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ASPECTS OF THE RIGHTS AND DUTIES OF SPOUSES UNDER ISLAMIC LAW

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Introduction

Under Islamic Law, Marriage Contract creates some social, legal and contractual consequences. These consequences are referred to as the rights and duties of the spouses.

They may be divided into three, viz:

a) The rights of the husband, which signifies the obligations of the wife and

b) The rights of the ~~husband~~ wife, which signifies the obligations of the husband ~~wife~~ and

c) The mutual rights and duties of both husband and wife.

The moral and legal basis of the relationship between a husband and a wife can be seen in several chapters and verses of the Holy Quran. Hence, spouses are bound and committed to each other legally, morally, contractually, religiously and socially based on the divine designation of peace tranquility and sovereignty, a link of mutual love and compassion – being God's signs for those who reflect.[1] The nature of the relationship that should exist between married spouses in Islam has been precisely stated by the learned author of the Family Structure in Islam as follows:

> *The role of the husband normatively evolves around the principles that it is his solemn duty to God to treat his wife with kindness, honour and patience, to keep her honourable or free her from marital bound honourably and to cause her no harm or grief. The role of the wife is summarized in the Quranic statement that women have rights even as they have duties according to what is equitable, but men have a degree over them.*[2]

This is usually interpreted by Muslims in conjunction with passage of the Quran: 4:34, which states, among other things, that:

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1. 'Abd al'Ati, H. (1982) Op. Cit. 147. See also Quran 30.21 and 2:184.

2 (a &b) 'Abd al'Ati, H. (1982) Op. Cit. 147-148. See also Quran 2:229-234 and 4:19; 2:228 and 4:34.

> *Men are protectors of women and managers of their affairs because God has made some excel over others and because men expend of their means. The righteous women are therefore devoutly obedient and consequently guard what God would have them guard.*

This may be likened to what sociological parlance call instrumental leadership or authority in the household due to role differentiation on the basis of sex[3].

The above quotation aptly provides us with the general principles of Islamic Law relating to marital relations of married spouses. The details of which shall now be considered.

The Rights of the Wife, an Obligations of the Husband

A wife under Islamic Law is entitled to various rights from her husband by virtue of the marriage contract between them. These rights may conveniently be divided into financial/material and non financial/non-material rights. The former involves the question of rights that demands the husband to expend for the wife from his wealth while the latter is asking the husband to discharge his social, religious and moral obligations for the wife.

Financial/Material Rights of the Wife

The financial/material rights of a wife from her husband are mainly two, namely the right to *dower* (*sadaq* or mahr) and right to maintenance.

a) The right to receive *dower* is one of the most important legal incidences of marriage under Islamic Law. Thus a husband must give his wife as of right her dower (*Sadaq* or *Mahr*) on the occasion of their marriage. The provisions of the Quran requiring a husband to marry his wife with his property is contained in Quran 4:4 and 4:24.

Quran 4:4 provides:

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

While Quran further provides in chapter 4:24.

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3 Baillie, N. B., A Digest of Muhammadan Law, (Premier Book Houses. Lahore, 1994) Pp 441-442.

> *Except for those prohibited all Women are lawful for you provided, you seek their hands with your property and given them their dower as appointed.*

Sadaq has no direct equivalent word in English even though dowry is today commonly used to describe it. In an attempt to define it, various definitions have been proffered and all of them are focused towards one end.

Dower according to BALLIE in his book is:

> *The property, which is incumbent on a husband (to give to the wife) either by reason of it being named in the contract itself as opposed to the usufruct of the wife's person.*[4]

It has also been defined as that thing given by a man to his proposed wife in form of money or its equivalent as consideration for conclusion of the marriage.[5]

In his own contribution to the description of *dower* a learned Islamic Law author, Abdal Ati, considers it as follows:

> *Dower is used to designate what a Muslim groom gives to his prospective bride. It is her personal property which she is empowered to waive reduce, return to her husband or dispense with as she pleases... It may consist of money, property movable objects or services rendered to the bride herself.*[6]

From the above definitions, it is evidently true that *dower* is not a price or cost for the purchase of the wife or marital benefits which is the only reason why it is given exclusively to the wife and not to her guardians or parents. For all intent and purposes, *dower* is given by the bride-groom for various reasons, which among others are the following:

Dower is seen as an expression of love and the bridegroom's demonstration of his willingness, readiness and capability of supporting and holding on to the wife for good; it is seen as manifest assurance on his part that the brides economic security and rights will be maintained; to the bride, *dower* is a token of the bridegroom's desire to enter into a union with her; to her family, it is a gesture of mutual friendship and

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4 Mahmud, A. B. The Supremacy of Islamic Law, (Hudadahuwa Publication Zaria (ND) P. 26-27.
5 'Abd al' Ati, H. (1982) Op. cit. P. 64.
6 Ibid. P. 70

solidarity, an assurance that their daughter will be secured and in good hand."[7] Even-though *dower* is exclusively for the bride this does not preclude her from surrendering it to her parents as custom may require for spending for the marriage of the parties, similarly, payment of *dower* per se does not remove the bride-groom from performing his other obligations due to the bride.

Dower, being an essential element of a valid marriage contract, may be paid either immediately, that is, a prompt *dower* or it may be deferred or be divided, all depending on the agreement of the parties themselves. Thus a wife's entitlement to *dower* is beyond doubt that, whether payment is prompt, deferred or divided, it is strongly recommended that at least a part of it should be paid before consummation of the marriage. On this basis, any part of the *dower*, which is un-paid, becomes specialty debt due on the husband in the case of divorce or widowhood. Dower may also be further subdivided into specified and unspecified.

Specified Dower

This is the *dower* that is expressly agreed upon by the parties before or at the time of concluding the marriage or after the marriage contract. If the groom is a minor his father or guardian may settle the amount of the *dower* on his behalf. Where the amount has been specified, the husband will be compelled to pay the whole of it however excessive it may seem to the court having regards to the husband's means.

Unspecified Dower (Marhr Al-Mithli)

This arises where the *dower* has not been fixed either before or at the time of the contract or after the contract. It is fixed with reference to the social position of the wives' father's family and her own personal qualifications. The social position of the husband and his means are of little account. This should be done by taking into consideration the amount of dower paid to her sister and paternal aunts.

The author of Hedaya says;

> *In regulating the proper dower of a woman, attention must be paid to her quality with the woman from whose dower the value is to be taken in point of age, beauty, fortune, understanding and virtue because it varies according to any differences in all these circumstances; and in like manner differ according to place of residence or time.*[8]

7 Hamilton, C. The Hedaya, Kitab Bhavan. (1979) p. 60
8 Case NO. BAS/SCA/CVA/90/AR.92

Islam therefore safeguards the rights of a wife and attempts to ensure her economic status consonant with her own social standing.

The following case expresses the exclusive rights of a wife to her *dower*; *Fatsuma Bako Rafa V Bako Rara Sharihuru*[9] in which the court ordered dissolution of the marriage on the ground that *dower* was not paid. This was an appeal case against the decision of Area Court between the parties. The court of first instance heard all the statement's of the parties and their witnesses, and subsequently ordered the dissolution of the marriage on the evidence of the appellant's witnesses. On a further appeal by the respondent at the Upper Area Court, the order was reversed but the wife failed to comply with it, where upon she went back to the court of first instance and instituted another suit. The Area court accepted the suit and dissolved the marriage again vide its Judgment of 31/12/91 relying on a tradition of the prophet but it neither quoted the tradition nor mentioned the name of the reporter. In its judgment the Upper Area Court, of Alkaleri set aside the decision of the Area Court, and allowed the appeal of Bako Rafa. It relied on what the author of one "Hkamul Ahkam" says in page 92 but without actually quoting it.

In one tradition, it was narrated that the prophet (PBH) paid *dower* on all his wives and also all those who married his daughters were made to pay *dower* to them. From the above provision it is very clear that marriage is unlawful save with the payment of *dower*.[10]

As to the amount payable as *dower*, no definite or specific amount is fixed. However, there are various traditions of the prophet (PBUH) on this subject. In one of the traditions, it has been narrated by Amir bin Rabiah that a woman belonging to Banu Fazarah was married on a pair of shoes as her *dower*. The prophet (PBUH) asked her:

> *Are you happy with yourself with a pair of shoes? She said yes. The Prophet (PBUH) permitted her to marry.*

Similarly, Sahal b. Sā,idi reported that:

> *A woman came to the Apostle of Allah (PBUH) and said: Apostle of Allah verily I give away myself to*

9 Daura, B.M. (Trans) Tuhfat Al-Hukkam, (Centre for Islamic Legal Studies, 1989) Pp 32-36. See also Quran 5:6.

10 Abdal A, H. Op. Cit. (1982) P.148, See also Ambali M. A. Op. Cit. (1998) P. 170.

thee and stood waiting for a long-time. A man then stood up and said: Apostle of Allah marry this woman to me if you have no need of her. The Apostle of Allah (may peace be upon him) said: Have you anything to give as Sadaq. The man said that except for his loincloth he had nothing. The Apostle of Allah (peace be upon him) said: You will be without a loin if you give it away to her; seek for something else. He said that he could find nothing. The Apostle of Allah (May peace be upon him) asked him to find out something still, even if it were an iron fingering. He said he could get nothing. Then the Apostle of Allah (May peace be upon him) asked him. Do you remember something from the Quran? He said: Yes I know such and such Surahs. The Apostle of Allah (May peace be upon him) said: I marry thee to this woman in exchange of the Quran that you remember.[11]

Rights to Maintenance (Nafaqah) of the Wife

Maintenance (Al-Nafaqah) is another important right a wife has to claim from her husband. This includes the right to feeding, shelter and clothing, in times of need in addition to all other essential services irrespective of whether the wife is rich. This right conferred on the wife must be provided for by the husband.

Maintenance of a wife in law has a status and special position and peculiar to it, it should not be confused with or considered the same as what is now being witnessed in some Muslim families in Nigeria where the maintenance of a wife is not seen as a responsibility as a result of which they (wives) support themselves and children.

The duty of maintenance has been fully acknowledge by Quran 2:286 and 65:7. Quran 2: 286 it provides that:

> *The husband shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear...*

While Quran 65:7 further provides that:

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11 The term "Reproach and injury seems the closest translation of the Arabic term Mann and Adha meaning in this context that men should not feel that by providing for women they are doing them favour Nor should men cause the independent women injury or grief by way of boasting or arrogance.

Dasuqi, M. Op. cit. Vol. 2. (ND) P. 509.

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

A specific consequence of this divine command is that a wife is entitled to this right by virtue of the fact that she is devoted to the husband and confined to his house hold by the very reason of marriage, that is, being his wife and trustful. This duty of maintenance is enjoyed to be discharged by the husband cheerfully without "reproach" or injury.[12]

The right of maintenance given to a woman is not qualified. Thus, it is a right given to a wife irrespective of her faith or religion, age, riches or poverty, healthy or sick. A wife under the law is relieved from the responsibility of maintaining herself no matter how wealthy she may be. Hence, even where a husband has less resource than his wife, it remains compulsory upon him to bear the family financial expenses in a generous and charitable way. Right to maintenance for a wife is inalienable and in case of failure by the husband to discharge that duty, she is entitled to take legal action in a court of law against him for the recovery of that maintenance.[13] Thus, it can be seen that maintenance is complex and covers the condition of both spouses and the custom and traditions prevailing in their community.[14]

However as regards residence, there seems to be no prescribed pattern for it. What is prescribed is, the husband's responsibility for the wife's shelter. The wife's lodge must be adequate so as to ensure her privacy, comfort and independence. The main concern here seems to be the welfare of the wife and the stability of the marriage. The wife's right to maintenance even extends to cases after her divorce and particularly where she happens to be pregnant. This was the issue for determination in the case of *Karimatu Idi Inusawa V Idrisu Dausara*[15]. In this case the ex-wife sued her former husband for maintenance and paternity of her child born after divorced and won because she was pregnant before the divorce. In the instant case the appellant sued the respondent. She told the court that the respondent divorce her 7 months ago and stated that

12 Murtada, M. Op cit. (1981) P. 244. See also Ambali M.A. Op. Cit. (1998) P. 170.
13 Suit NO. SCA/KN/18/01.
14 Khan, M. M., (Trans) Sahin Al-Bukhari., Vol. 8, (Hila-l Yayinlari, Ankara, Turkey, 1976) P. 151.
15 Ambali, M.A. Op. Cit. (1998) P.171, who cited Rida M: Darul Kutubil Amalliyya Lebanon (1975) P. 384.

she was pregnant within the period and later delivered the child. She further alleged that she observed her Iddah before re-marrying. That she never knew she was pregnant because she was small and could not therefore inform her husband.

The respondent denied what the appellant stated and maintained that the pregnancy was not his own because for 5 month the appellant stayed in her father's house. The respondent sought for settlement out of court with the appellant's parents but it proved abortive. The respondent further alleged that it was 12 months since they separated and not 7 months as alleged by the appellant. The parties then separated after the appellant's father gave back the *dower* to the respondent (ex-husband).

On a further appeal the Court asked the parties for their witnesses to testify as well as the evidence based on the medical doctor's report to find out the real paternity for the purpose of and maintenance. The court therefore reached the following conclusions:

1) That since the appellant and respondent was married for 15 days before she left for her father's house (as she was divorced) she started observing Iddah.
2) That after that the appellant married the 2nd husband, Lawan who was brought before the court to testify, it was proved that she indeed married the 2nd husband within 5 – 15 months of her divorce from the first husband and by which time she was pregnant.
3) In addition, they went to the hospital where it was verified that the appellant was 32 weeks pregnant.
4) That no doubt the appellant married the 2nd husband while she was pregnant and still serving her Iddah period.
5) As such the marriage between the appellant and the 2nd husband is null and void and are barred from marrying each other forever.
6) The respondent is to take care of the child as he is the rightful father and that all those who negotiated the immoral and illegal marriage should pray for Allah's forgiveness never to repeat such mistake again: The wife won the appeal for maintenance.

Like the above authority, traditions also abound in respect of maintenance. In one of those traditions, the Prophet (PBUH) was reported to have declared that:

> *"The best Muslim is one who is the best to his family."*[16]

16 Al-Azheri S. Jawahirul Iklil: Kutubul Arabiyya, Kano. Vol. 1. (N.D.) P.402. See also Ambali M.A. Op. Cit. (1998) P. 172.

The Prophet (SAW) in his farewell address on mount Arafat on his last pilgrimage said:

> *O men you are entitled to certain duties from your wives. They too are entitled to certain rights from you... if they yield to correction they are to be provided as a matter of right their maintenance and. clothing as due.*[17]

The cumulative understanding of the above textual authorities forms the basis upon which a wife is held to be entitled or vested with an inalienable right to maintenance. The jurists unanimously agreed on this even-though they differed on the details. This view of the jurists is clearly expressed by the view of Khalil, an Islamic Scholar who said:

> *It is a duty of the husband who has attained the age of puberty to provide food stuff, soup, clothes and accommodation in accordance with the prevailing custom for his wife who is not indisposed and who possesses the capacity to discharge her conjugal responsibility...*[18]

The Extent of Maintenance (Nafaqah)

Both the Quran and Sunnah of the Prophet (PBUH) has affirmed beyond doubt the inalienable right of a wife to maintenance by her husband with its various components namely feeding, clothing, shelter and medical and general care in times of needs. The question, however, is how can the quantum of the maintenance be assessed and determined. In other words what shall be the quantity and quality of maintenance given by husband to his wife. The most important considerations are:

i) the financial ability or means of the husband.
ii) the standard of living of the wife prior to the marriage and
iii) the prevailing custom and practices of the people of the community of the spouses.[19] Thus a husband must provide a shelter or accommodation, food, clothing and other general care to his wife adequately, customarily and equitably so as to ensure the privacy and independence of the wife. The wife is to be clothed, lodged, fed and cared for by the husband according to his means and her style of life. The husband has been warned against discarding

17 Ambali, M.A. Op. Cit (1998) P. 174, See also Abdal A. H. Op. Cit (1982) P.150.
18 Ambali, M. A. Op. Cit (1998) P. 172 who quoted Al-Azheri Zawahiral Ikhil Vol.2 (ND) P. 402.
19 Ambali, M> A. OP. cit (1998) p. 172.

these duties to his wife by the provisions in Quran 7: 31 as follows:

> *Men are taught to maintain their adornment at every place of worship and to eat and drink without being prodigal for God loves not the prodigal.*

In another passage, the Holy Quran 65: 6 – 7 reads:

> *Lodge them where you are lodging, according to your means and do not press them so as to straighten their circumstances.... let the man of plenty expend out of his plenty. As for him whose provision is tinted for him, let him; expend of what God has given him God charges no one beyond his means...*

In the light of the above, an Islamic Law writer and judge, in his book made an attempt to explain the standard of maintenance to a wife as follows:

> *... The quality of the maintenance must be based on a scale commensurate with his purse, her status, and the level of urbanization and cost of living in the community where both parties live. It amounts to misfortune if she is of voracious appetite but he either puts up with it or repudiates her. He should provide extra food for the nursing mother to enable her cope with the demands of the child. But he owes no duty to provide more than the actual need of food for the sickly woman or a woman whose appetite is low. It is not binding on him to provide her with Harir (Silk Materials). While some Scholars apply this principle to all places, others confine its application to Medinah. He should provide her water for her domestic and religious needs, oil, for ordinary purposes, burning, and for making ointment, firewood, salt, and meat from time to time, mat, bed and mattresses... essential cosmetics that are recognised by customs such as eye brow, grease, etc. He should provide maid (s) if her status calls for it otherwise she will do the domestic duties.*[20]

The above quotation is a general view of Islamic Jurists on the rights and extent of some in favour of a wife. However, on the details of such rights as it relates to minor are items like sweet, refreshments, etc, though opinions defer. Some said they are not obligatory for they are luxuries.[21]

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20 Dasuqi, M. Op. cit., Vol.2., (ND) P. 507.
21 Ibid. P. 524.

Conditions for the Entitlement of Maintenance

The issue of whether and when a wife is entitled to maintenance is a complex one. It has been held that a wife is only entitled to the maintenance when, in addition to the existence of a valid marriage, some conditions are fulfilled.

According to Maliki School, these conditions are:

a) she should be ready to be under the husband's general dispositions and control;
b) the marriage is valid and duly consummated or
c) if the bride has been invited for consummation, the husband is an adult or of matured age and the bride is capable and fit for conjugal relations.[22]

According to Hanafi School on the other hand, it is agreed that where the wife is a minor, she must be maintained by her father or guardian, however where she has submitted herself to the husband even if she has not reach the age of puberty she will invariably be maintained by the husband. An example of the above instance can be seen in the matrimonial relations between the Prophet (PBUH) and Aisha whom he married two years before she reached the age of puberty.

Some cases relating to the question of maintenance has already been highlighted with reference to various provisions of the Quran and traditions of the prophet (PBUH). It is however, important to state here categorically that a wife's right to maintenance is not absolute. Thus, she may be denied all the above rights where any of the following happens:

1) If she packed out of her matrimonial home to some other places without her husbands permission or consent and without any religious cause.
2) If she travelled without her husband's permission.
3) If she puts on Ihram for Hajj without his permission. But if he went with her or she travelled with his permission, the maintenance will be given.
4) If she refuse sexual intercourse with her husband.
5) If she is imprisoned after committing a crime
6) If the husband dies and she becomes a widow, in that case her right of inheritance supervenes. This is the very reason why the widow is not entitled to maintenance during the iddah of death.

22 'Abd al' Ati H. Op. Cit. (1982) P. 150.

As regards maintenance of a wife, the schools advance different views. However, the most favoured views are that of the Hanafi School which is that a wife is entitled to be maintained so long as she is under her husbands disposal and power however young or ill she may be once there is a valid mariage.[23]

Maliki and Shafi School hold the view that if the husband failed to provide maintenance for a period of two years, the wife will be entitled to dissolution of marriage.

The wife's lodge must be adequate to ensure her privacy, comfort and independence. Thus, it should be a lodging quarters befitting the life style and means of the spouses. The residence is the exclusive right of the wife to the extent that she may not allow relatives of the husband to stay in.[24]

Regarding clothing it is expected that at-least a wife should be given clothes twice in a year for the winter and summer,[25] and especially during Sallah festivals. A wife may however be given clothes more than twice a year according to the means of the husband. That feeding or food, is a matter of daily affairs and to be provided sufficiently too.[26]

A wife is entitled to demand from her husband when he is about to set out on a journey to either give her for the whole duration of his absence an anticipatory allowance or to give a power of attorney to another for her maintenance. The allowance will fall due at the same interval at which the husband was in the habit of paying it whenever he returns.

Other Circumstances of Maintenance

As earlier stated in the preceding topics, maintenance is an inalienable right of a wife and a corresponding duty or obligations, which is incumbent on the husband to discharge. This notwithstanding, the question of maintenance is not found on a hard and fast rule nor is it a pure mathematical equation or a calculated business transaction under which she is provided comfort, affection and compassion.

Whether a wife is entitle to maintenance in other circumstances, such as during sickness, working, waiting period (iddah) such as during arrest

23 Dasuqi, M. OP. Cit (ND) p. 513
24 Ibid.
25 'Abd al' Ati H. Op. Cit. (1982) P. 151.
26 Ibid at P. 153.

and recalcitrants are considered with reference to the provisions of law as follows:

Maintenance During Sickness

It is generally acknowledged that maintenance is the exclusive right of a wife and a responsibility on the husband, which he must discharge. However, unlike the various components of maintenance namely; food, clothing, shelter the issue of medical and general care at all times, gave rise to differing juristic opinions during sickness. One group among the majority (Maliki inclusive) hold the view that a wife will not be entitled to maintenance once she is sick as she cannot effectively discharge her marital roles and responsibilities as a wife and which is the only reason that entitles her to be maintained by the husband.

Another group (Hanafi inclusive) hold a different view, that the wife's sickness not withstanding, she is entitle to maintenance. They based their view on the principles of *Istihsan* i.e. moral and practical consideration and hold that it is still the duty of the husband to provide for the wife because she is still his mate whose companionship and trust he enjoys even-though illness may impede her performances in certain respects e.g. domestic responsibilities and sexual intercourse.[27]

This view is supported by Ibn Taymiyya who pointed out that a sick wife is unquestionably entitled to full maintenance.[28] One will be left with no choice but to be inclined to the jurists who approves wife's maintenance notwithstanding her sickness because to take a contrary position may amount to total negation of the general aims and spirit of Islam which requires kindness and love to one another.

On the maintenance of a sick wife, opinions still differs as to the question of medical care and expenses. While one group holds that the husband is not responsible legally, other group holds the view that if the charges are moderate and the husband is financially comfortable, he is responsible for it. Yet others argue that even if he is not legally responsible for the cost, it is still his religious duty to bear the responsibility out of compassion, courtesy, or in conformity with social norms.[29] This second group, with a moderate view is in accord with the spirit of Islam because medical care by the husband is like saving and preserving the health of the wife and that is also the aim of food, shelter and clothing. Similarly if procreation

27 Ambali, M.A. Op. Cit (1998) P. 172 who quoted Al-Fawakihid Dawari 3rd edition Vol. 2 (1955) P.104.

28 'Abd al' Ati H. Op. Cit. (1982) P. 153

29 'Abd al' Ati H. Op. Cit. (1982) P. 158, See also Ambali M. A. Op. Cit (1988) P. 173.

and child bearing which are the exclusive responsibilities of the wife is anything to consider in a marital relationship, then maintenance of a wife in all ramifications must be accorded a very special attention and recognition in the schemes of family roles. This second view is found by scholars like Hon. Justice Ambali M. A. and the learned author, Hammu dah Abdul Ati as very convincing as it enhance the textual instructions that a husband should be kind, compassionate and considerate to his wife.[30]

Maintenance of Recalcitrant Wife

All the jurists of Islamic law have agreed that a recalcitrant (Nashiz) wife is not entitled to maintenance from her husband provided such recalcitrance has been proved and is found to be unjustified in law.

Generally a recalcitrant wife is that wife who behaves with hatred and disinterest to the husband. She is always disobedient, defiant and refractory to the husband. According to some jurists, a wife who without lawful reason refused to answer the sexual demand of her husband is also rebellious and recalcitrant; hence she shall not be given maintenance.[31]

A wife may therefore be regarded as recalcitrant (Nashir) and will loss her right to maintenance in the following circumstances.[32]

i) If she refused the husband sexual intercourse save due to menses, or serious illness, fasting during Ramadan. The Hanafi Jurists, however, did not see this to be a sole reason for denying her maintenance. For maintenance is not because of sex only, but the fact that there is marriage and she remained confined to the husband and does other domestic work like care of their children.

ii) Where they have agreed to stay in her house, if she refused him entry into the house without prior knowledge of her decision for him to look for alternative accommodation.

iii) If she leaves her husband's residence without his permission or lawful cause.

iv) In case of his travelling to earn a living or in the modern days he is a public servant transferred from one state or town to another, if she refused to follow him without valid reasons. However, a wife can still disobey her husband but not to be taken as a recalcitrant which

30 El-Imari, M.T. unpublished Muslim Personal Law: According to Maliki Law Center for Islamic Legal Studies, A.B.U., Zaria (1978) P. 113-114.

31 Ibid. P. 144, See also al-Qirshi, Vol. 3., P. 331-355

32 Qutb, M. Shabuhat Hawlal-Islam, (Malba'atul Istiqlal al-Kubra, Bagdad, 1964) Pp. 264-266.

can deter her from receiving her maintenance. Hence, disobedience in the following circumstances will not be inferred;[33]

1) Refusal of consummation of marriage due to non-payment of prompt *dower*.
2) When accommodation is not legally sufficient and adequate under the law.
3) Where she is imprisoned for a reason not caused by the husband but her fault.
4) Travelling to Hajj for the first time with her *Muhram* even without the consent of her husband.

It is allowed for a husband on transfer to move with his wife and she has no right to refuse to follow him provided that:

1. The husband is trust-worthy;
2. The town to which the husband is transferring to is not far as to severe her relations from her parents and
3. The way to the town is safe.

The Hanafi and Malikis agreed that once the transfer is genuine, and the above conditions are fulfilled, the wife is bound to follow the husband and if she refuses, she loses her right to maintenance. However Ibn Hazan's view differs from that of Hanafi and Maliki. He holds that the husband is responsible for the wife's maintenance from the moment the contract is concluded, whether she submits herself for consummation or not, even if she is recalcitrant or a minor with whom consummation is not possible.

Maintenance During Arrest

Where the wife is arrested, detained, or imprisoned for committing an offence or for a debt, which is not caused by the husband, she forfeits her right to maintenance. Where the arrest is caused or initiated by the husband for debt she owes to him, then in this case he waives his reciprocal rights on her by causing her arrest (as agreed by both Maliki and Shafi Schools.)

Conversely, where the wife is arrested without any legal justification, she cannot be deprived of her right to maintenance because of the arrest, detention and or imprisonment is not caused by her. The rule applies even where the husband is arrested, detained or imprisoned unjustifiably or for a debt he owes the wife.[34] The wife in certain circumstances as

33 El-Imari, M. t. Op. Cit. (1978) P. 119-121.
34 Shukuri, A. Muhammadan Law of Marriage and Divorce, (A.M.S. Press. Inc. New York, 1966) P.80

where the husband is poor provides the maintenance as a debt due on the husband or that she should just bear the expenses without charging it as a debt due on the husband.

Maintenance of a Working Class Wife

Under Islamic Law maintenance is the exclusive responsibility of the husband and a right on the wife not-withstanding that she is working with the husband's consent and having separate account of her own. This is also in consonance with the provisions of Quran 4:32 which granted women like men the independence to acquire and own property.

The verse reads thus: (4:32)

> *And in no wise covet those things in which God Hath bestowed His gifts more freely on some of you than others. To men is allotted what they earn and to women what they earn; but ask God of His bounty: for God hath full knowledge of all things.*

However, notwithstanding the right, which the above verses conferred on women, the husbands have the exclusive right to either allow or disallow his wife from working. According to some jurists, the wife's rights to work are purely founded on an agreement (stipulation) entered with the husband prior to the conclusion of the marriage contract. Thus, where the husband agreed for the wife to work, then all her earnings are her exclusively right and not for the husband. Similarly, the jurists further hold that irrespective of whether there was a stipulation in marriage to allow the wife to work, nothing precludes the husband from subsequently refusing her to work and if she worked, she forfeits her right of maintenance. Another jurists however hold that if there was an agreement prior to marriage that she can work, the husband cannot stop her from working and if she disobeys him she is not to be seen as recalcitrant.[35]

Where a wife is to work out side her matrimonial home, she must guard her chastity, behaviour, and looks and properly cover herself decently.

Where the husband's means or income cannot adequately cater for the up-keep of the family and the wife is willing to work the husband may allow her to work for gain provided that:

35 Ibid. P. 97.

1) The husband has the right to terminate the wife's working right whenever he deems it necessary;
2) He has the right to object to any job if he feels that it would expose her to any harm, seduction or humiliation.
3) The wife has the right to discontinue working whenever she pleases.
4) Any gain from work realized by the wife belongs to the family and cannot be considered as her own personal property. When the wife is employed, the household becomes her jurist occupation. By house hold, it means the rearing of children and all domestic services required for maintaining a clear and comfortable habitation.[36]

In the tradition of the prophet (PBUH) he was reported to have said:

> *Cleanliness is a part of faith, motherhood is highly commended and it is the greatest value second to the worship of Allah (Ibadah).*[37]

Maintenance of Wife Due to Poverty of Husband

A husband may due to sudden financial disabilities fail to fully provide maintenance to his wife. The question is how does such poverty affect the wife's rights to maintenance?

According to the Hanafi School even if the husband is financially incapable of discharging his responsibility of maintenance, the duty remains his own and the wife is entitled to such maintenance. She may source for the maintenance herself according to her needs, which shall remain a debt to be paid by the husband whenever his financial status improves.

From Hanafi's stand the following suggestions can be inferred:

1. That where the wife is wealthy, she should feed herself and her husband without refund;
2. To pledge his credit for her maintenance. The question that follows is what if the husband is too poor to pay?

Then obviously the marriage must be dissolved.

36 'Abd al' Ati H. Op. Cit. (1982) P. 159-160.
37 Ibid at P. 160. see also Ambali M. A. Op. Cit. (1998) P. 167.

Exceptionally in Islam poverty is not a ground for a wife to seek divorce from the husband. While the Zahiris have agreed that poverty is not a ground for divorce, they differed from the Hanafis in that they did not see it as a debt payable by the husband, any maintenance sourced by the wife at the time of his financial incapacities.[38]

The majority of Jurists with the exception of Hanafi, however, opined that where a husband is so poor that he cannot discharge his obligation of maintenance to the wife, she has the choice of either enduring with that, to stay with him awaiting relief or she can go to the court and ask for separation or divorce due to lack of maintenance.

This is supported by the hadith of the Holy prophet (PBUH), which says:

> *... Let charity begin at home because the woman will maintain her stand saying you either feed me or let me go.*[39]

On this issue of maintenance during poverty Ibn Dayyin has intellectually observed as follows:

> *The spirit of Islamic Law demands the following; if the man deceives his wife by misrepresenting his financial status or deliberately refuses to support her, leaving her helpless, then she has right to seek separation from him. But if she marries him without any prior knowledge of his financial problem or if his position hardened after ease then she has no right to seek separation on account of his poverty.*[40]

Maintenance During Waiting Period (After Divorce or Death) (Iddah)

The wife's right to maintenance still subsists even after dissolution. The Law requires the wife to observe waiting period during that period. Where the divorce is a revocable one she is entitle to maintenance according to all the jurists. Also where the divorce is irrevocable but she is pregnant, she is entitle to maintenance according to the all the jurists.

In this respect the Holy Quran 65:1 provides:

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38 Ibn Qayyim, A. A Zadul-Ma'ad Fi Hadyi Khairi-Ibad, Vol. 4, (Al-Maktabatul Misriyyah, 1973) P. 297.

39 Gurin, A. M.: Introduction to Islamic Family Law (Centre for Islamic Legal Studies, ABU., Zaria) P. 179-182.

40 Ambali, M.A. Op. Cit. (1998) P. 246.

> *O Prophet, when you divorce women, divorce them at their prescribed period and calculate the period and keep your duties to Allah your Lord. Turn them not out of their houses nor should they themselves go forth unless they commit an open indecency.*

Again the Quran in 65:6 says:

> *Lodge the divorced women during the prescribed period in the houses where you dwell according to your means and harass them not that you may create hardships for them and force them not to leave and if they be with pregnancy, spend on them until they be delivered of their burden.*

As to the condition of the right to maintenance where the husband dies leaving a muslim wife, whether revocably divorced or not and whether pregnant or not loses her right to feeding and clothing. All the Imams are agreed upon this. This is because they have all taken the view that the whole property now passes on to the heirs and the spouse relict being one of them shall and should not be conferred with additional right.

This is in line with the provision of Quran 6:5 it reads:

> *And if they happen to be with child spend freely on them until they deliver their burden, and if they nurse your off-spring after the divorce has become final, give them their due recompense.*

As regards the right to clothing while pregnant, the divorcee is entitled to a complete dress if repudiated at the commencement of her pregnancy. This is however not obligatory on the husband if he has provided her with such a set at the beginning of her pregnancy.

Where the divorce is through a judicial process the rules applicable to a marriage, which has been irrevocably divorced, apply here and that is to say, the wife unless pregnant is not entitled to any form of maintenance.[41]

However where a wife is separated from her husband through *Khul'u* (self redemption) she shall not be entitled to maintenance except when she is pregnant. Similarly where the woman is separated from her husband through *Li'an* (oath by implication) she cannot claim maintenance from her husband even if she is pregnant.

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41 Ambali, M.A. Op. Cit. (1998) P. 246. See also El-Imari M. t. Unpublished Op. Cit. (1978) P. 198.

The purpose of the verses quoted above as well as juristic views is to the effect that after the expiration of *Iddah*, in cases of either divorce or death with or without pregnancy, she becomes eligible for re-marriage.[42] Waiting period is ordained by God to serve some purposes. Most important among the purposes are:

i) To establish the presence or absence of pregnancy
ii) To serve as a term of probation to make room for reconcilliation.[43]

In conclusion there is no doubt that Islamic Law have made far-reaching provisions for the right of wife to have a peaceful and comfortable family life and a loving society. It provides the duty of maintenance mainly on the husband and an exclusive right of the wife especially the right of residence.

Non-Financial/Material Rights of a Wife

A part from maintenance and right of *dower* which are inalienable rights of a wife by virtue of her marriage, the wife is also entitled to other non-financial rights which are of a social and moral kind. All non-financial rights conferred on the wife have basis in the provision of the Quran in which husband's are commanded by Allah to treat their wives with respect, equity and kindness with regards to all aspects of matrimonial and domestic affairs.

In fact, the Holy Quran and tradition of the prophet (PBUH) have requested a duty on the husband to be kind to his wife, to consort with the wife equitably. The husband is also saddled with the duty of being a source of companionship and security for his wife. In support of this, the Holy Quran in 4:19 and 21 provides that:

> *And treat them kindly. If you hate them it may be that you dislike a thing, which Allah has placed abundant good in it.*

As part of his kind treatment and equal consideration of wives, a husband should not beat his wife, isolate her from the matrimonial home, ensure he makes sexual intercourse with her at least once in four days, share equal days for each of the co-wives, permits her to condole or visit sick and near relatives and seek for education in such a manner that it will not cause the dissolution of the marriage.[44] Prophet Muhammad said:

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42 Mahmud, A. B. (ND) Op. Cit. 28
43 Prophet Muhammad's (PBUH) last Pilgrimage address at Mount Arafat.
44 Khan, M. M., Op. Cit P.

> *Beware about your treatment of women, you have taken them with the words of Allah and have made lawful sexual relationship with them with the words of Allah. And you have a duty to provide them the reasonable maintenance and clothing.*[45]

In another tradition narrated by Aisha, One Hurdah Bint Utbah said to the prophet (PBUH).

> *O messenger of Allah Abu Sufyan is a misery person. He does not provide for me and my son except whatever I take away myself secretly which he does not know. The Prophet (PBUH) replied: Take whatever is sufficient for you and your son in a reasonable way.*[46]

It is clear from the above that a husband's refusal to maintain his wife as required by law empowered the wife to claim her right through various means stated above. This, notwithstanding, the determining factors of what create responsibility on the husband in providing for his wife/wives and children of the marriage is his means and earning capacity.

Matrimonial Home

The matrimonial home is expected to be a place where both spouses are to live to have peace and tranquility throughout the subsistence of their marital life. Traditionally, it is very important for the wife as the mother in the house to always be at home. While the man is charged with the responsibility of going out to struggle for food, the woman is to prepare food at home for the up-keep of the home and to make the matrimonial home habitable for spouses and children of the marriage. The traditional role is fast fading away as women too are becoming very educated, husbands are retrenched, laid off from work.

The question of maintenance at the matrimonial home depends on the subsistence of the marriage contract and the way and manner of its dissolution (that is, whether the dissolution was effected through divorce, death or through *Khul'u* by the woman and *Li'an* by the husband. Regarding fixing the sum for maintenance at the matrimonial home, all the jurists agreed for the *Qadi* (Judge) in exercising his discretion to

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45 Case NO. BAS/SCA/CVA/125/GM/92

46 Al-Jassas Vol. 1. P. 443, See also Bukhari Sahih Bukhari, See also Holy Qur'an Chapter 28:8, 19:41-48, and 17-28.

consider the rank and circumstances of both spouses. In either case, the following conditions must be fulfilled:

1) There must be a valid marriage contract between the spouses;
2) The wife must submit herself to her husband and be obedient to him.
3) She must give the husband free access t sexual intercourse at all lawful times.
4) She must not refuse to accompany her husband when he travels unless she strongly feels that during the trip her person and property are not safe.
5) When both parties can derive benefits from each other.

Even though the wife stays at the matrimonial home, she will not be entitled to maintenance until the above conditions are present. Similarly the husband's duty to maintain his wife starts only when the wife attains the age of puberty and not before.

Rights of Inheritance

This is also one of the Rights of Al-mighty God but for the purpose of this work it will be treated as the right of the wife emanating from the Quran.

The earlier practice before the advent of Islam was that a woman had no right to inherit from the property of her deceased husband. The norm then was for the uncle or orphans to take possession of the estate of their late father in addition to taking the entire estate. The uncle also had the right to inherit the wife of the deceased. This practice of the pre-Islamic era was considered injurious to the women in their dual capacity as wife and daughters and this forms the basis for the revelation of the ordinance relating to inheritance by women. The entire injustices on women relating to inheritance are found on a tradition reported by Jaban (May Allah be pleased with him) that the wife of Sa'd bin-Rabia came to the Apostle (PBUH) with her daughters and said:

> *Oh Apostle of God. Here are the two daughters of Sa'd bin-Rabia. Their father became a martyr while fighting on your side in the battle of Uhud. Their uncle seized their property and left nothing for them. They cannot be married without property. The prophet (PBUH) replied that God will decide it as he has no immediate answer.*

It was on this ground that God revealed all the provisions of the Quran regarding inheritance generally and this is contained in Quran 4:11, 12

and 176 respectively. However, on the earlier complaint lodged before the Prophet (PBUH) by the wife of bin-Rabia. He sent for the brothers of the deceased husband of the woman and distributed his estate to the beneficiaries as follows: He allotted two-third of the estate to the two daughters and one-eighth of the estate went to the widow and the balance was given to the surviving brothers of the deceased. The courageous act of the wife of late Sa'd bin-Rabi resulted in Islam granting the women the rights of inheritance in triple capacity as a daughter, sisters and mothers.

Specifically, the wife's right to inheritance is provided for in Quran 4:12, it provides that:

> *...And unto them belongeth the fourth of that which ye leave if ye have no child but if ye have a child then the eight of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted hath been paid).*

Where the wife is not a muslim she can benefit from a device in her favour for any amount up to one-third of the net estate. She may also take gift by her husband made to her during the husband's lifetime.

The Rights of the Husband

Obligations and Duties of the Wife

Under Islamic Law, the rights which the husband has against his wife out-weighed that of the wife and this is by virtue of the position in which it was said God has placed man over a woman from creation. Various provisions of the Quran already quoted in the preceding chapters support this. Similarly, various traditions of the Prophet (PBUH) reveal that the rights of the husband have been held to be greater than that of the wife. In one of such traditions, it was narrated by Alhakim that Aisha was reported to have asked the Prophet (PBUH):

> *Whose right is greater than womans'?*
> *He replied (the rights of) her husband.*

And then she asked, "Then whose right is greater than man's? To this he replied (The right of his) mother.[47]

Notwithstanding this inequality the rights of both spouses are reciprocal and complimentary even-though the greater nature of a man's right have

47 Khan, M.S. Op. Cit. (1976) P. 149.

fully been recognised. This reciprocal and complimentary nature of the rights of both spouses have been stated in the Quran 2:228 which reads:

> *Women shall have rights similar to the rights against them according to what is equitable even though men have a degree (of advantage) over them (i.e. wife).*

Another verse supporting the above quoted verse is Quran 25:74. It reads;

> *Our Lord! Grant unto us wives and offspring who will be the apple of our eyes and guide us to be models for the righteous.*

The other provisions of the Quran in line with the already quoted ones are Quran 4:34 and 2:187, among others. From the above Quranic injunctions women are expected to contribute at all times to the success of their marriage by ensuring that they perform all their duties and obligations to the husband honourably with the fear of God.

The rights, which the husband has over his wife/wives, are numerous but the most important ones are as follows:

Duty of Obedience

This is the utmost of all rights which husband has from his wife within the limits of the law. That is, not to disobey God or the rules of law[48]. It means that the wife must at all times be loyal, obedient and submissive to the husband within the limits of law. There is however no obedience in Islam if it is to disobey the Creator. This right of the husband ranks first to the extent that it is mentioned in the Quran 4:34. It reads:

> *So virtuous women are those who are obedient guarding the intimacy, which Allah has ordained to be guarded.*

The extent of husband's right over his wife is mentioned together with the prescribed prayers in one tradition narrated by Ahmad and A-Tabarani in which the Prophet was reported to have said:

> *If woman performs her five daily prayers, observes her fasting during the month (of Ramadan), safeguards her chastity and obeys her husbands, it*

48 Ibid. P. 152.

will be said to her, "enter the paradise through any of its gates you want.[49]

Islam considers wife's obedience to her husband as performing a jihad in the cause of Allah. In a tradition, Ummu Salamah reported that the Prophet (PBUH) said:

> *Any woman that dies while her husband is happy with her will enter paradise.*

That what will make most women enter the fire of Hell is their disobedience and ingratitude to their husbands. This has been indicated in a tradition where the Prophet (P B U H) was reported to have said:

> *....I saw the (Hell) Fire.... And I saw that the majority of its ...dwellers were women ..... because of their ungratefulness ... they are not thankful to their husband 's and are ungrateful for the favors done to them. Even when she sees something (she does not like) from you, she will say I have never seen anything good from you.*

It is part of obedience that the wife should answer the husband whenever he calls upon her for sexual intercourse unless she has a justifiable reason for refusing to answer the call otherwise she will incur Allah's Wrath. On this Abu Huraira reported that the Prophet (P B U H) said:

> *If a man invites his wife to sleep with him and she refuses to come to him then Allah and his Angels send their curses on her till morning.*[50]

These are the general duties, which a wife owes her husband among other rights. In his own contribution Abdal Ati holds the view that the specific details of obedience may be unexhausted and thus stated the following as relevant:

i. She must not receive male strangers or accept gifts from them without his permission. Nor must she lend or dispose of any of his possession without his approval.

ii. She must restrict her movement and not leave her home without the permission of the husband as he has every legal right to curtail and restrict her freedom of movement.

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49 'Abd al' Ati, H. OP. Cit. (1982) P. 169.
50 Abdul Maliki, B. M. Op. cit. P. 29.

iii. She must submit herself to the disciplinary powers and measures of the husband in case she is found refractory or disobedient (i.e Nushur).

iv. She must not object to the husband taking another wife unless at the time of the marriage agreement they agreed to the condition that where he decides to marry another wife she has the right to seek divorce.

v. If the husband insist on part-locality or patrilocality. The wife must comply.

vi. She should undertake a journey with the husband to anywhere unless it is otherwise stipulated as a condition to the marriage contract.[51]

In all ramifications the wife is bound to observe the duty of obedience strictly unless there is a necessity or legitimate advantage or justification for her to do otherwise. In conclusion, this duty of obedience of a wife to her husband is not absolute; rather it is subject to the obedience of Allah and his Apostle. This condition is by virtue of a tradition in which the Prophet (P.B.U.H) was reported to have said:

> *There is no obedience to a created (being), which will lead to disobedience to the Creator (i.e. Allah)* [52]

The primary and most important duty of a wife has been explained in various provisions of the Quran, but the major one is in respect of the wife's basis of the duty of staying at home in Quran 30:21 which reads:

> *And one of His signs (of Wonders) is that: He created for you mates out of your own kind, so that you may dwell in tranquility with them and He has put love and mercy between you. Verily in this are signs for those who know.*
>
> *This verse further highlights the duty of wife towards her husband, which is providing tranquility and consolation for the husband through mutual love, and mercy, the duty, which is said to be better, performed at the matrimonial home requires the wife to always be at home. This duty of the wife is also clearly required in Quran 16:782.*

51 Narrated by Muslims and others.
52 Sabiq S., OP. Cit. Vol. 2, (1977) P. 179.

Allah has provided for you mates of your own kind and has provided for you through your mates' children and grandchildren.

This indicates that procreation and child bearing is the exclusive duty of the wife and it requires staying at home. Bringing up of children, inculcating good moral and religious virtues in their minds at the early age in life is the duty of the woman as a mother and because the children depends mostly on her at infancy though the efforts of the wife need to be complimented by the husband too. This duty of a wife, it is argued cannot be adequately and effectively discharged unless the wife stays at the matrimonial home. It is for this and many other reasons earlier mentioned that it is important for the wife to always be at the matrimonial home and to go out only with the husband's approval. Whenever there is a conflict between the husband's right of confining the wife to the matrimonial home and her right to visit her parents or relatives, the husband's right shall prevail. It is however necessary for the husband to exercise his rights reasonably so as to safeguard and not destroy the matrimonial relations between the spouses' inter-se and the parents or other relations of both spouses.

Staying at the matrimonial home is another aspect of obedience, which a wife owes her husband. The sum total of the wife's duty to stay at matrimonial home is a kin to the wife's duty to take care of the husband's wealth, The whole duty was summed up by the Prophet (P B U H) when he said:

A good wife is the one who pleases you when you look at her; obeys you if you command her; takes care of her self and your property when you are absent.

Living According to the Husband's Socio-Economic Standard

Like other rights earlier mentioned, another right of the husband upon his wife is that the wife has a duty not to create a burden, problem or hardship for the husband by requesting him to provide her with what she knew the husband cannot afford. This right is based on a tradition of the Prophet (P B U H) in which he was reported to have said:

Any woman who puts a burden on her husband regarding the nafaqah (maintenance) which he cannot bear, then Allah will not accept from her any good deeds unless she repents and comes back to the

right path and accepts from the husband what he can afford.[53]

It has already been clearly stated while discussing maintenance in the proceeding chapters that maintenance is the exclusive responsibilities of the husband and a right on the wife, it is however important to bear in mind that maintenance is qualified with respect to the means and earning capacity of the husband which is in line with the provision of Quran 65:7 which reads thus:

> *Let him who hath abundance wealth spend according to his abundance, and he whose provision is measured let him spend of that which Allah hath given him: Allah asketh naught of any soul save that which He hath given it. Allah will vouchsafe after hardship, ease.*

The provision of this verse shows that where the husband has enough wealth then it becomes imperative on him to provide adequately for his wife, children and other relatives. Conversely, where his means is meager, it will be wrong for the woman to press him to provide more than he can afford.

Right to Marry More than one Wife (Polygyny)

Unlike marriages under the Act and Christians marriages which are monogamous in nature Islam allows a man to marry up to four wives and his first wife has no right to deny his right to marry a second, third or even the fourth wife unless there was an earlier agreement to that effect. The provision of law allowing a man to marry more than one wife is contained in Quran 4:3. It provides that:

> *And if you fear that you will not act justly towards the orphans, marry such woman as seems good to you two, three, four; but if you fear that you will not be equitable, then marry only one, or what your right hands owes so it is likelier that you will not be partial or become destitute.*

The above quoted verse is usually read or interpreted in conjunction with this passage of the Quran 4:129, it reads:

> *You will not be able to be equitable between your wives even so you are eager. Yet do not be altogether partial so that you leave her (i.e. the wife*

53 Tabari, Makarimil-Aklaq Darul-Fikr, Beirut, (ND) P. 157.

discriminated against) as it were suspended. If you set things right and are God-minded (or God-fearing), God is All – forgiving, All compassionate.

There are many views and literature, which supports the right of the husband to marry more than one wife. One view holds that men's sexual needs are greater than and more demanding than women's. That man have natural predisposition towards polygyny based on their higher capacity for physical dominance and aggressive sexual arousal. This capacity is reinforced by the presence of more marriageable female than male in most societies.

Another reason supporting polygyny is the view that on the individual level, a man may be attracted to more than one woman and seriously wish to marry them. Such attraction may be the result of a desire on his part for sexual variety, offsprings wealth and authority. In some cases, polygyny may serve as a status symbol not only for the man but also for the women. To the man it is a mark of prestige and wealth, whereas to the woman it is a matter of distinction to be married to such a man and to mention the fact that with two or more woman the household burden becomes lighter for each one of them.[54] Apart from the established authority as contained in the earlier quoted verses, many scholars agreed in addition to the above provisions that for polygyny to become permissible as a right of man under Islamic Law, certain conditions must be fulfilled, these are:

1. The permissibility of polygyny must be in line with the provisions of Quran 4:3 already quoted, the Sunnah of the prophet (P B U H) and by the consensus of the Muslim jurists through the ages.
2. Polygyny was initially permitted to prevent injustice to women particularly female orphans and to promote continuance
3. It is lawful to those who have reasons for it who can treat their wives equitably and provide for them sufficiently. However, it is not easy to give equal justice to all the wives as required by Quran 4:129 in their treatment but the husband is expected and required to control fully his emotional inclinations so that his sentimental sympathy will not be greater for one wife than for the other. Even though Islam permits polygyny, certain moral exhortations and legal rulings are interpreted as checks against the abuse of Polygyny. In a tradition, the Prophet (PBUH) was reported to have proclaimed God's condemnation for the sensual men and women.

54 'Abd al' Ati, H. Op. Cit. (1982) P. 110-111.

Considering the actual and specific circumstances of polygyny in Islam, in the early schools of various persuasions have identified the following as necessitating polygyny...

1. The muslims had a greater need for progeny to build up and reinforce the nascent community.
2. There were an increasing number of helpless widows and orphans who had lost their supporters for one reason or another and who urgently needed providers, fosters and guardians to take proper care of their moral and material welfare.
3. The lack of public funds or "state budgets" to meet the urgent needs of such helpless dependant was obvious.
4. The marriage bonds were generally laxed at the time and in need of reforms. Polygamy was a measure of regularization and stability.[55]

Rights to Sexual Intercourse

Islamic jurists have recognised that it is the duty of the wife to provide legitimate sex to her husband. She must be sexually responsive and make herself attractive, available and co-operative to the husband. The sexual accessibility of a wife is an inalienable right of the husband, hence she is seen as a comfort or garment to him as he is a comfort and garment to her too. However, the sexual right of the husband is subject to the wife's health and some other legitimate justification for her to deprive him sex such as monthly menses, while fasting in the month of Ramadan in the day time or while on Ihram during holy pilgrimage to Mecca and Medina,[76] in recent times what about diseases such as STDS/HIV/AIDS.

Duty to breast Feed Children

A wife is under obligation and as part of her marital role to breast-feed the children of the marriage if she is still married to the father of the child. This is in compliance with the provisions of Quran 2:223. It reads:

> *And mothers shall suckle their children for two whole years for him who desires to complete the time of suckling. And their (mother's) maintenance and their clothing must be borne by the father according to usage. No soul shall be burdened beyond its capacity.*

The duty to breast-feeding however may not be completely binding. It all depends upon certain factors of the wife such as her ability, status, sickness or shortage of milk in her breast. In case of any of the above factors, a wife may not breast -feed the child and the husband must

55 Ibid at P. 118-121.

employ the services of professional breast-feeder as may be approved by the wife. Thus it is said:

> *It is the duty of a woman who remains under the matrimony of the father of the child to breast feed the child except if she belongs to the class of people who do not breast-feed.*[56]

Similarly, it is further stated that:

> *It is not binding on the mother to maintain her child, even if the child is an orphan. She however owes it a duty to breast-feed the child as long as she is a wife to him (the father of the child). If she does not breast feed because of her high status, sickness or scarcity of milk from her breast then the duty falls on the father except if he is too poor to employ a breast feeder or that the child will not breast feed from other women.*[57]

Mutual Rights of the Spouses Towards Themselves

Islamic law grants some rights and imposes some obligations on the spouses to a marriage contract. This ethical principles of mutual rights of the spouses is in line with the provisions of Quran 2:184 and 30:21 already quoted in the preceding chapters and which is to lead a conscientious commitment by both sides to the divine designation of marital union as an abode of peace and serenity, a link of mutual love and compassion, all being God's signs for those who reflect.

Among these mutual rights of the spouses are... Rights to maintenance; right to sexual intercourse; custody, paternity and or legitimacy of children; right to consortium of spouses; right to kind, impartial equitable and benevolent treatment; right of inheritance; and right to the dissolution of marriage.[58]

The Right to Sexual Inter-Course

Sexual inter-course is one of the mutual rights between the husband and wife. The wife is always commended to submit herself to the sexual call of her husband. The husband too is always expected to satisfy the sexual demand of the wife. In fact, in law, the only legitimate way a man and woman can have sexual intercourse without inhibition is through valid and subsisting marriage or with a captive. This is supported by Quran 23:1-6 which provides:

56 Abubakar, Hassan al-Katsnawi, Ashulul Madariki, Op. Cit. Vol. 11, P. 203.
57 Abdul Maliki, B. M> OP. Cit, P. 181.
58 'Abd al' Ati, H. (1982) Op. Cit., P. 187.

The believers must (eventually win through); those who humble themselves in their prayers: who avoid vain talk who are active in deeds or charity who abstain from sex, except with those joined to them in marriage bond or (the captives) whom their right hands possess for (in their case) they are free from blame.

It is therefore clear that the Holy Quran has not permitted indiscriminate sex. It must be sex between married couples or female captives that is owned by a freeman. Either of the spouses must try as much as practicable and within the ambit of the law to satisfy the sexual demands of the other. In fact, in some cases if any of the spouses is found to be sexually unsatisfactory or weak, the marriage maybe dissolved, so as to avoid transgressing Allah's limits by the unsatisfied party.

In all, each spouse owes a duty to satisfy the others reasonable demands for sexual intercourse. The word "reasonable demands" is to be determined with reference to the health, temperament and biological needs of the parties' as well as such extraneous factors like extreme temperature and other factors taken into consideration. On the other hand, excessive and in ordinate demand for sex could amount to cruelty especially if the other party is thereby affected adversely as well as inability to satisfy the other. Similarly, refusing reasonable demands like practicing coitus- interrupts (sexual – interruption) in spite of protest from the other party could be injurious to health. In all, parties are expected to strike a balance in satisfying each other's sexual demand in order to enhance a harmonious matrimonial relationship.

Custody, Paternity and Legitimacy of (Children of the Marriage)

Custody, paternity and legitimacy of children are a joint responsibility of both spouses. In cases of custody the wife is given priority because of her closeness to the children than the father. Following divorce the mother is to have custody of her female child till she is married and the marriage is consummated...For the male child, until he reaches puberty. Both parents enjoy this right whether or not they are Muslims. The basis of this right is to ensure the moral, social and religious uprightness of the children and also to inculcate on them good virtues and general education. Like the right of custody, which is conferred on the wife after divorce the right of guardianship of the children is vested on the father. In this regard, the father's responsibility as the head of family still continues, as he bears all the expenses involved in the maintenance of the children and the entire

household. Where for any circumstances the parties divorce or separate, this right of custody will still remains with the mother and maintenance is vested on the father."[59]

There are various decided authorities of the court expressing the position of the law on custody. One of such cases is the case of *Zulai Mohammed V Abubakar Ibn Abubakar.* [60] The question was who should be given priority on the right of custody.

This case is an appeal against the decision of the Upper Area Court No.1 Gombe, it originated from an Area Court.

Zulai instituted a suit against Abubakar Ibn Abubakar seeking for the restoration of her right to the custody of her 3 years old daughter. Abubakar said that he did not seize the girl from her but alleged that it was Zulai's father that took the girl to him. Zulai denied this and replied that the girl was taken to him for the purpose of census, to be counted among the Abubakar's family and to be taken back afterwards. The Court asked Zulai to bring witnesses to establish her claim. She brought witnesses who confirmed that her father took the girl to Abubakar not for custody.

Abubakar then complained that if he returned the girl, she would not be given proper upbringing as he desires.

Having consulted authorities the court found that Zulai was entitled to custody but since she had remarried, this right fall on to her mother or her sister. Except where there is no such close relation or where they waived their right, it will revert to the father.

Abubakar was dissatisfied with this decision and appealed to Upper Area Court No. 1 Gombe. In his grounds of appeal he submitted that if he accept the judgment of the lower court his daughter would not get proper upbringing. The court heard from both parties and put some questions to them. In his answer Abubakar maintained that his mother whose name was Aishatu was still alive.

In her reply, Zulai stated that her mother was dead but she had a sister named Ladi who was alive. In its assessment of this case the Upper Area Court realized that Ladi was married and was some other children in her

59 Case No. BAS/SCA/CVA/50/GMT/92.
60 Case No. BAS/SCA/CVA/211/GMT/92.

custody. On this ground the court reversed the decision of the lower court, which awarded the custody to the mother because investigations revealed that her right had lapsed. For this reason the Upper Area Court ordered that Zulai should send her daughter with all her belongings to the house of her father, Abubakar.

Zulai being dissatisfied with the decision, appealed to this court. On the ground that the Upper Area Court No.1 Gombe did not avert its mind to the Islamic rule where there is a maternal relation of a girl that is not up to 12 years she should ideally stay in the custody of her maternal relations: and consequently erred by granting custody to the father of the girl.
Having gone through the record of proceedings in both the Area court and Upper Area Court and having heard from both parties and analysed their contention the following observations were made by the Shariah' Court of Appeal said:

"That in Islamic law preference is given to mother in the custody of children, were it lapsed it goes to the mothers mother, then mother's sister if she is not married. It then falls to the father's mother." The court cited Bahja Vol. I page 407 where it provides that:

> *In the rank of women entitled to custody it is a condition that the woman should not have a husband that had intercourse with her except if she is a grand mother, meaning mother's mother who is marrying the mother's father.*

Our observation and the decision of the Upper Area Court are in line with the above tradition.

The Appeal was accordingly dismissed. Another case is that of *Muhammed Jatau Waziri V Mammu Hajira.*[61] The issue for determination was who has the right of custody of 4 years old daughter, between the mother and father. This is an appeal against the decision of Upper Area Court No.2 Gombe, which originated from Civil Area Court Gombe between the plaintiff Mammu and the defendant Muhammadu Jatua where the plaintiff claimed that Muhammadu Jatau divorced her and took away their year old daughter who was in her custody: she wants the court to restore the custody of the daughter to her.

61 Narrated by Al-Bukhari, Muslims and others.

In his defense, Jatau admitted that he took her with a view of taking her to a tailor to measure her for a dress from there he took her away, he added that the age of the girl was 5 years and not 4 as alleged by her mother.

The Area Court held that the mother of the girl had the right to have the custody of the girl even though she had re-married which Jatau himself was aware of but did not take any step to assert his right for a long time; consequently he had waived his right to that effect.
The court based its decision on the authority of what is contained in *Jawahirul Iklil* Vol. 1 Page 409. The court observed that even the woman whom Jatua gave the custody of the girl to was also married and had no right of custody of the girl. Moreover, Jatau had said, he would not give his wife the custody of the girl. For this reason the court said the mother of the girl was the most entitled and ideal for the daughter's custody even-though she was married.

Jatau was dissatisfied with this decision he appealed to Upper Area Court No.2 Gombe. His ground of appeal was that: he was not satisfied with the decision of the Area Court, because the court ordered the custody of the girl to Hajiya Mammu.

The Upper Area Court affirmed the decision of the civil Area Court. Jatau was still dissatisfied. The Shariah Court of Appeal having gone through the copies of proceedings of both the Civil Area Court and Upper Area Court and heard the address of both parties, It was observed that Jatau did not mention any one who is more entitle to the custody of the girl than her mother. For the first person to be entitled to the custody is the mother, then the mother's mother then followed by the father's mother as contained in *Tuhfa – The Commentary of Mayyara* Vol. 1 Page 270 where it is provided that;

> *Mother of a child is the first to be entitled to the custody of her child, and then followed by the mother's mother then the mother's sister and then the father's mother.*

Having observed that out of all those mentioned above none is more entitled to the custody than the mother of the girl in this circumstance. We agree with the conclusion arrived at by the lower courts that the mother of the girl should continue to keep (custody) the girl.

The court dismisses the appeal of Jatau and affirmed the decisions of the Upper Area Court and that of the lower court.

From the two reported cases it is clear that in cases of custody preference is given to the mother and where there is no mother, the next person to take charge of the custody is maternal or paternal grand – mother, the child's maternal aunt, the mother's maternal or paternal aunt, the child's grand paternal grand-mother, then the father.

The above categorization is further supported by the traditions of the Prophet (P.B.U.H.) where an early muslim woman activist was reported by Abdullahi Ibn Umm Amr to have protested to the Prophet (PBUH) when she said.

> *This my child, my stomach was his abode, my thighs were his playing centre my breast was the reservour to quench his thirst. His father wants to take him from me. The Prophet (PBUH) replied (uttering the law). 'You have better claim to guardianship than his father, as long you have not remarried.*[62]

Another classical case on the above topic was reported in respect of the companion of the Prophet and his mother-in-law:

> *On the authority of Yahaya Ibn Sa'd he said that he heard Al-Qasim Ibn Mohammed saying; Umar Ibn Khattab was married to a woman from the Ansar. She had a child for him called Asim. Later Umar divorced her. Umar came to Qinba and found his child Asim playing at the corridor of the mosque. He took him by the arm and put him in his front on the animal he rode; the grand mother of the child pursued him and challenged him. They both appeared before Abubakar Sadiq. Umar said my son "and she said " my son" Abubakar ordered Umar to let her have him. Umar did not contest it further.*

In another version, it was reported that Abubakar told him the mother is more sympathetic than the man and therefore she has a better claim to the custody of her young child than the husband as long as she has not re-married.

Paternity And Legitimacy

As regards paternity and legitimacy of children both the husband and wife must ensure that the child if born during a valid marriage has inalienable right to life and equal life chances as their biological child and both of them must bear the responsibility of the paternity of the children

62 Ambali, M. A. (1998) Op. Cit. 187, See also Quran 24:5-9.

of the marriage except if the child is disclaimed by the husband through the process of *Li`an.*

The principle of legitimacy was intended to avoid the ugly pre-Islamic practices under which children were given to men based on their higher status than that of women.

With the coming of Islam the practice was completely abolished and the principle of legitimacy requires that every child is to have a biological father and not a social father, a real father whose fatherhood once established 'cannot be revoked and accordingly, every child born will be reasonably assured of placement. Much of this security rests upon the individual's conscience and his religious sensitivity. However, these moral instructions may be designed to supplement the specific legal procedures and to generate an active sense of moral responsibility.

In one of his strong declarations, the Prophet (PBUH) said:

> *Any woman who misplaces a child's legitimacy by relegating its descent to some one who is not responsible for its conception has committed a grave offence, alienated herself from God, and will be denied the bliss of eternity. Likewise a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted upon himself universal disgrace. This seems so institutionalized in Islam that stigma of illegitimacy seldom clings to a child in the Islamic family even the children of slave concubine are legitimate members of the family with family right.*

The Right to Consortium

Consortium connotes as far as possible the sharing of a Common home and a common domestic life. In another instance, it is described as the fact of the spouses accepting and treating each other as husband and wife or at-least the intention of so doing as soon as circumstances permits.

In Islamic law, there is no clear provision relating to consortium but by analogy consortium applies to Islamic law because consortium is meant to ensure matrimonial harmony between the spouses as well as any thing that will bring about an enhanced matrimonial stability and prosperity between spouses.

The Right to Kind, Impartial, Equitable and Benevolent Treatment

The husband and the wife are all expected to be kind, impartial, equitable and are expected to show love to one another, Islam grants this rights to

all the spouses by virtue of various provisions of the Quran. In Quran 2:187 it reads:

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

Similarly Quran 2:228 provide that;

> *...The women have rights similar to that of men according to what is equitable and just.*

Again the Quran in 30:21 made marriage to be a source of happiness and harmony between spouses, it reads:

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

Conclusion

The goal of these comprehensive injunctions is to guarantee Human rights within the family which is capable of promoting mutual love, affection, cooperation, and peaceful coexistence. It arose from the Devine inherent dignity of women as human beings. It provides corresponding rights for the spouses in order to strengthen and promote the rights of women and children. Rather, the practical compliance with the principles is the aspect that leaves one to raise questions of injustices to women amongst Muslims.