

**AN ANALYSIS OF AL-QISM AS A CO-WIFE'S
RIGHT IN ISLAMIC LAW
BY
MUHAMMAD ARSALAN MUHAMMAD**

1.0 INTRODUCTION

The right of Al-Qism (allocation of nights among wives) is very wide, it covers not only allocation of nights between co-wives by a husband, but it equally extends to the house or apartment to be given to each wife. The right of Al-Qism or allocation of nights among co-wives has remained a very recurrent and challenging one. It has been subjected to much misunderstanding and abuse, sometimes due to ignorance of its true nature and significance under the Sharia. It is in the light of the above that this paper principally aims at assessing some important aspects of the matter of Al-Qism as one of the fundamental right of co-wives over their husbands under Islamic Law.

2.0 THE DEFINITION OF AL-QISM

Literally, al-Qism means: a division or portion.¹ Technically, the word al-Qism has been defined differently by the Muslim jurists. For example, Maliki and Shafi'i schools of law define it as: "giving of equal rights by the husband to his co-wives".² The Hanafi school defines it as: "The obligation upon a husband to give equal rights to his wives in terms of feeding, clothing and allocation of nights".³ But Hanbali School defines it as: "distribution of times by a husband to his wives".⁴

Looking at the above definition; the Hanafi definition is more cogent because of its clarity and wideness compared with that of the others.

All Muslim jurists unanimously agree that the allocation of nights to be spent by the husband with his wives, on an equal basis, is a right of each of the co-wives. Some jurists hold that any husband who does not conform to this allocation is not fit to give evidence and is not fit to lead the prayer. In fact some even go to the extent of declaring such a man apostate if he refuses the said obligation and shall be given three days to return to Islam. If he refuses then he should be taken to sword.⁵ They rely upon the following verses and Hadiths of the Prophet (SAW) "...But turn not away (from a wife) altogether, so as to leave her (as it were) hanging....(Q 4:29)"⁶

This prohibition is absolute because Allah (SWT) says: "And dwell with them (women) on equitable terms" (Q4:19).

And a total inclination towards one to the exclusion of another cannot be termed equitable.

They also quote the Hadith narrated on the authority of Abu Harairah (RA) who reported from the Prophet (SAW) that: "Whoever has two wives and favours one over the other, shall be raised up on the Day of Judgment dragging half of his body"⁷

In another Hadith, Aisha (RA) was reported to have said; the Prophet (SAW) used to allocate nights for us equally and used to say: "O Allah! This is my partitioning concerning what is within my means; do not accuse me (of injustice) regarding what you control (of love) and I do not control".⁸

2.1 WISDOM BEHIND JUSTICE BETWEEN CO-WIVES

Primarily, man is asked by the Sharia to marry one wife⁹ and he is allowed to have more than one if he can fulfill some conditions, one of such conditions is to be just in dealing with his co-wives in all physical matters which include the right of allocation of nights among them. One of the main goals of marital life is to get love, mercy and tranquility between the spouses and that is achievable through a just husband.

In this regard, Allah says: "Then marry women of your choice, two or three, or four but if you fear that you shall not be able to deal justly (with them), then (marry) only one or (the captives or the slaves) that your right hands possess. That is nearer to prevent you from doing injustice". (Q4:3)

2.2 HOW TO ALLOCATE THE NIGHTS AMONG CO-WIVES

Muslim jurists have different views on how to distribute/allocate the nights between co-wives. Maliki and Hanbali schools are of the view that a husband can allocate the nights among his wives only one day and its night and is not allowed to allocate it otherwise except with their consent.¹⁰ They rely upon the practice of the Prophet (SAW), and his companions where they used to allocate the nights to their wives for each of them a day and its night.¹¹ It was also reported by Anas bin Malik (RA) that: "the Prophet (SAW) had nine wives and he used to allocate the nights between them, he would not reach the first wife until after nine days. They used to gather in the house of the wife which the Prophet (SAW) was every night".¹² They also hold that delaying of rotation more than what is known by the Sharia may cause some difficulties for each one of the wives except with their consent.¹³

On the other hand, the majority of Hanafis and the Shafi'is are of the view that a husband has the right to allocate the nights between his wives one day and night, or two days and their nights or three days and their nights but not more than that, because three is the minimal number of plural in Arabic language and is not too much for the wives.¹⁴

The Zahiri school and some of the Hanafis hold that a husband has the right to allocate the nights among his wives one day and night and above up to seven days and their nights. They rely on Ummu Salamah's Hadith. "...If you please I shall stay for seven days with you but if I spend seven days I shall also spend seven days with each of my other wives" saying of the Prophet (SAW) if you please I shall stay with you for seven days". If it had not been allowed, the Prophet (SAW) would not have mentioned it.

The most acceptable view is the opinion of the Malikis and Hanbalis based on their authority on the matter. The view of the majority of Hanafi and the Shafi'I School is weak because of its contradiction to the acts of the Prophet (SAW) and his companions. The Zahiri opinion is also weak because the Hadith is concerned with a newly wedded wife only, and also the Prophet (SAW) had said so to Umm Salamah as an answer when she requested him to stay beyond her right, this is clear in the report of Imam Muslim: "...when he (the Prophet SAW) wanted to leave she (Ummu Salmah) held on to his shirt and he said to her: if you please I shall stay for seven days with you but if I stay for seven days with you I shall also stay seven days with each of my other wives"

The view of this writer is that a husband has no right to allocate the nights between his co-wives more than one day and night except with their consent for that was the practice of the Prophet (SAW) and his companions.

2.3 BALLOTS AMONG CO-WIVES

Muslim jurists are of the view that in the case of a man who has two or more wives he shall not begin consortium with any of them except by asking their permission or drawing lots. This is because choosing between them shall amount to favoritism over the others whereas none of them has a preferential treatment over the others. According to the jurists the loser of the ballot shall automatically be entitled to the consortium after the session of the winner of the ballot. And if there are more than two wives, the husband shall either re-cast the ballot between the losers, or from the onset because a general ballot that shall indicate a winner and runner up and so forth.

2.4 WHERE CO-WIVES ARE A COMBINATION OF SLAVES AND FREE WOMEN

Where the co-wives are a combination of slaves and free women, the jurists have two opposing views according to one which the division of stays shall favour the free wife in a ratio of 2:1. The basis for this view of theirs is the verdict of Aliyu (R.A) where he gave the free-wife two days and the slave-wife one day. The second view is to the effect that there is no distinction in the matter of rotation of wives between the slave-wife, and the free-wife and the Muslim wife and the Kitabiyyah (Jew or Christian) wife. This view is based on the fact that the general principles (Umumat) of the law point to the necessary of equality between wives. For example, the Prophet (S.A.W) said: "whoever has two wives and favours one over the other shall be raised up on the day of judgment dragging half of his body".¹⁸

They argue that this Hadith contains a stern warning against discrimination between wives. They further argue that the authority relied upon by the other jurists is not authentic and even if it were authentic it is the saying of a companion and cannot be referred to as a clear Hadith from the Prophet (SAW).

The second view is the cogent one because of the strength of its legal and logical evidence. However, it must be stated that all these arguments, are in respect of the slave that is married to the free man. Thus, if she is merely a maid she cannot claim equality.¹⁹

2.5 WHERE ONE OF THE SPOUSES IS ILL

Where the husband cannot go round the quarters of his wives because of extreme illness he shall seek their permission to stay with one of the wives. This is what the Prophet (SAW) did in his death sickness. But difficulty may arise where one declines to give permission in which case the husband shall have to cast ballots or avoid all quarters of the wives and take to a neutral place. However, where one of the wives is a lunatic regard shall be added to the state of her lunacy. If there is no fear of her being violent she must be given all the rights due to her including the division of nights. This is because the objective of visit of the husband is not merely to consult but also to provide companionship. But if it is feared that she might be violent, the husband shall not be made to stay with her because the objective of the stay, which is to achieve safe and peaceful companionship, is lacking. A wife who is in her post-delivery discharge also enjoys to night allocation despite her condition which is a natural phenomenon. Therefore, a husband must ensure that a woman in this type of state is given her full right to night allocation. This is because the purpose of night allocation is not to only be

for sexual satisfaction but also companionship. He must give her that companionship which is attained from equitable night allocation. Where however, she relinquishes her right to night allocation for whatever reason, then it is allowed. The husband that is a lunatic is in the same position as the lunatic wife; thus if there is no fear of his being violent he must be given all the rights to go round the wives. Where he is not capable of going round himself his guardian shall take him round. If the guardian does not act equitably in the rotation of the wives, the husband shall be bound to repay the stays missed with the wronged wife when he recovers or achieves lucidity. But if there is apprehension as to his being violent then the rotation shall not be binding on him because the objective of his companionship will not be realized.²⁰

2.6 WHERE ONE OF THE CO-WIVES GIVES HER RIGHT TO ANOTHER

There is no dispute among the jurists that a wife has the right to give out her right to night allocation for one of her co-wives, but the husband also has the right to accept the offer or reject it because he may have other needs in staying with her for her rotation. The wife also has the right to withdraw her gift at any time, but the husband is not bound to repay her.⁽²⁰⁾

2.7 WHERE ONE OF THE CO-WIVES SELLS HER SHARE IN ALLOCATION OF NIGHTS

The majority of Hanafi, Shafi'I and Hanbali schools are of the view that it is not allowed for a wife to sell her right of night to the husband or to her co-wives and it is also not allowed for a wife to pay her husband some money just to add more right for her in return, if he happens to accept it he shall return it because it is a kind of bribe.⁽²¹⁾

On the other hand, the Maliki School allows a wife to sell her right of nights just as she has the right to withdraw it but she must pay back what she had already collected in return, if she withdraw. According to this view there is no difference between gift and trading, because both the contracts can be withdrawn by any one of the parties.⁽²⁰⁾

The view of the majority is more sound because even if it is agreed that gift is like trading in some aspects but they differ in others.

2.8 WHERE A HUSBAND MARRIES A NEW WIFE

Where a husband marries a virgin he is entitled to spend seven days with her without having to repay her co-wives and, thereafter, he shall resume the normal equality in his rotation. And if he marries a matron he gives her a choice between three days grace with her without repayment; and seven days with her but with a full balancing of turns after. This is the opinion of

the majority of the jurists. But according to the minority, there should be no distinction between the newly wed-wife and the old wife as all of them are wives and it is obligatory on him to treat them justly. They consider the general precepts of the law only. But the majority argue that the Hadiths of the Prophet (SAW) do support their position. The Hadith of Ummu Salamah narrated by Imam Muslim in which it was reported that when the Prophet (SAW) married her as a matron he stayed with her for three days and she wanted him to stay longer with her and he said: "...if you please I shall stay for seven days with you but if I spend seven days I shall also spend seven days with each of my other wives"²⁴

Anas (RA) also reported that:

"It is part of the Sunnah of the Prophet (SAW) that if a man marries a virgin after a matron, he shall stay with her for seven days and then return to the normal rotation; and if he marries a matron after a wife, he shall stay with the matron for three days then return to the normal rotation".²⁵

This opinion of the majority is to be preferred, because it is clear that above mentioned Hadiths simply particularize the applications of the general rules.

2.9 WHERE A HUSBAND HAS WIVES IN SEPARATE TOWNS

One who has wives in separate towns is, non-the-less, under an obligation to treat them justly in his rotation because it is by his act that they dwell in separate towns. Therefore, the right of each of them shall not lapse. He shall either share his stays on equal basis, such as weekly or monthly divisions, or he shall live with them all in one town. Alternatively, he may choose to take a wife on each trip to the distant town on an equal weekly or monthly basis.²⁶ It is the observation of this presentation that some Muslims in Nigeria especially in Northern states have the practice of working in different towns while their wives and families live in other towns. In the process, the husband may decide to take one of his wives leaving behind others to stay at his hometown in the name of taking care of his children and their school. This practice is contrary to the principles of Islamic law except if the husband secures the prior consent of the other wives left to take care of the children. To insist on allowing the husband to freely stay with one wife just because she has a lesser number of children at one town while other wives with many children stay in another town where he does not himself stay and works. May lead some women to refuse to bear children thereby contravening the aims and objectives of marriage in Islam.

One important issue that is also necessary to expatriate upon here is whether or not a husband has right to select one of his wives while traveling. Jurists have expressed three major distinct views on this issue.²⁷

The first view is held by the Maliki School, which maintained that traveling under Islamic law may be carried out for two basic purposes or reasons, namely religious and others. Where he is traveling for religious purposes such as Hajj (pilgrimage) Umrah (lesser hajj), seeking knowledge of Islam, or Jihad etc, the Maliki School opined that, the husband should always cast vote between his wives in order to determine the one to do the journey with. However, if his journey is not for purely religious purpose but rather for purposes like business, tourism etc he has to examine the status background of his wives. If they are of equal or same status, he must cast vote between them. But where they are not of equal status he is free to take the one that is more useful and beneficial for the journey.²⁸

The Maliki School held the above opinions on the basis that, a religious trip contains divine rewards which every one of his wives is desirous of getting and casting vote will reduce the tension and high level of competition for the journey. Also, where the trip is for business, the divine rewards may not be significant, rather material and worldly gains only. Hence, he may decide on the one that is fit for that particular type of trip.

Unlike Maliki School, Shafii, Hambali and Zahiri schools did not differentiate between religious and other journey for purposes of selecting a wife to travel with among co-wives. They submitted that for whatever purposes a husband is traveling, he must cast vote between his wives for him to determine the one to travel with. He is to travel with the winner of the vote.²⁹ The basis of their opinion or argument are as follows: Aisha (may Allah be pleased with her) reported that the Holy Prophet (SAW) used to cast vote among his wives when traveling and he would always go with the winner.³⁰

The third views is held by the Hanafi School and Ibn Qasim of Maliki School. They opine that a husband has exclusive right of selecting the wife to travel with. He does not need to cast a vote. However, casting of vote is optional. They based their arguments on the following reasons: that co-wives have no legal right over their husband when he is traveling, especially if he did not travel with any one of them and that the process of casting vote may cause- ill-feeling and harm to the losers.³¹

In the final analysis, this presentation is inclined to go along with the opinion expressed by Maliki School. This is because, it covers all other

opinions express by the Hanafi, Shafi'i, Hanbali and Zahiri Schools. Again, the view of the Maliki is more in compliance with the general purposes of Islamic Law and more logical to human realities of life.

2.10 WHERE THE HUSBAND DESERTS HIS WIFE OR WIVES

It is prohibited that a husband deserts his wife completely. If such a thing should occur the wife has the right to go to Court. According to the Hanafi'i School, the Judge should not punish the husband but rather warn him, and if it is repeated by him then he should be lashed by way of Ta'zir. But he should not be detained, because doing so would harm his other wives.³² The Maliki school is of the view that the husband should not be punished. He is to be admonished. But where the wife asked for divorce as a result of the harm caused by his desertion the judge should separate between them without her paying the compensation.³³ But Hanbali School holds same view with the Maliki School except that, they submitted that the wife can be separated from him by the judge only if she requested for it and the period of husbands desertion reached four months for no cogent reason.³⁴ It is also prohibited for the husband to enter the house of one of his co-wives while he is in other's house except with a cogent reason. It should be noted that day can be considered as night for a husband whose work is at night.

3.0 AN ANALYSIS OF THE OPINIONS OF THE SCHOOLS OF LAW OVER THE QUESTION OF THE WIFE'S SEPARATE QUARTERS

We have mentioned that lodging is one of the rights of the wife. For this reason it is obligatory upon the husband to provide quarters befitting of her status as part of her maintenance package.

Her quarters are to be measured by what is sufficient for her. One element of this is that it must be exclusively reserved for her use and that of her husband. It is not for the husband to lodge someone else within her quarters because of the fact that it is detrimental to her and it interferes with her martial opportunities and cohabitation with her husband except if she concedes to such arrangement. This is accepted because she voluntarily relinquished her rights. Where the husband has other children from other wives. He may not lodge them with the wife: except if they are very little children who have no idea about sex.³⁵

Hambali School

Ibn Qudamah in the Mugni said:

"The husband may not join two of his wives in one and the same quarters except if they consent to it; this is regardless of their being young or old. The reason for this is the

detrimental effects such as enmity and hatred, jealousy such as constant quarrels, and each hears and sees the condition of the other. However, if they consent to this it is permissible as they are free to relinquish their rights."³⁶

Maliki School

It is right of the wife to refuse to reside together with the relations of the husband (such as his parents) in the same quarters because of what it entails of harm to her because she is exposed to their observation and will not be in a position to hide anything from them except where she is in a lower status by her family background.³⁷

Shafi'i School

It is obligatory upon the husband to provide a befitting lodge for his wife according to the local custom of what is reasonable because she does not have the disposition to change it unilaterally. Therefore the law has tended to give preference to her interest contrary to the position in terms of food and clothing where the interests of the husband are given priority.³⁸

Hanafi'i School

Wife reserves the right to refuse to reside in one house with co-wives or other members of the husband's family. Thus, she may demand a separate and self-contained house from other members of her husband's family.⁽³⁹⁾

3.1 WHAT SUFFICES AS WIFE'S QUARTERS UNDER SHARIA

The house of the wife ought to be safe and secure because the lack of safety and security would jeopardize the chances of good morality in the wife and her children. And, in the same being, if the house is isolated and there are no neighbours the wife would be forced to live in constant fear during the working hours of the husband or during the long hours of the night especially if the husband has other wives elsewhere. In such cases it is obligatory for the husband to provide the wife with female company.

Since it is the responsibility of a husband to provide shelter for his wife it is also his responsibility to provide all the domestic materials such as bed, and beddings, and all utensils. However, the provision of all these depends on the culture of the people, climatic condition, means of the husband and background of the wife. The replacement of these materials depends on the wear and tear of the materials and the status of the wife.⁴⁰

4.0 CONCLUSION

In conclusion, this presentation has shown how the concept of al-Qism (or allocation of nights among wives) under Islamic Law can be achieved for the overall successes of marital life especially polygamous family. Many people assume/suppose that al-Qism is restricted to sharing of nights only. This is not correct from the analysis and findings in this paper. Allocation of nights is one of the major issues of al-Qism. Others include allocation of separate and independent apartments or houses for the co-wives. The right to equal sharing of nights may be relinquished by the wives where the husband is a civil servant residing in a different town or where one gives up her night in favour of another.

Consequently, this presentation observes, and recommends, that indeed if the several issues covered by the rule of al-Qism under Islamic Law will be followed by the generality of Muslims, justice and fairness will be realized in the family. Furthermore, there will be a serious reduction of cases of divorce arising from complaint by a wife for lack of fairness by a husband due to denial of rights to equal allocation of nights.

This presentation suggests that Muslims in Nigeria need to appreciate better the concept of al-Qism and its effect on Muslim families. The idea of al-Qism further buttresses the beauty of the Islamic family whereby spouses are expected to enjoy reciprocal rights and duties. Also there are certain benefits that can be derived from the current operation of the Islamic rules on al-Qism. For instance, the principles will keep the wives fit, alert hygienic and up to their responsibilities particularly when the nights are divided on the basis of one night and a day for each wife as practiced by the Holy Prophet (SAW) and his Companions (May Allah be pleased with them). Again, it can prevent idleness that will lead to immoral acts and other vices. Each wife will have certain responsibilities if the principles of night sharing is observed properly.

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