] Jordan,[4] Syrian,[5] Lebanon,[6] Morocco,[7] Pakistan,[8] have made enactments which in effect/made it obligatory that maintenance of wife/wives, should be fixed according to the financial conditions of the husband irrespective of the wife's position and that a husband who keeps more than a wife must treat them equitably in accordance with the injunctions of the Qur'an

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1. The Holy Qur'an Chapter 65:7
2. Art. Six of legal Circular, No. 44/1935
3. Art. No.16 of Law No. 25/1929
4. S.56 of the Jordanian Law of Family Rights, 1951
5. S.76 of the Syrian Law of Personal Status, 1913
6. S.74 of the Ottoman Law of Family, 1917
7. S.119(1) & S.35(6) of the Morocco Code of Personal Status, 1958.
8. S.2(viii)(f) of the Pakistani Dissolution of Muslim Marriages Act, 1939.

(2) THE PRIMARY NECESSARIES AND THEIR QUANTUM

It is a condition that unless a person is able and ready to provide a wife with FOOD, MATRIMONIAL RESIDENCE and CLOTHING, he is not qualified to contract a marriage under the Shari'ah. These are considered to be the primary necessaries for maintaining a wife. How then does the Shari'ah require a person to provide for these things?

(A) FOOD:

Food comprehends a nourishing substance taken into and absorved by an organism to sustain life and enable growth and repair of tissues. In general term therefore, it includes not only the solid but the liquid elements the combination of which sustains the life. So food is meal or flour, water, salt, wood and oil. And as the husband is bound to supply food, so ought he also to supply the wife with such condiments as are usually eaten therewith. It should be noted however that provisions due to feeding are such as form the principal nourishment of the majority of the inhabitants of the locality. If there is no principal nourishment in general use one must give one's wife/wives some suitable nourishment.

While determining the sufficiency or quality of the food, alot of factors for instance, the financial capability of the husband the availability of the stapple in use in the local area, the time and circumstances as at the period of supply and the status of the husband, have to be taken into consideration.

"وفى الحديث دلالة على ان النفقة تقدربكفاية المرأة مع التقييد بالمعروف اى : المتعارف بين كل جهة باعتباراهو الغالب على اهلها ، وهذا يختلف باختلاف الأزمنة ، والأمكنة ، والأحوال ، والاشخاص .

" وقد راى صاحب الروضة الندية ان الكفاية بالنسبة للطعام تعم جميع ماتحتاج اليه الزوجة ، فيدخل فيه الفاكهه، وماهومعتاد من التوسعة فى الاعياد ، وسائر الأشياء التى قد صارت بالإستمرار عليها مألوفة ، يجب تحمل التضرربمفارقتها ، والتضجروالتكدر . "

So food includes (FAWAKIH) and (ADDIYAH) i.e., fruits and medicine and any other diet considered to be necessary for the existence of the wife. This is however conditional. If the wife can exist without some of the items listed, e.g., fruits, then the husband is not obliged to supply.

In practical application of the above provision however, it has been found that not all husbands are able, for one reason or the other, to effect the required supply. This is perhaps due to a number of reasons as suggested by a handful of householders interviewed.

(i) UNRESOURCEFULNESS:-

The general practice in the Northern States is that wet-season farming is the basis of the economy. It is only within this period that almost all house-holders are greatly involved in the production of food materials for both personal consuption or for sale. The food and cash crops produced, such as corn, millet, maize, beans groundnut, cottonware, on harvest either sold or reserved in parts.

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1. Al-Sayyid Sabiq: Fiq al-Sunnah Vol.II p.151
2. Ibid

Those of the crops reserved are to be used throughout the year for family consumption, while the proceeds realised from the sales of the cash crops are used in buying the necessary ingredients such as meat, tomato, okro, fish, salt, oil and a host of others to make the food (prepared from the stored cereals) eadable. Another part of the sales proceeds is used in buying the dress, the pomades and other necessary make-ups for the wife, children and for the husband too. Furthermore, some of the sales proceeds has to be used in maintaining the matrimonial house to protect it from collapse in cases of heavy rain-falls or strong winds.

For the husband to meet up these maltiferous demands, he is, at times, forced to sell some of the stored food items. This, therefore, occasions,a shortage in the estimated food provision for that year and thus making it obviously difficult for the husband to effect the required supply, at least the three - square meals- to the wife (wives). What then is to be done? (i) Is the wife to abdicate to her parents house on the grpund of inadequacy of food supply? or (ii) Is the husband qualified at all in this respect to maintain a wife?

I have tried to answer these questions through the following suggestions:-

(a) That as there is evolved a new dynamic scheme of "Dry season farming" (NOMAN RANI) in a number of states, e.g., Kano, Sokoto, Niger, Benue, Bauchi /and etc.[1] Other Northern States governments without these projects in existence, should

1. Example: Hadejia/Jama'are River Basin Development Authority, the Rima Basin Development Authority, and very recently, the Gongola/Jama'are River Basin Development Project and many others.

(ii) BUKHUL (NIGGARDNESS/STINGINESS)

It is not surprising to bring to the fore that there are house holders who are reasonably wealthy in terms of money and feeding materials but niggard. This category of house holders is at all time unwilling to release the food materials or money for the domestic use of the family. They prefer to keep the money and the food items in safe/reservoir. They go ahead starving their wives and family; their sole aim being to amess wealth.[1] This kind of wealth is profoundly unhealthy. The Shari'ah has in no uncertain terms frown and discouraged the collection of such a wealth, E.G.,

"الهكم التكاثر. حتى زرتم المقابر.

"You are obsessed by greed for more and more until you go down to your graves."[2]

"اما من بخل واستغنى ... فسيسره للعسرى. ومايغنى عنه ماله اذا تردى .

"But as for him who is niggardly and thinks that he is self-sufficient --- for him shall we make easy the path towards hardship. And what will his wealth avail him when he goes down (to his grave)-[3]

"كلا ان الإنسان ليطغى ان رءاه استغنى. ان الى ربك الرجعى ....

"Nay, verily man becomes grossly overweening, whenever he believes himself to be self-sufficient, for behold, unto thy Sustainer all must return."[4]

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1. In the Hausa language this wealth is called "DUKIYAR LUKUDI"
2. The Holy Qur'an Chapter 102 verses 1-2
3. Ibid - Chapter 92 verses 8-11
4. Ibid - Chapter 96 verses 6-8.

borrow a leave from the states running such schemes. This scheme, it is generally acknowledged, engages a lot of house holders mainly after the rainy season. Alternative resources are therefore provided which obviously enhances the smooth running and regular supply of food or other needs to the wife and family:

(B) That more local industries of like nature with (a) above should be set-up by the business tycoons and the various states governments to provide jobs or means of livelihood to house holders who idle about after the harvest of the rainy season produce.

(C) That the highly inflationary trends adopted by most traders in the markets must be discouraged by the local community, so as to ensure the continuous flow, at reasonable prices, of commodities in local markets. This can be achieved through self sufficiency. For instance, the communities living around KURA village, along Kano - Zaria road have an all round the year farming scheme. They grow alot of the pereniel crops i.e., tomato, peppy, onion, cucumber, sweet potato, pawpaw, large scale farms of rice, maize and etc. This has been made possible through the construction of enormous ponds/dams by the Hadejia/Jama'are River Basin Development Project. The items listed above are very much in abundance there and are at the door steps of every house holder. Visitors too, oftenly go there to get these commodities at reasonably cheap prices.

"....الذين يبخلون ويأمرون الناس بالبخل ويكتمون ماآتهم الله من فضله واعتدنا للكافرين عذابا مهينـــا...."

"verily God does not love -- those who are niggardly, and bid others to be niggardly, and conceal whatever God has bestowed upon them out of His bounty --- ."[1]

So such are the glorious exhortations against niggardness from the Holy Qur'an. After all it is ridiculous to learn that a house holder is wealthy but his family are starved, no adequate supply of the necessaries. For what benefit is that wealth?

Where a member of such a family, particularly the wife, becomes a victim of such circumstances, she has every right to file a petition to a court of law for the enforcement of her rights. The court is duty bound to order for the supply of these necessaries out of the horded goods of the householder on reasonable scales.

(B) MATRIMONIAL RESIDENCE: (المسكـــــن)

I have elected to use the phrase matrimonial residence for MASKAN in preference to 'accommodation', 'lodge', 'matrimonial home,' 'shelter' or whatever. This is because the phrase 'matrimonial residence' comprehends a wider meaning than each of the latter words and conveys a meaning nearer to the Arabic word 'MASKAN'.

The word "residence" connotes 'the act of living in a particular place in connection with an official

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1. The Holy Qur'an Chapter 4 Verses 36-38
2. The Lexicon Webster Dictionary Vol. II

duty' It assures the wife to dwell permanently or for a considerable length of time in the matrimonial shelter which provides all the necessary protection against any injury, danger or discomfort from weather or any other intruder.

Matrimonial residence is a compulsory condition for a marriage. In other words, if the man who wants to get married to a certain woman is incapable of providing a residence for her howsoever, he is prima facie disqualified to get her married to himself.

In the matrimonial jargon, residence in quantity, includes complete set of a dwelling house with such provisions as to the sleeping or conjugal room, a lavatory, a kitchen and any other appurtunence and apparatus which is considered to be necessary to ensure the independence of the wife from any outside interference. And as to quality, the house has to commensurate with the local buildings of the area bearing in mind the financial position of the husband and the condition of the wife. This is buttressed by the Holy Qur'an -

"اسكنوهن من حيث سكنتم من وجدكم ....."

"Lodge them where ye dwell, according to your wealth.. ....."[1]

This applies to a wife and even where the number of wives is more than one, each of the wives has to enjoy equal facilities as aforesaid. In other words, where the husband has more than one wife, each of the wives is entitled to a complete dwelling house. But

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1. The Holy Qur'an - Chapter 65 Verse 6.

where all the wives agree to live peacefully and harmoniously, they can reside in one compound sharing, if they like, some of the facilities which endure public utility, e.g., kitchen, lavatory and a common room. But they cannot for any reason live in the same conjugal room. Each must have her own. And the husband has to spend equal hours or period of time with each of the wives as her turn comes up.[1] Ofcourse he is permitted to have his own separate dwelling room but he is not advised where he has more than a wife, to invite each on her turn to his dwelling room. It is more tense - releasing and respectful if he follows each to her room. This was the practice of the Prophet (S.A.W.). It is recommended further that the location of the matrimonial residence be in an area habitable by good, sincere, peace-loving and honest people. The wife/wives reserves the right to refuse to live in the same compound with the husband's relations and the vice-versa. The wife or any of the wives can offer the husband a matrimonial residence if she has and he does not have.

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1. This according to the Malikis is what amounts to Justice (adala) equal treatment between co-wives as referred to by the Qur'an (4:4). The husband is prohibited to spend for instance two nights with A and just a night with B, C or D. And as to the exercise of the conjugal relation, this is motivated by the husbands anxiety. He is however prohibited from:-

   (i) Accummulation of strength meant for A to B

   (ii) Forsaking a wife for up to four months without a genuine reason.

THE PRACTICE

The practice in some parts of the Northern States has relaxed the above provisions of the law to the extent that the generality of people regard the actual contracting of marriage as obligatory and the attending paraphenalia such as the matrimonial residence hanging in the air. Marriage is therefore concluded whenever it is convenient to the man but "convenience" in the sense of being able to meet up the ceremonial aspects of the contract irrespective of whether adequate and proper arrangements have been made as to where to lodge the bride. Ofcourse there are some men who meet up all the necessaries as a result of their being acquainted with the Islamic rules of law in this regard and they are possessed of the means.

The modulus operandi however in some parts of the North, is that the would be bridegroom on being betrothed to the bride starts to erect a room, a pit toilet for the bride as these are considered to be the immediate needs. Other things such as well, store and other appurtunences come at a later stage depending on the husband's financial strength, Others, who, for one reason or another, could not meet up even these, have to either be loaned where to house the wife or look for a rented quarter.

The general pattern of living is that normally, the wife is initially kept within the family compound of the husband, as she is now regarded part and parcel of that family. This kind of living i.e., sharing of compound

with husband's relatives has its advantages and disadvantages. Among the advantages are that:-

(i) The newly married wife should be familiar and socialise herself with the husband's relation and vice-versa.

(ii) She should also learn and imbibe the customs and norms of that family and

(iii) That she should acquire more skills in cooking, baking or boiling the food. The practice in some societies is that the new wife has to spend up to one year observing how to prepare food before she starts on her own. And within that period, the couples are fed entirely from the main family's diets.

Conversely, the disadvantages are:-

(i) That disagreements and wranglings on simple issues are bound to occur between the new wife and some other members of the family unit especially the women folk,

(ii) The parents of the groom are almost always reluctant/shy in mixing up with the bride and the vice-versa. This therefore, unnecessarily restricts the freedom of both.

(iii) The talent and enthusiasm of the bride and her groom suffers in silence, in the sense that they can hardly put into practice what th y should have been practising if on their own.

(iv) In case of a misunderstanding between his wife and a member of his family, the husband is likely to get confused as to where to lay his support. This is likely to give room for allegations from both sides that: "he now starts to side with his wife" may say his family member, or that, "he is siding with his family," may say the wife.

By far therefore, it is better if one can afford, to secure a separate and independent matrimonial residence for himself and his wife so as to take off from a clean slate.

(C) CLOTHES: (الكســـوة)

Clothese are garments worn by human beings. And a garment is any article of clothing, To clothe means to furnish or supply with clothes or raiment. This is yet another condition for a husband to engage a wife. He has to be able and willing to supply his wife with a set of garments. And for the purposes of shariah a set of garment in case of a women is that piece of cloth or clothese which can cover her nakedness which in jurisprudence entails the whole of her body with the exception of the face and the palms. The cloth has to be ready made for her use. This too will have to commensurate with the husband's financial capabilities, the social position of the wife and the prevailing local circumstances. However, the wife must receive from the husband one winter and one summer garment each year. The husband is not bound to replace them in case of accidental loss or if a garment can endure for a longer period than a year.

وقدرت الكسوة في السنة مرتين بالشتاء ميناسبه والصيف ماينا سبه .

"Clothing is decreed two times a year; for the winter what is suitable and for the summer what is suitable."[1]

This is the general rule. But as normal, the practice has its variants. In some parts of the North, the bridegroom, on the date his marriage is effected, is required to present some ready made dressings with some pomades to the bride. The bride starts to wear/use these ready articles from this date. But in other parts such presents are deferred to be presented at a later stage irrespective of whether the marriage shall have been consummated.or not. Such presents include also some unsawn materials in different varities depending on the financial capacity of the husband and the status of the wife. This is a laudable practice for it makes a long term provision. All the husband needs to do further is to get the material ready for wearing when the need arises. But the funny side of it all is that a larger part of such presents is distributed amongst the bride - bridegroom relations towards the end of the marriage ceremony. This actually defeats the aim of the long term provision and destroys the plan of the bridegroom.

It has been an age - long custom among the Hausa Muslims to provide new set of dressings, pomades, necklaces, ear-rings and etc to the wife/wives and children on some festivities e.g., the Idayn naming and circumcission ceremonies. This is so well established convention such that the breaking of it is not totally impossible but difficult. Consequences of omitting such a provision when it

arises, can lead to the dissolution of a marriage. And this is irrespective of whether the wife has the required set of garment or not. But with proper enlightenment on what the rights of a wife are on her husband and what previleges she may enjoy, the convention has gradually started loosing its grip. It is good to enlighten the wife that it is the wish of every husband to see his wife/wives in maltiferous dressings if he has the means but ofcourse guarding against prodigality and ostantation. Equally it is not the wish of a husband to see his wife/wives clad in ruggs unless he is the type of those who resort to niggardness. Both prodigalism and niggardness each has it's consequences under the Shariah, so the coat should be cut to fit the size.

In the Kumo[1] Area Court a suit was filed by one Joda Wuro Yaya, petitioning her husband, one Gambo Gamawa to divorce her on the ground that the defendant bought presents for his second wife on the Id-festival and refused to buy anything for the complainant, his first wife. The defendant admitted the allegation but wanted the court to donvince the complainant to return to the matrimonial home and he will buy her such presents.

The complainant replied the court that she still insists on getting divorced from the husband. The trial court finally granted the complainant's application on the ground that:-

(i) As defendant, admitted buying presents to the second wife on the Id-festival and refused to buy same to the first wife, this shows that the defendant does not love the first wife and

(ii) That since defendant gave option of choice (takkayyur) to the complainant and the court, the complainant elected not to go back to the matrimonial home and for that

(iii) the marriage contract between the complainant and the defendant is hereby terminated.

The trial judge quoted as his authority a section from Sharh Adawi Vol.II page 87:-

والملكة والصغيرة لهما ان يتخيا مادامتا في المجلـــس

I have just cited the above case to show the adverse consequences of such conventions I refered to above dispite the numerous procedural irregularities in the judgment which cause apparent miscarriage of justice.

C H A P T E R F I V E

FORFEITURE OF THE RIGHT TO MAINTENANCE

1. GROUNDS OF FORFEITURE DURING COVERTURE OF MARRIAGE

Forfeiture ordinarily, is the act of losing some rights or previleges as a result of some misdeeds or offences or where there is occasioned a breach of a condition or conditions in fulfilling certain onligations. Legally however, it is the act of losing a legal right confered by law, as in this case, on a wife from her husband for non fulfilment of a condition or conditions which entitles her to maintenance both during the subsistence of the marriage and after the marriage has been dissolved.

There are a number of grounds which make a wife forfeit her right to maintenance during the coverture of the marriage and they include inter alia:-

(a) Minority of the wife

(b) Sickness of the wife

(c) Inaccessibility of the wife for conjugal relations.

(d) Apostacy of the wife

(e) Nooshuz (Recalcitrance) of the wife

(g) Indigence of the husband

It is pertinent to look at each of the above grounds separately:

(a) MINORITY OF THE WIFE:

Where the marriage has been concluded while the wife is of a tender age no maintenance is due to her from her husband. It is then the duty of her father to maintain her up to the time when she attains puberty.

This is because during this tender age (minority) sexual enjoyment is not possible with her; and this includes those factors aki inter-course such as kissing, embracing and etc.

The Hanafis however opine that age may not be a determining factor, rather it all depends on the circumstances of the wife: she may be a minor with a stoutly built up structure which may make her endure sexual enjoyment, or she may be a grown-up but with a lean structured body which may not allow her tolerate sexual intercourse. And in whichever of the two cases if the minor wife has rendered herself sexually fit then it is incumbent on the husband to maintain her irrespective of her age and whether he (i.e., the husband) appreciates the sexual enjoyment or not.

" ان تكون الزوجة مطيقة للوط ء منه او من غيره ، ولا يشترط لذلك سن
خاص بل بقدر حسب حال الزوجة اذ قد تكون صغيرة بدينة تطيق ،
وقد تكون كبيرة هزيلة لا تطيق ، فاذا كانت صغيرة تطيق الوط ء وسلمت
نفسها فلن النفقة تجب على الزوج ولو كان صغيرا لا يعرف الوط ء .

The position of the Shafi'i School as to whether a minor wife loses her right to maintenance appears in the Hidaya, it is stated that the wife even though minor is entitled to maintenance whereas in the Fathul Qarib and the Minhaj al-Talibin, it is stated that "an adult who marries a young girl in her minority is not bound to supply her with the prescribed maintenance....." On the whole however, it appears that the current opinion of the school is the latter. This is because Imam Shafi'i formed the opinion during his sojourn to Egypt whereas the former was the opinion he formed previous to the sojourn.

(b) SICKNESS OF THE WIFE:

Where a wife falls sick either at the matrimonial residence or at her father's residence, she has no legal right to maintenance from her husband. This is because on the account of her falling sick, she is unable to discharge her marital duties.

Where the wife has been living at her father's house and has been so ill, dating from a time before her marriage, as not to be able to come to her husbands house she shall not be entitled to get any maintenance from the husband.

" .... المريضة اذا لم تزوف ، فإذا تزوجا مرأة ولم يدخل بها ثم رضت مرضا لا تستطيع منه الإنتقال الى دارزوجها على اس حال لا تعدام تسليم نفسها فى هذه الحالة ، اما اذا مرضت فى دارزوجها مرضا شديدا فان عليه نفقتهـــا ....." (١)

But where she has removed herself to the matrimonial residence and she falls seriously sick then she is entitled to maintenance from the husband equally, while living with the husband at his house and she falls sick and comes back to her parents house to live

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1. This is the Hanafi view cf: Al-Fiqh ala Mazahabil Arba Vol.IV page 567.

(C) INACCESSIBILITY OF THE WIFE FOR CONJUGAL RELATIONS

Maintenance will not be payable by the husband if he is unable to have sexual relation with the wife for any act or conduct of the wife e.g., if she is imprisoned for debt, if the debt is not at the instance of the husband or even where she has fully been abducted. The right to maintenance is further lost if there is any impediment to sexual relation whether the wife is living at the matrimonial residence or at her fathers residence. Likewise if she makes any injustified refusal to cohabit with the husband she loses the right.

That is the position in all the schools of law:

The Malikis state: "ان تمنعه من الوطء او الإستمتاع بها فسقط نفقتها فى يوم الذى منعته فيـــه .

"That the wife's right to maintenance is lost if she refuses the husband sexual intercourse or other enjoyment. She loses such right for the day she refuses."[1]

The Hanafis states:- "أن تسلم نفسها / تاما فى اى بلدة تسليما او مكان يليق بها فانا امتنعت عن تسليم نفسها فى بلددون بلد فان نفقتها تسقط ..."

"That the wife should surrender herself completely to the husband at any place he lives but if she refuses to submit herself in a place and she submits in another, she loses her rights to maintenance."[2]

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1. Al-Fiqh ala Mazahibil Arba'a Vol.iv pp. 570-573.
2. Ibid.

(d) APOSTACY OF THE WIFE

A Muslim wife, who apostacizes loses her right to maintenance.[1] فاذا ارتدت سقط نفقتها . . . وهذا بخلاف ما اذا كانت ذميـة تحت مسلم فانهـا تحب لهـا النفقـــة .

It should be noted however that if the wife was not a Muslimah, she cannot be considered as an apostate. So if the husband is married to an Ahlul-Kitab (e.g. Christian) she shall be entitled to maintenance unless she is refractory or unsubmissive.

This is under the Hanafi school. Other Imams are agreed to this.

(e) NUSHOOZ (RECALCITRANCE) OF THE WIFE

Recalcitrance or Nushooz; connot s a certain degree of sturbonness; perversity or unyieldingness to orders of a constituted authority. Or put in simple phrase, when an object proves difficult to handle it is referred to as recalcitrant or 'refractory.

Wherever there arises an association of more than two persons, there is the likelihood of having a commander from amongst them. This is more so in Islam as the Prophet (S.A.W) has ordered for that. The orders of the commander have to be obeyed by the members of that association. Disciplinary measures are consequently taken against any member who appears recalcitrnat.

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1. Al-Figh ala Mazahibil Arba Vol.iv page 566.

there with her husbands permission, she does not lose her right to maintenance. If however the husband wants her to return to his house and she fails to do so, her rights of maintenance shall depend on whether she is able to undertake the journey back to the matrimonial residence or not. If she is able to do so physically she shall not be entitled to maintenance, but if her condition does not permit her to travel she shall be entitled to her maintenance.[1] This is the position of the sick wife under the Hanafi school of law.

The position in the Maliki school of law however is not clear. All that is stated is what has been stated in chapter three of this writing i.e., whether a husband is bound to provide medicine and medical charges to his sick wife. It is however reasonable to infer from the Maliki's doctrine of Istilaan, that in cases of such nature and where there is no clear text from the Qur'an or Sunnah on the issue, that they resort to istihsan (equity) where the husband still considers the wife his mate, whose companionship he enjoys even though illness may impede her performance in certain marital aspects, be provided with maintenance, her physical condition being inconsequential.

As for Imam Shafi'i it has already been pointed out earlier that maintaining a sick wife is as obligatory as that of a healthy one. She does not lose her right on the mere fact of her being sick.

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1. K.N. Ahmad in his Muslim Law of Divorce Quoting Ibn Abidin.

In a married couples' life, the husband has been empowered to be the leader of his family. And in this regard he is the controller and sustainer of his wife and their issues if they are so blessed. The wife has to, by necessity, obey all reasonable orders of the husband. If she fails so to do she is failing in one of the conditions that entitle her to be maintained by the husband. In short she has to obey him head to tail reasonably and justifiably.

The Holy Qur'an states:-

الرجال قوامون على النساء بما فضل الله بعضهم على بعض و بما انفقوا من أموالهم فالصالحت قانتات حافظات للغيب بما حفظ الله..."

"Men are the protectors and maintainers of women because God has given the one more strength than the other and because they support them from their means. Therefore, the righteous women are devotedly obedient, and guard in the husband's absence what God would have them guard....."

A number of traditions also, have been reported from the Prophet (S.A.W) emphasising the significance of obedience to a husband by his wife:-

Umm Salamah reported from the Prophet that "whosoever being a wife, dies while her husband is pleased with her shall enter paradise."

Abu Hurairah reported:

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1. The Holy Qur'an Chapter iv Verse 34.

"If a woman prays the five prescribed daily prayers, observes chastity and obeys her husband, she shall enter paradise."[1]

It is also reported from Ibn Abbas that "one day a woman came to the Prophet (S.A.W) and said to him. "I have been sent to you as woman representative; that Jihad is a duty imposed upon men by Allah, if they succeed they be rewarded and if they are killed they remain alive in abundance with their Lord. We the woman folk do stand for them, then what of us?" Then the Prophet said: "communicate to any woman you meet that obedience to husband and acknowledging of his rights over the wife) is equal to the Jihad. But only few of you do that."

Anas bn Malik reported the Prophet as having said: "Were it permissible for a human being to prostrate before another, I could have ordered a wife to prostrate before her husband whenever he enters unto her for the superiority God has conferred on him over her."[1]

From the totality of the above authorities it can safely be concluded that a good wife is always obedient and harmonious in her husband's presence and in his absence guards his property, reputation and her own virtue unpolluted as ordained by God.

Some of the circumstances which can render a wife to be Nashiz (recalcitrant) and thereby disentitling

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1. The above traditions and many others can be found in Abdul Azeem bn Abdul-Qawiy al-Munzaris Al-Targhib wat-Tarhih Vol. iii pp. 48 - 61.

herself from maintenance are:-

(i) Where she refuses to have sexual intercourse with the husband without a valid excuse. The excuse can be on the basis of health or religious duty. The Law considers as valid excuses among others where there appears excessive development of the genital organ in the husband or a malady of the wife that would be aggravated by coition. On the other hand, the wife may be in her menses or observes the Ramadan fast or being a mahrim. The husband may object to his wife accomplishing a supre-rogatory fast and if she insists upon doing so inspite of his forbidding her, she is disobedient.

(ii) Leaving the matrimonial home without the husbands authority constitutes disobedience. Unless there is a valid reason for her to go out, e.g. where she apprends some danger likely to befall her e.g., where the wall, roof or room threatens to collapse on her or where there is a fire out brake ; otherwise she is not to go out unpermitted. This leads us to the discussion of a well known Hausa Muslim women practice of constructive desertion

CONSTRUCTIVE DESERTION (YAJI)

Within the Hausa Muslim community, a practice has grown up where if something has some how somewhere gone wrong between the husband and his wife such that the latter considers it to be beyond the limit of tolerance she abdicates herself (usually) to her parents house or to some other places. This period of constructive desertion is in Hausa known as YAJI.

The duration of this Yaji depends on the nature and gravity of the allegations levied (normally) against the husband. It also depends on the temperament and understanding of the spouses parents or guardians who are invariably involved in solving the problem.

The fundamental question now is whether such a wife on constructive desertion, is entitled to any form of maintenance from the husband.

It seems that there is no plain discussion on the issue by the jurists; but reasonable conclusions from earlier discussions on conditions of entitlement to maintenance would warrant one to say, without mincing words that such a wife is not entitled to maintenance. This is because, her illegal exit from the matrimonial residence could mount to nushooz, which ab initio disentitles her to maintenance.

But the view discussed under the Hanafi orthodoxy by a modern writer[1] opines that a wife who leaves her husband shall not necessarily be considered to be refractory in

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1. K.N. Ahmad - Muslim Law of Divorce page 723.

each and every case, because it is possible that she might have been forced to leave his house on account of his conduct. The writer equals such a situation to that of one who leaves his wife. And that in the formers case, the wife's act of living apart from ther husband shall be attributed to him. Hence a wife shall not become disentitled to maintenance when it is the conduct of the husband that forces her to leave him and live apart from him. Thus acts of cruelty may compel the wife to leave him particularly when she is exposed to personal danger. The conduct of the husband which entitles the wife to live apart from him is not restricted merely to physical cruelty but may also consist of mental cruelty. However, the yardstick of measuring the cruel act alleged is the reasonable man's test.

Other circumstances where the wife is deemed to be nashiz under the Hanafi Law include:-

(i) If she travels to perform the Umra (Lesser Hajj) without the husband's authority.

(ii) Where the wife refuses the husband entry into her house if it is the one used as the matrimonial residence.

(iii) If the husband has asked her to accompany him to another place for earning his living e.g., on transfer to another station and she refused without a justifiable cause or causes.

There are however certain circumstances under which the wife can legally be entitled to maintenance though she may appear refractory.

(a) Where she refuses to consummate the marriage on the basis of non payment of the portion of the prompt dower.

(b) If she is imprisoned because of debt due to somebody or when she pledged the husbands credit.

(f) WIFE SHARING HER MEALS WITH THE HUSBAND

A wife is not bound to eat together with her husband. But where she shares her food with him, she loses her right to food allowance. Likewise, where she is clothed with him simultaneously she loses the clothing allowance. This is the Malikis view:-

ان تأكل معه فسقط ولوكانت مقررة، ولا فرق فى ذلك بين الطعام او الكسوة، فإذا اكلا معه سقطت الكسوة ."

The Hanafis are in agreement here with the Malikis.[1]

(g) INDIGENCE OF THE HUSBAND

A husband is exempted from maintaining his wife where he suffers abject poverty. The wife must, in such a circumstance maintain herself and could not claim back what she has expanded during such period from the poor husband. However she has a discretionary right of seeking for a revocable repudiation of the marriage contract if she can prove that she did not know that the husband had no means of subsistence when the contract was effected, otherwise she has to lose her right of being maintained by this poor husband .

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1. Al-Fiqh ala Mazahibil Arba Vol. iv page 573.

This is irrespective of whether consummation has taken place or not:-[1]

" فاذا ايسر الزوج فليس لها الحق فى للرجوع عليه بألنفقة مدة اعساره، ولوكانت مفروضة بحكم حاكم مالكى ، ولاحق لها فى مطالبتها بالنفقة مادام معسـرا."

This is the Malikis view. For other schools view, this sub-topic has been discussed in a more detailed manner in chapter three supra.

2. GROUNDS OF FORFEITURE AFTER DISSOLUTION OF MARRIAGE

The classes of wives who are entitled to maintenance even after the marriage contract has been determined can lose such a right on some grounds. It is pertinent to consider each of the classes with a view to ascertaining the nature of forfeiture whether total or partial.

(a) DIVORCE AS A RESULT OF DEATH OF HUSBAND

Where death of the husband was the cause of separation of the wife the wife loses her right to maintenance, except that she can remain in the matrimonial residence till the expiry of her idda period which is four months, ten days, This is on the condition that the house belonged to the deceased husband. If the house is rented, she loses such a right too. It is the same condition where the wife was divorced and the husband died later, and the idda changes to that of spouse relict. This is where she is not pregnant. But if she is pregnant she has to be maintained till delivery of the child, This is according to the Malikis:

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1. Al-Fiqh ala Mazahibil Arba Vol.iv p.573.

فإذ مات زوجها انتقلت الى عدة الوفاة وسقطت نفقتها، كما لومات عنها وهي في عصمته، ولكن يبقى لها حق السكنى حتى تنقض عدتها، وهي اربعة اشهر وعشراة بشرط ان يكون المنزل الذى تسكنه مملوكاله، اماانا كان لأجرة فإن حقها في السكنى يسقط ايضا..... هذا اذاكانت غير حامل أو طلقها بائنا وهي حامل، فان النفقة بأنواعها الثلاثة من الطعام وكسوة ومسكن تجب للعمل لا للمطلقة حتى يولـــد.....

The Hanafis however view the situation of a widow as follows:-

That she has no right to any form of maintenance whether she be pregnant or not. And the effective period is reckoned from the demise of the husband.

They base this view on the following reasons:-

(a) That as maintenance is allowed to a divorcee because she cannot leave the matrimonial residence during the waiting period which is prescribed to as certain whether she is pregnant or not, the residence of a widow on the other hand serves as a mere mark of sorrow and respect for the deceased.

(b) That maintenance is paid out of the husbands property when he was alive, but on his death now, his ownership ceases and ownership immediately thereafter is vested in the invidivual legal heirs, the widow inclusive. It is however not the responsibility of the other co-heirs to maintain her.

According to the . . . Hanbali school of thought, on the demise of her husband the wife loses her Nafaqah وتنقطع نفقتها بموتـــــــ

(b) CASE OF A WIFE IRREVOCABLY DIVORCED:

A wife repudiated irrevocably loses her right to food, clothing but she enjoys accommodation till the expiry of her waiting period.

اما المطلقة للابنا بائنا فإنها لا نفقة لها الا السكنى — فإنها تجب لها حتى تنقضى عدتها . *

But where she is pregnant all the ingredients of maintenance shall be available to her for the pregnance till delivery and her exit from the iddah room does not disentitle her to such rights because the rights are not meant for her but for the one in the womb.[1] The pregnancy however is a subject of confirmation by experts.

The Hanbali school states that if the wife is irrevocably divorced and she is pregnant she does not lose her right to maintenance as to clothing and lodging. But if she is not pregnant she does lose such rights.

" اما البائن فان كانت حاملا ، فان نفقتهـا لا تنقطع، ولها السكنى والكسـوة ، والا انقطع نفقتهـــــا . "

Under the Hanafi law, the divorcee on account of repudiation, is entitled to maintenance and lodging, whether the repudiation is revocable or irrevocable and whether she is pregnant or otherwise. However, when she is irrevocably divorced, a further condition is put: that she does not go out, throughout the period of her idda, from the lodging in which she observes the iddah. If she dares go out, she then becomes a nashiz and thereby losing such a right.[2]

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1. Ibid - pp 575-6
2. Ibid - p 574
3. cf Ibid.

(c) OTHER CLASSES OF DIVORCE:

By other processes or classes of divorce, it is meant to cover cases of divorce through li'an (mutual imprecation) Khul (divorce at the instance of the wife). Ila (oath of continence). The nature of these forms of repudiation is that, Khul is regarded to be irrevocable, so also divorce through mutual imprecation: so the rules applicable in case of an irrevocable divorce apply to them. However, in the case of a divorce by mutual imprecation the food claim shall cease: this is because the husband disclaims the paternity.

As for the ilo, it is regarded to be a raja'i divorce i.e., a revocable divorce. So rules applying to a revocable divorce relating to maintenance apply here. This is however according to the Malikis school. According to the Hanafis the above classes of divorces are entitled to maintenance and lodging.

(3) REVIVAL OF THE RIGHT OF MAINTENANCE LOST

A wife who has lost her right of maintenance due to her minority (tender age) regains such a right when she attains majority and is capable to discharge marital functions.[1]

A sick wife regains right to maintenance when she is capable to discharge her marital functions on recovery.

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1. Cf: Ibid.

As for the recalcitrant and the inaccessible wives, they can regain the lost rights if they yield to the husband and make themselves disposable to the husband.

The wife who shares her meals or is dressed at the same time with the husband regains the right when she objects to such a practice.

For the wife of an indigent husband, she regains her rights to be maintained if the condition of her husband improves. But no compensation for what she expanded during the period of hardship of husband.

As for the apostate, according to Hanafi she does not not revive the lost right by subsequent reversion to Islam. As for other schools, the lost right is revived on reversion to Islam.

As for the wife who was revocably divorced and she apostacises during iddah period she does not regain such a right.

(4) APPLICATION OF THESE GROUNDS OF FORFEITURE IN CASE OF A NULL MIFE IN THE NORTHERN STATES:

The local practice of these grounds of forfeiture of maintenance both during the coverture and dissolution of the marriage has been treated along with the conditions and incidents of entitlement to maintenance in chapter three supra. Please refer to that chapter for details.

C H A P T E R S I X

WIFE'S MAINTENANCE UNDER NON-ISLAMIC LAWS IN THE NORTHERN STATES

1. INTRODUCTION

Northern Nigeria, though predominantly a Muslim occupied region, has been largely influenced in it's legal system by various indigenous and foreign laws. This influence, on both the people and the well known and well founded rules of law, has in no small measure, and surreptitiously conquered alot of people thereby putting them in a serious state of dilemma and uncertainties.

It is worth noting, that before the advent of the British, who imposed their rule on Nigeria and its people, two well known systems of law existed:

(a) The pagan customary law;[1]

(b) The Islamic Law.[2]

Each of the two systems of law was having its separate courts and personnel to administer all the branches of the respective law.

On their assumption of Jurisdiction however, the British, came along with them, their system of law, (the English Law) and through a gradual process transplanted such a law in the country.

It is considered therefore pertinent, to consider though in passing, the provisions of those other two laws the English law and the customary law regarding maintenance.

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1. This law was known as "Native Law and Custom" or generally, and officially, "Customary Law"

2. This is known as the "Shari'ah".

2. CLASSIFICATION OF NON ISLAMIC LAWS APPLICABLE IN THE NORTHERN STATES

Broadly speaking, the non Islamic Laws in application in the ten Northern States[1] are classified into three:

(a) The English Law

(b) The Nigerian Statutory Law; and

(c) The Customary Law.

It is pertinent to look at each of the above laws.

(a) THE ENGLISH LAW

English Law is the general name used in referring to those rules of Law that have to come to Nigeria expressly or otherwise and are accordingly adapted, thereby forming part of the Nigerian Law.

In specific terms however; the following are the constituents of English Law:-

(i) English Statutes;

(ii) Common Law and Equity

(i) ENGLISH (BRITISH) STATUTES

By way of general discussion statutes in England are of two types:- Those which derive their force from the legislature (Acts of Parliament) and those which derive their force from the delegated legislations.

Of the above classes of statutes, those which find their way into Nigeria fall into two groups: (a) Those statutes made to apply directly to Nigeria by their own force and (b) those which were received into Nigeria by local legislatures.

As for the former, they were made by the British crown to apply directly to the colonial territories.

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1. Bauchi, Benue, Borno, Gongola, Kaduna, Kano, Kwara, Plateau, Niger and Sokoto.

They made uniform regulations on matters of general concern throughout the British empire:- e.g., public health and transport, social welfare and etc. This is because, such matters fell out of the scope of common law and equity. And as for the latter, there was no attempt to identify the particular topics on which English statutes received into Nigeria by local legislatures. All that was done was to give such a statute a nomenclature of "Statute of General Application" And by this they meant to say that where such a statute was sought to be enforced, it must have been in force in England on the 1st of January, 1900. And this is irrespective of whether there were subsequent repeals of such a statute in England or not. However one point that stands clear is that the statute of general application; suffers the vagueness of defination and certainty.

(ii) COMMON LAW AND EQUITY

By the term "English Common Law" it is meant to portray the basic Law of the land which was developed by the old common law courts out of the general and local customs prevailing among the various English communities in the early centuries. Such laws are noted to have through systematic application, been formalised, rigid and highly technical thus breeding apparent injustice:[1]

It was this rigour of injustice that equity came to mitigate. However while applying the rules of common law and the doctrines of equity, the Nigerian Courts could make such modifications as are necessary to conform with

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1. Okonkwo: Introduction to Nigerian Law.

local circumstances.[1]

So by viewing at the above imported laws of British, one could hardly appreciate with satisfaction the raison detre for such importation. Further, none of the Instruments used to import such laws into the country has given any satisfactory reasons for such whole sale importation. However, the author of the sources of Nigerian law, Dr. E.W. Park, opines that what is best for a nation is to have its own "home grown" legal system. But the machinery for developing such a system is a slow and gradual process, and when a society chooses or is forced by circumstances to undergo a radical change, it is most unlikely that it's domestic law will be able to adopt itself rapidly enough to fit in new situation. And this therefore, according to park calls for the adoption and application by the society for its own purposes of the legal system of another country which has already developed to the stage to which that society envisages. So, comparatively speaking in our own case - Nigeria - the decisive events which made the reception of English statutes necessary were the arrival of Europeans, the acquisition of political power by the British and the gradual infilteration into Nigeria of new practices and institutions, such as large scale commercial activity; which, Dr. Park considered could not cope up with our local or traditional laws in that new situations and new persons for which customary law was inadequate, made it necessary to introduce the law of England into our country.[2] This is Dr. Park's view but ofcourse the view is controversial and

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1. Park, the sources of Nigerian Law pg.36; Allot, Essays in African Law pg.25; Nwabueze, The Machinery of Justice in Nigeria pg. 19
2. Park - The sources of Nig. Law. (The underlining is however mine).

can attract a protracted and lengthy argument, but for obvious reasons this is not the proper paper to accommodate that.

(b) THE NIGERIAN STATUTORY LAW

Pre-Independence enactments by both the central and the Regional Legislatures were termed "Ordinances" and "Laws" respectively whereas post - independent enactments by the Federal and Regional (States) legislatures were given the respective names of "Acts" and "Laws."

It should be noted anyway, that under the post Independence constitution, the Federal Legislature was empowered to legislate on certain specified matters with respect to the whole country. Such laws being known as "the laws of the Federation;" it also had full legislative authority over the Federal Territory and Lagos. Such laws enacted were called, "laws of the Federation and Lagos." Each of the Regional Legislatures however had competence to make laws for the territory within its jurisdiction and laws made thereof were termed: 'Laws of Northern Nigeria;' 'Laws of Western Region;' 'Laws of Eastern Region and 'Laws of Mid Western Region.'

It was from such types of enactments that the country has been provided with most of its laws. Further, item 23 of the Exclusive Legislative list of the 1963 Republican Constitution spelt out the exclusive authority of the then Federal Government to legislate on matrimonial causes. On the take over of the Military in 1966, in the Constitution suspension and modification Decree of the 1966 the Decree clearly spelt out that:-

"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,"[1] could be legislated upon by the Federal Military Government.

This is the basis of Decree No. 18 - Matrimonial Causes Decree of 1970. And under this sub-topic i e., Nigerian Statutory Law, it is intended to solely consider this Decree.

THE MATRIMONIAL CAUSES DECREE, 1970

According to Dr. Adesnaya, "The enactment of the matrimonial causes Decree, 1970, of Nigeria, constitutes a landmark in the history of the country's legal system because the Decree provides an appreciable, though by no means absolute, break with the traditional source of the local law on matrimonial causes."[2] And according to Dr. Nwogugu, the Decree marked the starting point of the quest for fashioning an indigenous law on matrimonial causes to suit local circumstances.[3] This is because up to the date of commencement of the Decree i.e., 17 March, 1970, the Nigerian Courts were in the habit of applying English Law on matrimonial causes which where applicable in the English superior courts,[4]

The Decree however, has not up till date been absolute as it only effected a partial break with the hitherto applicable English Law.

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1. Decree No. of 1966
2. Adesanya: Laws of Matrimonial Causes
3. Nwogugu: Family Law in Nigeria
4. Such application was by virtue of S - 4 of the State Court (Federal Jurisdiction) Act Cap.177 of the 1958 edition of the Laws of the Federation and Lagos.

(Recourse may be had to ss 98, 112(1) of the Decree for further details). Furthermore, English rules of common law including the doctrines of equity and some statutes of general application still apply as residual laws in filling the gaps existing in the Decree.

Thus, from the outlook and application of the provisions of the decree, the decree appears mostly English in nature and mode of application. This is because, the provisions of the decree are a sort of amalgum of the Australian matrimonial causes Act of 1959 and the Divorce Reform Act of 1969 of England.

(c) CUSTOMARY LAW

Customary Law, is designated with the official name of and is popularly known as "NATIVE LAW AND CUSTOM" in the Northern States. And the native law and custom of a community is defined to be a body of customs and traditions which regulate the various kinds of relationship between members of the community in their traditional setting.[1] It is further considered to be, "a mirror of accepted usage", a reflection of the social attitudes and habits of various ethnic groups, and it derives its validity from the consent of the community which it governs and is thus flexible, dynamic and not static.[2]

The outsanding features of native law and custom are that:-

(i) It is unwritten

(ii) It derives its strength from its acceptance by the very community which it governs

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1. Okonkwo: Introduction to Nigerian Law
2. Salacuse: A selective survey of Nigerian Family Law

(iii) It is dynamic and grows with time.

There is however, no single uniform system of Native Law and Custom prevailing in the Northern States. Rather it is composed of hundreds of sets of laws each of which was developed by and applies to a particular ethnic or tribal group, and each varying from the other significantly. It was the "Indigeneous Law, the only Law which existed in the land known as Nigeria before the coming of the British."[1]

The above quotation from Salacuse presupposes the existence of Native Law and Custom (Customary Law) as the ONLY law. Well how correct this statement is, is both a question of fact and law. May be Mr. Salacuse fell victim of such legal casuistries, as have done many other authors and legislators. All of them built upon the wrong notion of defining and classifying Islamic Law (Shariah) as a native law or custom (customary Law). For instance:-

S.2 of the Native Courts Law, 1956 specifically provided that,

"Native Law and Custom includes Muslim Law",

S.2 of the High Court Law, Laws of the Northern Nigeria, 1963 states:- the term "Customary Law" generally includes Islamic Law."

Numerous writers, do, more often than not cite such provisions as the ones defining Islamic Law to be a customary Law.

But the question one needs to ask at this juncture and with all meticulousness is this:

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1. Salacuse: A Selective Survey of Nigerian Family Law.

IS ISLAMIC LAW A CUSTOMARY LAW?

Mr. Salacuse, four pages after making the above supposition, tried to draw some mild distinctions between Islamic Law and other Laws: "Islamic Law differs markedly from the other types of native law and custom in that it is neither indigeneous nor unwritten. Unlike the indigeneous forms of native law and custom, Islamic Law possesses scholarly works which are the product of centuries of thought and investigation by trained jurists."[1]

Professor J.N.D. Anderson, while quoting from Lord Lugard's political memoranda says that "It is curious and illuminative to notice the degree to which Islamic Law is identified with, and yet at the same time differentiated from, native law and custom in such a book as Lord Lugard's political memoranda.

> Thus on page 84 he distinguishes them in the following terms: "The fundamental law in the Native Muslim Courts of Nigeria is the Maliki Code of Muhammadan Law, and in the Native pagan courts it is the local native law and custom. Both are subject to the proviso that all judgments and sentences must not be repugnant to natural justice and humanity, or to any Ordinance of Nigeria."[2]

Further, to borrow example from one of the East African countries, the well-known dictum of the Eastern Africa Court of Appeal, In the case of KHAMIS V. AHMED,[3] on

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1. Salacuse: A Selective Study of Nigerian Family Law pg.7.
2. Anderson: Islamic Law in Africa
3. I E.A.C.A., 130 at 133.

whether Islamic Law could be regarded as a native law and custom, it is stated there that the law of Islam cannot be described as "native law" for the purpose of article 7 of the Kenya Colony Order in council merely because it is the law applicable to many or even all of the natives of Kenya Protectorate."[1]

Now, it is on record also that Islamic Law is more extensively followed and enforced in Northern Nigeria than any where else in the world outside Arabia."[2] This is because, as pointed out earlier, that the Northern States are predominantly inhabited by Muslims. And wherever a Muslim be, his life and conduct of all affairs religious social, economic, political, cultural and whatever, have to be regulated by the laws of Islam. If the intended conduct or affair passes the test of the Shari'ah and not repugnant, pari materia thereto, then it is allowed to apply. But where it is found repugnant to the rules of Islamic Law, it only merits outright rejection.

So Islamic Law, in the context of what amounts to native law and custom in Nigeria and particularly in the Muslim dominated North and in any other community or tribe, cannot and does not become a native law and custom or a customary law. And to regard it as such is derogatory to the Muslims. This is because it is only Islamic Law that has the character of universal application, dynamism and stands the test of time. I shall endeavour to compare the excellence of Islamic Law as a divine law and what

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1. Anderson: Islamic Law In Africa p.3
2. Ibid.

actually is a customary law at the end of this chapter.

4. PROVISIONS RELATING TO WIFE'S MAINTENANCE UNDER THE ABOVE LAWS AND THEIR APPLICATION IN THE NORTHERN STATES TO A NON MUSLIMS WIFE

For convenience and precision the application of provisions relating to maintenance of a non-Muslim wife in the Northern State as shall be discussed hereafter and vis-a-vis the above laws referred, I shall follow the same sequence but in an abridged nature.

(a) UNDER THE ENGLISH LAW

The cumulative effect of the provisions of the English statutes and the English doctrines of common law and equity as relating to maintenance is that it is the duty of the husband to provide necessaries to the wife or pay her the necessary amount of money for the same. And for the purposes of English law, maintenance consists mainly of food, clothes and lodging. It however includes other things also as medicines, medical and legal services. Thus in ACWORTH VS. ACWORTH[1] It was held that, "Maintenance is a very wide word, and in my view, it should be read as covering every thing which a wife may in reason want to do with the income which she enjoys. It includes much more than food, lodging, clothes, travelling and so on, it includes for instance, charity and making arrangements for the future thus incurring various liabilities in her discretion, and it is wrong to limit it to any particular form of expenditure."

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1. (1942) 2 All E.R. 704 C.A.

However, where the husband fails to maintain the wife, the latter can, by pledging the former's credit, purchase the same, and is liable for the payment of the values to the tradesman who has effected the supply to the wife.

Equally the wife can, in certain situations, be held liable for the support of her husband if she is able to do so. For instance where the husband is needy. She must support her destitute husband when she earns more than is necessary for her support and the support of her children, or has substantial private means.[1]

CONDITIONS OF ENTITLEMENT TO MAINTENANCE

Under the English Law, a wife shall be entitled to maintenance as provided by the matrimonial proceedings (Magistrates Courts Act), 1960, on the following grounds:-

(a) Where the husband deserts the wife,

(b) When the husband has been guilty of persistent cruelty to her,

(c) When the husband committed adultery,

(d) Where the husband insists on having sexual intercourse with the wife while she suffers from a veneral disease

(e) When the husband is a habitual drunkard or drug addict

(f) Where the husband compelled her to submit to prostitution,

(g) When he has neglected to provide maintenance to her

(h) Where he has been convicted of an offence against her.

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1. Matrimonial Cause Act, 1950, SS 16(3) and 20(6), Matrimonial Proceedings (Magistrate's Courts) Act, 1960.

Conversely, a husband is entitled to claim maintenance from his wife on the following grounds:-

(a) Where the wife files a petition for divorce or judicial separation on the ground of the husband's incurable insanity.

(b) When the husband obtains a decree of divorce for judicial separation on the ground of the wife's adultery, cruelty or desertion and the wife has property either in possession or reversion. In such a case the court may make such order as it thinks it fit for the settlement of such property for the benefit of the husband,

(c) Where the husband obtains a decree for restitution of conjugal rights and the wife is entitled to any property either in possession or reversion, the court may order a settlemtn of the property or part thereof for the benefit of the husband.[1]

CONDITIONS OF FORFEITURE OF MAINTENANCE.

A wife, under the English Law, loses her right to maintenance from the husband on the following grounds:-

(a) Where the wife commits adultery. However it is effective if the husband has not connived at or condoned the adultery.

(b) Where the wife deserts the husband she forfeits her right to maintenance. But if she, during the period of desertion becomes insane she revives the right.

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1. CF SS 15(6), 16(3), 20(1), (6); 17(2); 19, 21(3) of the matrimonial proceedings (Magistrates Courts)Act, 1960.

QUANTUM OF MAINTENANCE

As a general rule, the English courts take only the husband's income and status into consideration while fixing the wife's maintenance, and the order is usually based on the amount of money required for necessaries for the wife according to the status of the husband.

Under the English Law also, arrears of alimony do not constitute a legal debt and so no action can be taken against the husband.[1]

The above are some of the salient provisions with regard to maintenance under the English Statutes and the doctrines of common law and equity which remain applicable in England and some of which by virtue of their being statutes of General Application or Common Law and Equity were applicable in NIGERIA. For instance, the issues of whether S.22 of the Matrimonial Causes Act 1965 was applicable in Nigeria, it was held to be applicable. This was in Ekisola V. Ekisola[2] where the wife instituted proceedings for maintenance order in favour of herself and the children of the marriage. The proceedings were brought under S.23 of the matrimonial Causes Act, 1950 (a provision which was later re-enacted in S.22 of the 1965 Act), the wife's claim was upheld on the authority that S.16 of the High Court of Lagos Act, Cap., 00 enjoined the High Court to exercise its jurisdiction in matrimonial causes in conformity with the law and practice for the time being in

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CF Bailey Vs. Bailey, (1884) 130 BD, CA. However the wife can resort to the Debtors Act. 1869 for redress.

2 (1961) LLR 8

force in England and that the English Law referred to included S. 23 of the 1950 Act.[1]

By virtue of sections 1 and 8 of the 1970 MCD however, which furnishes the matrimonial causes as per local statutes, abolished the imperial statutes that provided for the application in Nigeria of the current English law on matrimonial causes. So now, these Laws do not affect the Nigerians directly.[2]

(b) THE NIGERIAN STATUTORY LAW.

The current statutory Law on maintenance is provided in part iv of section 70 of the matrimonial causes Decree (MCD) 1970. From the wordings of this section, it is clear that the High Court has been conferred with the sole power to deal with both the principal reliefs and the ancillary ones, the latter of which encompasses maintenance.

(a) MAINTENANCE

S. 70 of the 1970 MCD states:-

> "Subject to this section, the Court may, in proceedings with respect to the maintenance of a party to marriage, or of children of the marriage other than the proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earnings capacity and conduct of the parties to the marriage and

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1. Adesanya: Laws of Matrimonial Causes
2. Ibid

all other relevant circumstances."[1]

As noted earlier, in a monogamous marriage, each of the spouses may be liable to maintain the other, depending, upon the circumstances of the petition, the means and earning capacity, of a spouse have to be determined first to see whether in fact the spouse claiming maintenance is really in need of it. This is because where the spouse (claimant) has adequate means or income he or she can hardly secure any order for maintenance. And by "means" of the parties, the phrase may be construed to mean the respective capital assets of the parties, including contingent and prospective assets. And the "earnings capacity," as stated out by Wallace J. in Rogers vs. Rogers (1962) 3 F L R 398, that "there are cases where the husband's earning capacity is subject to fluctuations: --- "hese are some of the factors which the court will keep in mind when assessing a proper maintenance: ---"[2]

And as for "the conduct of the parties" the above court pointed out a multiple of factors to be considered (i) a wife's misconduct which involves sufficient turpitude may result in the reduction or even the elimination of a proper maintenance;

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1. The underlinings are mine. And it should be remembered from the outset that by "marriage" or "the marriage" the Decree has in mind a monogamous marriage only.

2. At p.401 - 402. However there has so far been no known Nigerian case on such phrases.

(ii) A wife is entitled to a full maintenance but should not be enriched by the immoral or perfidious conduct of the husband;

(iii) Punitive damages in the form of maintenance on the ground of immoral or improper conduct should not be awarded;

(iv) where the immoral conduct of the husband or his marital behaviour has affected or depreciated the financial status or the standard of living of the parties this may be taken into consideration and

(v) where the applicant is the guilty party, evidence of the other party's misconduct, for example conduct falling short of condonation or connivance, may be given with a view to inducing the court to take a more lenient view of the applicant's misconduct.[1]

"All other relevant circumstances" may include such other issues at stake hanging on the neck of the respondent or the requirements of the applicant; public interest and etc. The present Chief Justice of Nigeria, Sowemimo J. (as he then was) once made the following observation in this connection:-

> "The most unfortunate thing with regard to Nigerians contracting marriage under either the English Laws or the local marriage Act is that these laws do not take into consideration, the 'extended family' responsibilities of either the husband or the wife as the case may be. The result has been that those English cases cited cannot be of much assistance if

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1. Adesanya: Laws of Matrimonial Causes p.124.

one has to take into consideration what is the accepted practice amongst the Yorubas as regards their attitude with regard to responsibility of their families having regard to the extent of the meaning of that term."[1]

(b) MAINTENANCE AFTER DIVORCE

A high Court can order for the award of maintenance to a successful applicant. And where the court satisfies itself that an order for maintenance can issue and it is accordingly issued, the court may, in addition, prescribe how such maintenance can be realised from the respondent. Section 73(1)(a) - (c) states:-

"The Court, in exercise of its powers under this part of this Decree, may do any or all of the following, that is to say, it may:

"(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

"(b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

"(c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;[2]

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1. In Giwa Vs. Giwa-an unreported case High Court of Lagos, 16 January, 1970. W applied for maintenance after decree absolute. H shouldered alot of burdens; his immediate family a jobless brother and two elderly aunts.

2. S.73(1)(a) - (c) of the 1970 MCD

(d) OTHER POWERS OF THE COURT

The High Court, in relation to a maintenance order can generally make the following orders to ensure compliance of an earlier order given:-

(i) Settlement of property.
The property to be settled however must confer such entitlements to both or any of the spouses, either in possession or reversion.

(ii) Execution of Instruments:-
This is to ensure effective compliance of the courts orders. The respondent shall be required to execute any necessary deed or instrument and to provide any relevant documents of title

(iii) Appointment of a trustee or trustees. This is in case of any eventuality, so that payment may be made to the trustee on behalf of the successful claimant.

(iv) The Court may also impose some terms or conditions while making the order for the award of maintenance.

(v) The court has power also to refuse to treat an ancillary order for maintenance where the principal relief sought e.g., divorce, nullity of the marriage, judicial separation and etc fails.

(vi) The Court can enforce order for payment of maintenance through any of the following procedures:-

(a) Attachment of property of the respondent or through sequestration;

(b) Recovery of money as a judgment debt.

(c) Recovery against deceased's estate

(d) Attachment of earnings.

Such are the Salient provisions on maintenance as provided by the 1970 matrimonial causes Decree - the first indigenous legislation on monogamous marriage in Nigeria.

The provisions apply country wide. It is however obvious that much resort is had to the provisions of this decree mostly by the 9 Southern States of the country.[1] It is not by any means however, meant to say, that monogamous marriages do not exist in the Northern States. But they are the least. Sequelly, much of the practices are seen from the pronouncements of the high courts of the Southern States, as there are virtually no other courts such as the Shari'ah Courts, Area Courts or Customary Courts to deal with matrimonial issues even where the marriages are not monogamous. For instance in suits relating to Islamic Law marriages, the parties have to resort to the District/Magistrate Courts.[2]

(c) THE CUSTOMARY LAW

Native Law and Custom or Customary Law in this writing, it should be noted, does not include Islamic Law.

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1. They are: Anambra, Bendel, Cross-Rivers, Imo, Ondo, Oyo, Ogun, Lagos and Rivers States.

2. Quite recently, these have been repeated calls on the authorities concerned by some reasonable Southern Muslims for the establishment of Sharia Court, Area Courts to take care of thei (family) Matrimonial Causes. A National Conference has just been conducted at the University of Lagos in this October, solely for that.

It is intended here therefore to treat the provisions of maintenance as provided by some of the most outstanding tribes who till today conduct their marriages under their native laws and custom. I have specifically in mind the tribes of ANGAS, IGBIRRA AND the Natives of BIU.

MAINTENANCE UNDER THE ANGAS FAMILY LAW

The Angas are a tribe who are predominant in the Plateau State. And their marriages are polygamous in most cases. There is no limitation to the number of wives an Angas is permitted to marry. "If a man has more than one wife, each wife must be given a separate "room" or hut of her own." A husband must treat each wife equally and he is not permitted to discriminate. In distributing presents, clothing, or food, the husband gives his most senior wife all of the things which she subsequently distributes to the juniors. She also has the previlege of settling disputes arising among the juniors.

A husband has a duty to support each of his wives and to provide her with at least the bare essentials. She is reciprocally bound to render some services to him such as taking general care of the house, works with him on the farm.

The husband has the right of control of the wife's action and activities. Beating is however disallowed. And where the wife proves refractory and she cannot be convinced to revert to nomalcy, divorce may occur.

As to the wife's right to property she does not enjoy such right and even what she gets during the subsistence of the marriage becomes her husband property. She had to take permission from the husband before spending a kobo. That had been the practice. But the waves of modernism and right consciousness now greatly infilterates into the tribe as a result of the admixture they have with different persons with different culture and orientation. An Angas wife, as I have learnt enjoys the same if not equal property rights with her husband and she can dispense with her fortunes as she deems fit. However some of the stigma still lags behind. This is in respect of loans granted to a husband. She cannot sue him to recover such debts but if it were he who leaned her, he can sue her to claim the debt.

In the event of a marriage coming to a termination point, the wife enjoys a right to re-marry where as the husband has the rights of refund of the bride price and the custody of children of the marriage. If a marriage comes to an end as a result of death of the wife, the husband inherits all her property.

MAINTENANCE UNDER IGBIRRA FAMILY LAW

The Igbirra tribe mainly lives around Kabba, in Kwara State and under their native law and custom, marriage is polygamous. In their Igbirra Declaration.[1] It is therein provided that:-

"12(1) A husband has the right to:-

"(a) Conjugal rights with his wife;

"(b) His wife's (fidelity);

"(c) The children of the marriage;

"(d) His wife's ordinary (domestic services such as cooking, maintaining the home, and caring for the children);

"(e) the services of his wife with regard to light farm work;

"(f) one third of the young of his wife's livestock if he looks after them.

"(g) expects his wife not to cause trouble."

As for the wife, she enjoys the following rights from the husband;

"2 "(a) Conjugal rights with the husband,

"(b) Maintenance by her husband of herself and her children, including housing clothing food, at a standard consistent with his means;

"(c) One-third of the young of her husband's livestock if she looks after them.

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1. The Igbirra people are one of those who started reducing their Native Law and Custom into writing and they termed it 'Igbiraa Declaration.

(d) reasonable assistance from her husband for her family in times of need."

Unlike the Angas, only a native court may divorce a couple married under Igbirra native law and custom. And failure to observe the above rights can furnish a ground for divorce. Further, on divorce, a wife is allowed to take from her husband's house all property which belongs to her. But if the wife's conduct was the ground for divorce, the court will order her to return to her husband all clothes given to her by him and which are in a condition as good as new; but if it was the husband whose conduct was the ground for divorce, he will have no claim to any clothes which he has given her. That any jewellery which can be considered as an heir loam that is to say those types known in Igbirra as "omo," "orbene", "issue", "igoru", "Azurfa" and "egburu" will be granted by the court to the party who owned them at the time of the marriage, but all other types of jewellery given by either to the other is the property of the recipient. Finally, all household utensils including cooking, furniture etc; will be granted to the party who brought them.

RIGHT TO PERSONAL PROPERTY

Where a husband dies, and without an issue one sixth of his effects shall go to his wife or wives and the remainder to his closest male blood relative. But where he left male and female issues, then she loses such a right.[1]

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1. The Igbirra Declaration - S.16(a) & (b)

On the other hand, if it is the wife that dies, and she leaves a child by the husband one third of her effects shall pass to her husband and the remainder two thirds to any of her children by a previous marriage or in default of which it goes to her nearest relative. But where there co-exist issues of a previous marriage and issue or issues of the marriage immediately before her death, then the husband loses such a right and the whole effects are now distributed to all the issues on equal basis.[1]

However, in case of a widow the declaration provides as follows:-

"(Not less than 70 days after the death of a husband), the head of the deceased's family, in consultation with the family, will decide whether the deceased's wife or wives shall be inherited by his male relatives or not, should he decide that they will not be inherited then:-

(a) If a wife is not content to remain uninherited, in her deceased husband's house, she must apply to a court for a legal separation from his family. The court will hear such case as if she were divorcing the head of the family and the latter will be entitled to have granted to him all that a husband would have been entitled to had his wife divorced him prior to his death.[2]

(b) "If (the widow) is content not to be inherited and to remain in her deceased husband's house, the head of the family will enter into quasi-marital relations with her, that is he will undertake to honour the rights

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1. Ibid S.45 (a) & (b)
2. Ibid S. 28 (a)

of a wife enumerated in section 12(2), (c), (d), (e), while she will undertake to honour all the rights of a husband enumerated in section (12)(1)(c), (d), (e), (f) and (g)---[1]

MAINTENANCE UNDER THE BIU NATIVE LAW AND CUSTOM

Biu, is presently a district in the Borno state. It comprises of the Buras, the Marghis, Babur, Chibok and Kanakuru, so it has alot of component tribes. The Biu Native Authority of the 1960s reduced some of the native laws and custom in writing. And with regards to maintenance, the Declaration of Biu Native Law and Custom relating to marriage and divorce stipulates as follows:-

"(1) A husband has a right to demand the following from his wife:-

(a) Conjugal rights;

(b) Marital fidelity;

(c) The children conceived by her during the marriage, whether or not begotten by him;

(d) Normal domestic duties including cooking and caring for the house and children;

(e) farm work;

(f) Other customary duties;

(g) generally, the maintenance of a quite orderly domestic life."

"(2) A wife has a right to demand the following from her husband:-

(a) Conjugal rights;

(b) Marital fidelity within the circle of his legal wives

(c) Maintenance of herself and her children

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1. Ibid Section 28(b)

including, food, clothing, and housing at a standard commensurate with his means

(d) reasonable assistance for her family if they are in need.

(3) A husband, may subject to the provisions of section 5 of the Declaration Inflict Corporal Punishment on his wife for the purpose of correcting her."[1]

EFFECTS OF DIVORCE

No woman shall contract a further marriage, after divorce, until one month expires from the date of the divorce. And if she has an unweaned child, till the expiration of weaning period; if pregnant until after the delivery and weaning of the issue.[2]

On the death of a husband section 16 of the Declaration seems to provide equal terms as that of the Igbirra Declaration referred to above. They have same consequences too.

4. COMPARISON BETWEEN THE PROVISIONS OF THE ENGLISH LAW, THE CUSTOMARY LAW AND THE ISLAMIC LAW.

(i) ISLAMIC LAW VERSUS THE ENGLISH LAW:

To start with Islamic Law is divine in origin and comprehensive in nature and universal in application. It's provisions relating to maintenance therefore are not subject to human whims and caprices. They are meant to

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1. SS 7(1)-(3) of the Declaration of Biu Native Law and Custom Declaration to marriage and Divorce, 1964.

2. Ibid S.6(2). Weaning period here is fixed at 18 months after delivery.

be of universal application irrespective of race, colour, tribe or even geographical demarcations. English Law is essentially human in legislation. It has a limited application in the sense that it applies to a people who evolve it or who impose it upon themselves.

Both Islamic Law and English Law are agreed upon the fundamental necessaries, food, clothing and matrimonial residence as forming the core and kernel of maintenance though they differ in the ancillaries conditions of entitlement or forfeiture and the incidents. For instance where the English Law takes into consideration the financial status of the wife before awarding maintenance, Islamic Law considers the financial position of the husband alone vis-a-vis his wife's entitlement to maintenace of course taking also into consideration of the conditions of entitlement to maintenance. In the Islamic law also, validity and subsistence of marriage contract including the Iddah period forms a basis for maintenance.

Both under the Islamic Law and the English Law, the wife is entitled to economic rights and such rights belong to her solely. The difference however is that such economic rights in Islam must conform both in modes of acquisition and ownership, with the stipulated legal means provided therefor. The Islamic Law set aside a period known as 'waiting' (iddah) period' for a divorced wife to undergo after the dissolution of marriage. This does not exist under the English Law. Arrears of maintenance are a legal debt in Islamic Law. They are not so under the English Law (unless the wife invokes the Debtors Act). Marriages, under the English Law are

mainly monogamous. Under Islamic Law, marriages are polygamous or potentially polygamous. A divorced wife is, under Islamic Law, entitled to some form of maintenance up to the expiry of her iddah period. Under the English Law, a provision can be made for a divorcee consequent to a courts order on the husband to provide to the wife on the dissolution of the marriage such gross or annual sum of money for her life for such period as the court may deem fit depending upon the circumstances of the case.

(ii) ISLAMIC LAW VERSUS CUSTOMARY LAW:

Islamic Law, as stated above is divine in origin, comprehensive in nature and universal in application customary law, on the other hand grows up as a result of sponteneous evolution of such old relics and practices as are considered binding by a particular society or community. It has a limited application too.

Both Islamic Law and Customary Law, at least in the Northern States, are agreed on the fundamentals of maintenance viz: Food, shelter and lodging. They however differ in the mode of distribution or conditions of entitlement.

The responsibility of maintaining a wife in Islamic Law is unreservedly the duty of the husband without any anticipation for reciprocation. Under the Customary Law, the responsibility is largely on the husband but in some cases, with reciprocation. Thus under some customary Law, the wife has to render some farm work or other domestic duties to the husband. Domestic duties as such in Islamic Law, are in most cases mere matters of moral obligation.

The wife is entitled to economic rights in Islamic Law, no economic rights accrue to a wife of a customary marriage and even if they do, such rights will become the property of the husband. After marriage dissolution, except marriage is dissolved by Khul; divorcee does not return anything to the divorcer. But under customary Law, the divorcee has to return the bride price in most cases or some other valuable goods. There is idda period in Islamic Law in case of divorce. This is not-existent, except in few cases under customary law, arrears of maintenance are legal rights in Islamic Law, whereas they are not in customary law. Marriages are polygamous or potentially polygamous under both Islamic Law and customary law. The difference lies where Islamic Law limits the number of wives to four whereas customary law puts no limit to it.

(iii) THE EXCELLENCE OF ISLAMIC LAW

Looking at the brief comparative analysis of provisions relating to maintenace under the English Law, the customary law and the Islamic Law, one can easily and manifestly see the golden virtues and comprehensiveness of Islamic Law. Yet, for reasons unknown to the present writer some cluster of minds decided to classify Islamic Law as a Native Law and Custom (Customary Law). It is this aspect that this sub-topic seeks to treat.

It could be observed that from the prologue to this discussion on Islamic Law versus the Customary Law, the latter, particularly in the Northern States suffers problem of defination. If it was clearly defined, perhaps the Europeans could not have brought about the

present confusion in regarding Islamic Law to be a customary law. The attempt by Lord Lugard to different Islamic Law from other Customary Law ended, inevitably with a confusion. Thus J.N.D. Anderson, after having quoted Lord Lugard extensively from his political memoranda, made one to be aware that in the North, there were "at least three strata of law the Indigenous pagan customs of the country, the pagan or semi pagan customs introduced by its different conquerers ending, with the Fulani, and Islamic Law (or "the teachings of the Qur'an") as adopted at different stages and to different degrees, by a certain proportion of both conquerers and conquered are all now enforced with more regard for the situation already existent at the time of the conquest than for any logical consistency or precise nomenclature under the all inclusive aegis of "native law and custom".[1]

But "native law and custom" or customary law on an international full scale defination is accepted to be a rule which, in a particular district, has from long usage, obtain/and is fortified by established native usages, the recognition of a particular community or tribe. This clearly therefore shows that native law and custom can never have the quality of universal acceptability as there are no two tribes invariably with same customs. There must be a difference however infinitesimal. For instance.

> "Custom" is a rule which in a particular district, has from long usage, obstained the force of Law."

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1. Anderson - Islamic Law in Africa p.172

This is according to the interpretation section of the 1945. Evidence Act.[1] The provisions of this Act remain applicable throughout Nigeria. Thus in Nigeria, and in the absence of any further statutory defination of customary law, it will be taken to mean that customary law means or includes local customs including a rule which in a particular district or clan or even class of people has from long usage obstained the force of law and recognition, each tribe having its own.

In the Ghanian Interpretation Act, the approach to customary law is that:-

> "Customary Law, as comprised in the Laws of Ghana, consists of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as suitable for general application.."[2]

The Botswana formerly Bechuanaland Native Courts Proclamation states:

> "Native Law or Custom means in relation to a particular tribe or in relation to any native community outside any tribal area the general law or custom of such tribe or community....."[3]

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1. S.2(1) of the Evidence Act, 1945
2. Ghana Interpretation Act 1960.
3. The Bechuanaland Native Courts Proclamation 1942.

In Tanzania "Customary Law means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tangayikan (Tanzanian), African community and accepted by such community in general as having the force of law--------"[1]

Finally, in the case of

MOULT VS. HALLIDAY,[2] Channel J, made a declaration of a custom, "A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well-known that it must be taken to be incorprated into every contract unless something to the contrary is said." So from the above, the most outstanding features of customary law are that:-

(i) It is unwritten

(ii) It must be indigenous

(iii) It must reflect the social attitudes and habits of the particular tribe or community in question

(iv) It derives it's validity from the consent of the community which it governs and

(v) It must have been in usage for a very long time to accord it recognition.

The aim of drawing such a cross fertilisational idea of the various meanings and concepts of "native law" and

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1. Tangayika Interpretation and general clauses Ordinance.
2. (1898) 1 QB, 195.

"custom" is to contrast it with the salient features of Islamic Law and see the jusitification of classifying Islamic Law as a native Law and custom."

Islamic law popularly and authoritatively termed by the Qur'an as Shari'ah, is divine in its origin human in its subject matter and application, ideal in its principles, scientific in its methods, democratic in its spirit socialistic in its pattern and dynamic in its nature. It is an all embracing legal system that regulates and guides the life and conduct of Muslims concerning their rights and duties. Islamic Law promotes the welfare of people both individually and collectively. It is adaptive, dynamic and progressive such that it meets the challenge of changing conditions and current demands of life and society. It caters for the social needs and genuine requirements of the community. It's basic characteristics are therefore justice, equality, liberty and fraternity.[1]

The essence of this divine law in contradistinction with the customary or any man-made law is that it came, to set aside the tribal customs in various respects; It's purpose being to establish certain basic standards of behaviour which are of universaal application. It therefore contemplates one community of the faithfuls, though may be of various tribes and in widely separated locations "Religion," not nationalism or geography, is the proper cohesive force"[2] So the Shari'ah remains the law of God

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1. Habibi - Muslim Law

2. Dr. Mohammad Muslehuddin - Islamic Jurisprudence and the Rule of Necessity and need.

even though there is no one to enforce it. The believers even if they reside outside the territory of Islam, are bound by the law for the law was revealed to bind them as individuals wherever they may be. And they have to forget. their ancestral or tribal relicts. The law takes into consideration primarily the rights and obligations of the community, the personal rights of the individual are only in so far as they are not in conflict with the rights of the community. And as to its dynamism, Islamic Law contains broad principles that admit of interpretation to accommodate the growing needs of society and depending on the circumstances, it may also be extended by anology to solve the new problems that arise in life.

Further, Islamic Law as opposed to the Native Law and custom is WRITTEN. The primary source of the law; i.e., the Holy Qur'an has been reduced into writing for well over 1400 years ago. The second source i.e., the Sunnah of the Prophet has also been compiled in writing since the period of the companions of the Prophet. These can be seen in such famous Hadith Books as the Sahihan (the two authentic collections of Bukhari and Muslim), the Sunnan of Abu Daud and Muslim. The Muwattah of Imam Malik, and etc. Other compendium of writing expounding the principles of Islamic Law are so conspicuous enough and numerous.

It is a pride to a Muslim to note that most of the substantive and procedural laws of the English laws have been derived from Islamic law, though they made alot of alterations.

One may for instance wish to compare the rules of Islamic Law of contract and that of Evidence, with the current English Laws of contract and or Evidence e.g., in Islamic Law of contract of sale; we have a concept of Khiyarul ruya i.e., option of inspection. Where a buyer is allowed all opportunities to inspect properly the subjects matter and content himself thereof or have his reservation. The English Law of contract and the sale of Goods Act, allow the doctrine of caveat empto which allows a purchaser to have proper inspection of the subject matter. This very much resembles the Islamic Law doctrine of option of inspection.

It is therefore an act out of sinister motives malice and mayopia to give an unwritten character to Islamic Law.

To say also that Islamic Law is a custom is a pure misjudgment. It's universal character does not allow it to be a tribal or community law. The custom of an Arab naturally differs from that of a Hausa man. But since both are under the umberalla of the shariah, each has to foregore his native customs and succumb to the universal rules of the shariah. A Muslim of whatever tribe locality or race is governed by same set of rules/laws as prescribed by Islam.

C H A P T E R S E V E N

CONCLUSION AND SUGGESTIONS

A. CONCLUSION

1. GENERAL ATTITUDES OF THE NORTHERN NIGERIA MUSLIMS TOWARDS ISLAMIC INSTITUTIONS PARTICULARLY MAINTENANCE:

The chapters written supra have, in no small measure, made alot of startling revelations concerning the theoretical and the practical aspects of maintenance of a Muslim wife in the Northern States of Nigeria. The Northern States, ten in number as pointed out earlier, are predominantly a Muslim territory. This is because with the exception of a few states, the bulk of the population in each state is Muslim. This notwithstanding however, the governments of these States are not Islamic, provisions of Islamic Law, therefore, save which relate to personal status, are not applicable. And even where these provisions are allowed to be applied, deviations are found between the theory and the practice. Not only in these respects but also in other religious undertakings. This, has largely been so because as put by one Area Court Judge, that,

> "Many of the Muslims here have the notion that Islam is only confined to matters of prayers, Zakat, Fasting, Hajj, Burials etc; forgetting the fact that Islam is a dynamic and all-embracing religion making provisions for transactions of trade, barter, economy, military administration and the politics regulations with regard to family life, animals and etc. For all that, sets of Islamic substantive and procedural laws have been

provided for the smooth running of affairs."[1]
As pointed out by the judge the generality of Muslims are in these states somehow lacking in the general knowledge on Islam, nafaqah inclusive.

A sample of opinion has been collected from some lay Muslims on the concept of nafaqah and the nature and importance they attach to it. One of them said that when his parents got him married to his present wife, he was just between the ages of 17 and 18. "I did not have a room of my own nor did I personally possess anything to feed or clothe the said wife. All these were done on my behalf. And we continued to live in the same compound with my parents I never cared to struggle for food for my wife as I was confident that she would be fed and occasionally clothed."

Another person interviewed opined that:
"I consider getting married primary and the question of maintaining the wife normally hangs in the air. If God grants me what to eat I extend it to my wife. I think what is necessary is to secure the sleeping room and on the question of dress also that depends on if I am able to dress myself then I shall dress my wife."

The third person interviewed was a one time married woman. She stated that her former husband was not in the habit of paying to her the lunch allowance; nor was he in

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1. Al-Qadi Mahmud Abubakar Azare, Administering warnings to some of the litigants in a land suit No.484, dated 5/4/84 an unreported civil suit at Y.N.A. Area Court, Bauchi State.

the habit of buying kolanut to her. "The room we used to occupy was leaking;there was no toilet in use and I had to go out to the bush to ease my self. He was not also in the habit of paying the "Kudin Kitso," i.e., payment for plaiting the hair. My neighbours appeared in costly dress on the festivals but used to wear ordinary "atampa." Worst of it all is that he used to shower abusive language on me whenever a dispute arose between us. This was too much and I had to ask him to divorce me which he did."

From the above three instances one can see the apparent dilemma and general unawareness of such rights and obligations as imposed by Law on the spouses. If any of the three sets of couples was aware of his/her rights or obligations such problems could never have arisen. But such problems and others of like nature had to arise because the couples in any case before their marriage, were never taught of their personal rights in general and such other rights as that of a spouse in particular. This unfortunate situation will have to continue unless Muslims embark seriously on general acquisition of knowledge.

2. WHY THE LAXITY?

It has been observed from the foregoing that there is a general laxity on the part of the Muslims generally. This laxity has been brought about by the utter loss of hope by the Muslims. They do not seem to know their rights; nor do they seem to assert the rights. Further, the colonialists have done their worst in trasplanting the seeds of confusion uncertaint and aimlessness in the minds of millions of Nigerian Muslims.

This they did carefully and insidiously through their Educational system. That system of education promises one all comforts and luxuries of this world. That is why there are those Muslims who are devoutedly allegiant to materialism; there are others who are allegiant to the Western fashion of life and there are a handful of Muslims who are staunchly allegiant and desirous of having the proper shariah as a regulator of their lives. However those allegiant to materialism and the Western fashion of life should note that "it is not all that glitters which is gold."

The Northern States governments even though not Islamic in principle and operation have to take the greatest percentage of the blame for this laxity. Even if by their refusal to implement the whole provisions of Islamic law, they could have, in the least acted positively to ensure strict adherence and application of all the Islamic Law provisions they are empowered to enforce. And even where this has been the case, that is not enough, further steps have to be taken to see to the implementation of all the provisions of Islamic Law - Civil or Criminal. This is because, Law is an instrument of regulating life activities of individuals and groups. And amongst the purposes of Law is the securing of the greatest good for the greatest number of persons. So the Muslims who are in the majority can only have the greatest good which include peace, prosperity, progress purposefulness and, happiness only when full provisions of the Islamic Law

are allowed to operate. Anything short of that can only keep on fuelling the rate of confusion, retrogression and chaos.

3. THE ROLE OF THE INTELLIGENTSIA

Under the role of the intelligentsia, it is intended to treat the sub-topic as follows:-

(i) Expected Duties of the Intelligentsia and

(ii) The Actual (Practical) Behaviour of the Intelligentsia.

(i) EXPECTED DUTIES OF THE INTELLIGENTSIA

Like any other class of intelligentsia the Muslim intelligentsia in the Northern States of Nigeria is expected primarily to cover a number of activities within the society. This is because they are regarded to be those scholars who have acquired profound knowledge generally on Islam and are capable to teach some classes of students. Quite admittedly there are alot of such scholars. They are identified with different nomenclatures e.g., "MALAMIN ALLO," "MALAMIN ZAURE " "MAI WA'AZI," "MAI TAFSIRI," "ALARAMMA", etc. They all mean one and the same thing, i.e., learned, but with some degree of specialisation in particular area or areas.

The duties expected of these ulama, multiferous and important as they are may primarily include inter alia:

(a) General Enlightenment:-

Under this, the Muslim scholars are expected to educate, enlighten and remind the Muslim entirety of the general requirements of Islam on a Muslim. This can be done through lectures, symposia, workshops, conferences

where a number of scholars of different discipline expound on the proper position of shariah on a certain subject matter.

(b) Da'wah:

This is the Islamic form of propagation. And for this, there shall arise out of the Muslims society, a committed and dedicated band of preachers. And it is natural that one cannot obviously become a preacher if one is not learnered. Da'wah can take place at any ordinary gathering place e.g., Mosques, Markets place, in the Bus, Plane, Train, Ship or any other place considered conducive for preaching.

(c) Formal Training Methods:

Desirous and serious Islamic scholars seek to attach themselves to a private Islamic teacher for intensive training. To that effect the practice of private Institutions or schools has since the early days of Islam been established. Some students have to remain for long with a particular teacher to gain expertise in a particular area, while others change hands to gain a variety of knowledge from various teachers. All this, is with a view to bringing up more Islamic scholars who should be expected to teach and enlighten those who are ignorant. This, in the least, is what is expected of a Muslim Intelligentsia. But, do the Northern Muslim Intelligentsia carry out sincerely and satisfactorily such numerous and diversified activities into realities?

(ii) THE ACTUAL BEHAVIOUR OF THE INTELLIGENTSIA

It is true that some of the scholars in the North have sincerely and devoutedly taken the task to deliver the message of educating and enlightening those who are ignorant of the stipulations of the shariah. They exert all their might to see that their brethren are extricated from the cancer of ignorance and thereby saved from going astray. They extend their teachings and enlightenment not only to their families at home but in the Mosques, Market places, Schools, and Colleges, expounding the principles of unity, other rituals, trade and other monetary dealings, the family relations, the politics, the army and etc. But on the other side of the coin, there are the psychopants of Islam. They normally restrict their activities around their homes. They know very little about the shariah but presume to have all the treasuretrove of knowledge. Their main work is misleading instead of leading the ignorant Muslims. They instruct such Muslims that matters of prayers, fasting and Hajj are the concern of Islam. Family relations, or marriage, they say, are matters of custom.

The irony of it however is that one would find that such psychopants or parasites do not, in the actual sense know even the rudimentary rules of ablution or prayers. They conceal this ignorance but their followeres who appear more ignorant never realise that fact. Other scholars are also all out to derive material benefits from the little knowledge they acquire. They either

resort to sooth-saying, syncretism or resort to collecting sadaqah (charity). Likewise those who teach the Holy Qur'an to the small boys as observed by Hamidu Alkali,

> "The system of teaching and learning the Qur'an and Arabic language started in Northern Nigeria where the teachers in the early stage dependedd for their living on charity or to be precise SADAQAH....."[1]

This, essentially reduced the status of the teacher to that of a mere beggar which accords him a socially low status. So that is the unfortunate situations most of the Intelligentsia find themselves in. With these, it is hardly possible for them to devout their lives in expounding the actual rules of shariah such as the family affairs which they regard as a matter of custom.

4. THE ROLE OF THE ISLAMIC LAW COURTS

Under this sub-topic also it is desirable to look at:-

(i) The Expected Roles of the Court and

(ii) The Actual Practice of the Courts.

(i) THE EXPECTED ROLES OF THE COURTS:

Islamic Law Courts or put in other words, courts empowered to administer Islamic Law, are in the Northern States the Area Courts and the Shariah Courts of Appeal.

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1. Fafunwa: History of Education in Nigeria, quoting Hamidu Alkali's Note on Arabic Teaching in Northern Nigeria (June, 1967).

The expected roles as outlined by the Shariah to be played by such courts are concisely summed up in the following authorities:-

انا انزلنا عليك الكتاب بالحق لتحكم بين الناس بما اراك الله ولا تكن للخائنين خصيما. "

"We have sent down to thee the Book in truth, that you might judge between men, as guided by Allah....."[1]

"لقد ارسلنا رسلنا بالبينت وانزلنا معهم الكتب والميزان ليقوم الناس بالقسط "

"We verily sent our Messengers with clear proofs, and revealed with them the scripture and the Balance, that mankind may stand forth in Justice."[2]

" ثم جعلناكم على شريعة من الأمر فاتبعها ولا تتبع اهواء الذين لا يعلمون. "

"We made for you a Law, so follow it and not the fancies of those who have no knowledge."[3]

It is clear from the above authorities that these courts are expected to dispense justice mutatis mutandis between persons in accordance with what Allah has revealed as the Arbiter - i.e. the Holy Qur'an. This is irrespective of the nature of the dispute, civil or criminal involving any person any subject matter geographical demarcation.

The Northern Nigerian Islamic Law Courts have, since 1960 been confined to the following functions as provided by S.242 of the 1979 Federal Constitution:

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1. The Holy Qur'an Chapter 4:105
2. Ibid 57:25
3. Ibid 65:18

"(a) Any question of Islamic Personal Law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage and relating to family relationship or the guardianship of an infant.,"

"(b) Where all the parties are Muslims, any question of Islamic Personal Law regarding a marriage including the validity or dissolution of that marriage or regarding family relationship, a foundling or the guardianship of an infant,"

"(c) Any question of Islamic personal law regarding a Wakaf, Gift, Will or Succession where the endower, donor, testator or deceased person is a Muslim;

"(d) Any question of Islamic Personal Law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or guardianship of a Muslim who is physically or mentally in firm, or"

"(e) Where all the parties to the proceedings (whether or not they are Muslims) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic Personal Law or any other question."[1]

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1. S.242 of the Unsuspended provisions of the 1979 Constitution of the Federal Republic of Nigeria.

In the Area Court Edict of 1967, which spells out the Civil and Criminal Jurisdictions of the Area Courts, section 18 sets out that every area court shall have power and jurisdiction to the extent set forth in the warrant establishing it, and subject to the provisions of the Edict and of the criminal procedure code law, in all civil and criminal cases, in which all the parties are subject to the jurisdiction of such area court. This means that criminal offences committed by Muslims are to be tried in accordance with the provisions of the penal code upon which the criminal procedure code lies. As far as civil matters affecting Muslims are concerned, the jurisdiction of the Area Courts are set out in the first schedule part two thereof. Such matters include, matrimonial causes and matters arising between persons married under native law and custom. Suits relating to the custody of children under native law and custom, actions on debt, damages to property succession to property administration of estates under native law and custom, question of ownership, possession or occupation of land and etc are expected to be treated by the area courts subject to their respective jurisdictions.[1] So much are the expected functions of the Islamic Law courts of the Northern States. And that being the case one needs to contrast the expected roles of such courts with what actually obtains.

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1. Cf: First schedule, Part 2 of the 1967 Area Courts Edict.

(ii) THE ACTUAL ROLE OF THE ISLAMIC LAW COURTS:

It is clear from the provisions of section 10, 11, and 14 of the Sharia Court of Appeal Law, 1960[1] that the Shariah Court of Appeal is completely divested of any criminal jurisdiction. And even where jurisdiction is conferred on civil matters, the court is competent to hear and determine cases enumerated by section 11 of the law establishing the court. Other civil matters affecting Muslims such as contract, tort go to the High Court on Appeal, Jurisdiction of the Shariah Courts is therefore very much limited.

However, it is gratifying to note that the callibre, competence and qualification, moral probity and uprightness of the Judges of each of the existing Shariah Courts of Appeal in the North is commendable and examplery.

Cases on appeal from the Area Courts are treated with despatch bearing no ill-will, affection or bias but with strict adherence to the rules of law both substantive and procedural.

On the other side of the coin however, the lower Islamic Law courts, forming the bulkiest portion of all the law courts in the North and treating the greatest number of cases, as 85% of the totality of cases, civil or criminal, in the North goes to the Area Courts, it is sad and most unfortunate to note the allegation of malpractices levied against such courts. Despite the fact that these courts are mainly manned by Muslims who are supposed to have been the torch-bearers of justice, therefore knowledgeable and trustworthy,

1. Cap 122 of the Laws of Northern Nigeria Vol.iii, 1963.

one notices with dismay a collosal abuse miscarriage and misdirection of Justice. Most of the Judges are unable to dispense with despatch and equity even those Islamic Law cause on which they are required to determine. For instance, it is not a new story to hear of an Area Court Judge demanding bribe or squander property of orphans. It is not also new to learn of such Judges demanding to have the carnal knowledge of a wife who present herself to the court for a divorce. Such malpractices are ad infinitum!

For the purposes of clearity however, it should be noted that such malpractices are alien to the Islamic Judicial Ethics. Such debasements are the sole making of the Judicial Officer who involves himself in such activities. The shame, disrespect or disrepute accrue only to the file of the maker. And he does not in any way reduce the status or efficacy of Islamic Law.

Quite admittedly such courts serve as a clearing house on many cases yet many people express their passimism about the actual role of the courts.

5. WAVE OF MODIFICATIONS IN SOME MUSLIM COUNTRIES

Recourse has been sporadically made in this writing to some modifications introduced by some Muslim countries affecting the body of their applicable laws. Such countries number up to twenty. The modifications were in the nature of either (a) substantive or (b) regulatory. The substantive modification (reform) has been described as a reform of the locally prevalent schools of Islamic Law and not of the substantive law itself. The technique generally

employed for such reforms has been the adoption and enforcement of the principles and juristic opinions under the schools of Islamic Law other than those followed in a particular country. This is not a new thing in Islamic jurisprudence because the jurisprudence has given due recognition to TALFIQ[1] as reforming a subsidiary source of law. The Regulatory reforms were introduced by imposing certain regulatory measures, leaving the substantive principles intact. This has been done by conferring powers of interference with family matters upon judicial, quasi-judicial or administrative bodies. They mainly affect matters of divorce by husband, polygamy and etc. The intensity of the reforms however differ from one country to another.

It is pertinent and interesting to look at some reforms on the issue of maintenance in some countries

THE OTTOMAN LAW OF FAMILY RIGHTS, 1917

Provided in section 69 that dower and maintenance of the wife become binding on the husband on the conclusion of the contract of a valid marriage; at the same time mutual rights of inheritence also come to exist.

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1. Talfiq is the process of 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.

S. 70 - The husband is bound to make provisions of a legal residence, comprising all amenities, for his wife in a locality of his choice.

S. 71 - The wife is bound, after receiving her prompt dower to reside in the house of her husband and to travel with him if he wants to shift to another town, unless there is any legal obstacle.

S. 72 - The husband cannot, without the consent of his wife, accommodate in the marriage home any of his relatives except a child incapable of discernment; the wife cannot, without the consent of her husband, accommodate with her any of her, children or other relatives.

S. 73 - The husband shall behave with his wife with benevolence and the wife shall obey him in all legally permitted matters.

S. 74 - A man having more wives than one must do equal justice and equal treatment to them.[1]

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1. The Ottoman Law of Family Rights, 1917 Ss. 92 101 discuss the other components of maintenance. SS 150-154 maintenance during iddah.

THE EGYPTIAN FAMILY LAWS, 1920 - 29

Provide that:-

1 - The maintenance of a wife who is faithful to her husband and is in fact entitled thereto shall be a debt against her husband from the date he refrained from paying it, independent of any judicial decision or mutual agreement fixing its scale; this debt will not lapse except by payment or release.

2. - In the case of a wife divorced by her husband, who is entitled to maintenance during her iddah maintenance shall be a debt against him, as under the forgoing article, from the date of divorce.

16 - The scale of maintenance for the wife is to be fixed up with reference to the means of her husband exclusively.

17 - A claim of maintenance in respedt of the period of idda shall not be entertained if it concerns a period after the expiry of one year from the date of divorce.[1]

THE SUDANESE CIRCULAR OF 1935

Provided that:-

S. 6 The scale of wife's maintenance shall be fixed up with regard to the financial condition of her husband.

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1. The Egyptian Family Laws, 1920-29 Law No.25 of 1920.

7 - No claim of maintenance shall be heard by the Qadi in respect of the period in excess of one year from the date of the husband's death or divorce as the case may be.[1]

THE JORDANIAN LAW OF FAMILY RIGHTS, 1951

S.56 - The scale of wife's maintenance shall be fixed up with regard to the position of her husband only. Maintenance shall become payable when its amount has been agreed upon by the parties or fixed by the Qadi.

61 - Where the wife leaves her husband's house without his permission, she will lose her right to maintenance for the period concerned. It will be a good defence for her in such a case that her husband has beaten or maltreated her or has otherwise caused injury to her.

65(i) When the 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.

(ii) Where the wife who is entitled to maintenance falls ill requiring treatment, the husband shall be liable for the expenses of the treatment which shall be fixed up in accordance with his financial condition. The same will be the liability of a father with regard to his minor

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1. The Sudanese Legal Circular, Extracts from No.41 of 1935.

children entitled to maintenance.[1]

THE SYRIAN LAW OF PERSONAL STATUS, 1953:

S. 72(1) Maintenance of wife shall be binding on the husband from the time of marriage even if the wife is a follower of a different religion and even if she is living with her people, except when the husband asks her to shift to his place and she refuses without any right to to do so.

(2) The wife shall have the right of refusal if the husband has not paid the prompt dower or provided a residence as required by law.

76- The scale of wife's maintenance shall be fixed with regard to the financial condition of the husband provided that it shall not be as law not enough to provide to her the basic necessaries of life.

78(1) The Qadi can grant a decree of maintenance in favour of wife with effect from the date when the husband failed to provide it.

79 The amount of maintenance fixed by the Qadi or agreed upon by the spouses shall not lapse except by payment or release.

82 When proceedings for the realisation of maintenance are pending, the Qadi may, after the side of such maintenance has been fixed, direct the husband to pay to the wife by way of credit an amount not exceeding one month's maintenance, during the pendency of the proceedings,

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1. The Jordanian Law of Family Rights 1951
2. The Syrian Law of Personal Status, 1953.

and may also renew such a direction.

(2) Such a direction shall be executed forthwith.

84 - Maintenace during idda shall be like the maintenance during marriage. It shall be ordered from the date when idda becomes obligatory, but shall not be paid for more than nine months.[1]

THE TUNISIAN CODE OF PERSONAL STATUS, 1958

spelt out three things clearly.

(a) Mutual obligations of spouses.

S.23 - The husband must treat his wife with benevolence. Live with her on good terms, refrain from causing any injury to her, and provide maintenance to her and her children in accordance with his and her circumstances. The wife shall, if she has got any property of her own, contribute to the support of the family. She shall submit to the husband as the head of the family and, within the limits, obey him in whatever he orders her. She shall perform her marital duties according to custom and usage.

24. The husband is not the guardian of his wife's property.

(b) Maintenance of Wife

S.37 - The causes of maintenance rights are marriage. Blood relationship and contractual obligations.

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1. The Syrian Law of Personal Status, 1953.

51 Maintenance right lapses when its basis disappears, and he who provides it without a basis can reclaim it.

52. The amount of maintenance shall be determined according to the capacity of the person paying it and the status of the person getting it, and with regard to the conditions of time and costs.

53. Where there are several person entitled to maintenance and the persons responsible for it is unable to maintain all of them the wife shall have precedence over the children and minor children shall be preferred to ascendants.[1]

Other enactments having bearings upon maintenace include:-

(i) The Moroccan code of personal status, 1958: Section 53, 60, 115 - 129.

(ii) The Iraq Law of Personal Status, 1959, sections 23 - 33 and S.45. Sections 58-63 thereof talk on maintenance of descendants, ascendants and Relations.

(iii) The Iranian Family Laws under the marriage law 1931-37; Sections 4,6,8, 9-14 such are the clear examples of reforms in Islamic Family Laws of various nations of the world. There are yet many other countries that effected like reforms. Others may be are yet to be influenced to initiate such a reform.

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1. The Tunisian Code of Personal Status. 1958.

However, whatever may have been the motives of such reforms, it is obvious that the authorities of the respective countries have acted Positively in initiating and allowing such reforms.

Generally speaking, the question whether Muslim citizens of the various nations of the world/shall continue to be governed by the Islamic Family Law no uniform answer is forthcoming. This is because, a general survey on that issue shows that there exist three different groups:[1]

(i) The countries where the classical Islamic Family Law, according to its various schools, remains unchanged and uncodified till the present day include Saudi Arabia and Nigeria (Northern Nigeria).

(ii) The countries where Islamic Family Law has been completely abandoned and replaced by the non-Islamic statutes applicable to all citizens irrespective of their religion are: Turkey, Albania, Tanzania, Kenya, Philippines and the Soviet Union.

(iii) The countries where the locally prevalent forms of Islamic Family Law have been reformed through modern legislative process, either by adopting provisions of the various other schools of Islamic Law itself or by subjecting some of its institutions to certain regulatory measures. Such countries include: Turkey, now applicable

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1. Tahir Mahmood; Family Law Reform in the Muslim World, 1972.

in Lebanon, Egypt, the Sudan, Jordan, Syria, Tunisia, Nro Morocco, Algeria, Iraq, Iran, Pakistan and India.

B - SUGGESTIONS:

From the totality of what has so far been discussed in this treatise, the writer humbly suggests:

1. That the Muslims both individually and collectively should arise from the deep slumber to acquire knowledge generally and especially on matters affecting their lives both here and Hereafter. We should remember that each and everyone of us is accountable to God as an individual as well as collective. The stigma shall not hang on any neck but on ours for our refusal to implement God's injunctions on earth. The era of Sheikh Uthman bn Fodio has left its imprints. It was in this very country they were born, grew and led an examplary life of piety, steadfastness and complete surrender to God. How then are the present Muslims bequeathed of a goalless, and more of a perfiduous existence? Cannot we understand?
2. Pertaining to family affairs, it is the bounden duty of a head of family to educate or sponsor the education of his wife and children. And education is not restricted to religious education but including/secular education; skill or vocation that shall ensure an independent existence of his children in case they grow up. The females especially should start to learn marital responsibilities at home as the adage goes, "charity begins at home."

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3. That the Ijbar power granted to the father or grandfather by the applicable Maliki school of Law here in the North occasions at times unnecessary hardships on a spouse. It is thus suggested that parents should be more critical and hesitant about the indiscriminate use of such a power. "To live is peace, in better than to live in pieces." It is further suggested that it is better to allow one's daughter to reach a certain mental capacity such that she can reason with the ratio decidendi of the parents. Otherwise, if she is deprived of her maiden choice and a husband is imposed on her, the three parties involved i.e., the wife her parents and the husband may live separately and apart. And this defeats the aim of the marriage. And in the light of the modification of laws of some Muslim countries, it appears that they have done away; even though Maliki Law was either completely applicable or still remains applicable in such countries, with the question of ijbar (marriage constraint). Examples are the Sudan in article seven of their 1960 Legal Circular No. 54, Tunisia in section 9 of their Code of Personal Status 1958, Morocco in article five of their 1958 code of personal status.

Suggested further is that the practice embarked by some fathers to delegate some friends to be the Wali of a daughter, whereas there are a much more entitled blood relation around does not online with the recommended practice of the shari'ah. Those who are naturally entitled, once they are around should be made to feel a sense of belonging in the family.

4. SADAQ - Though there is no seal to Sadaq, Muslims should be reasonably mean and considerate in their expenditure. One should assess the situation in the society first before arriving at his personal subjectivity. The amount of Sadaq in some states and with some people start from ₦500.00 to any amount whereas in the same society there are some, desirous of marriage but because of its exhorbitence they could not afford it. A helping hand should be extended to such brothers that could be possible by reducing the unwarranted marriage expenses to a minimum. During the political days some states legislative Houses had started initiating bills to restrict marriage expenses e.g., in Sokoto, Kano, Borno and Bauchi States. One thing with such Laws ever if they had hatched into laws is whether they could be effective. The society is already deeply rooted in such practices/and the most effective method of implementing such reforms should be through mass literacy campaigns against the evils of such practices.

Evening classes or extra mural activities should be conducted to acquaint the generality of Muslims with the family principles.

5. The activities conducted at the Majlis al-aqd should also be reviewed. Such rowdy, baseless and

oppressive customs should be curtailed i.e., begging at the majlis-al-aqd, distribution of the kolanut, sweats or whatever and the customary levies with different nomenclatures should also disappear. Attendance of the groom and his bride at the majlis-al-aqd should be made compulsory so as to administer the words of caution and some address as to their mutual rights and obligations. This will at the same time serve as a place of instruction to others who are unaware of such rights and obligations. This, will ensure continuous family education.

6. The issue of maintaining two or more co-wives but of different family status. This should be phased out to allow peace, harmony and good mutual co-existence between the members of such a family. The preferential treatment accorded to a sharifah is generally regarded to be injurious to the other co-wife or wives.

7. Likewise, when a husband is in a state of indigence and the wife has some means, instead of allowing this indigence to be a ground for marriage dissolution, the rich wife should be made to maintain herself, the children of the marriage and the husband, Ibn Hazm, one of the independent pioneers of private schools of law, holds the opinion that "in case the husband is poor and unable to maintain himself while his wife is rich, the latter is obliged to spend on him, the legal ground being the fact that she is his heir after his death."[1]

It is a hidden fact that this practice obtains in some families here in the North.

8. The question of a sick wife also needs to be reviewed. She should be fully maintained by the husband. This is because her inability to render marital services to the husband is not of her own making. This is a situation one could not help. It is just like the case of the indegent husband. She should not be victim of situations and nor should her parents be made to suffer for her sickness.

9. There is the high need for the Northern States governments to reassess the defination and the class accorded to Islamic Law - with a view to properly seeing whether Islamic Law can be defined or classed as a customary law. And it's totality should be applied to all Muslims.

10. More importantly, those bodies charged with the responsibilities of appointing, disciplining or removing judges to administer Islamic Law, in any aspect, must see that candidates are properly and sincerely screened to qualify/as the real persons - proper and fit before appointment. The most important qualification apart from the professional is the TAQWA (piety), though hard to be established but it has its symptoms. This is to allow prudence and objective administration of justice devoid of any interest.

وماتو فقى الا بالله ولله الحمد . وصلى الله على سيدنا محمد .

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