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Editorial Comment

The Editorial Board of HUJIL is pleased to thank our contributors to the Volume 4 of this Journal. We equally appreciate very useful opinions and suggestions in respect of its previous editions. This has greatly informed the quality and improvement in this fourth edition.

In this edition, only twelve (12) articles that scaled through blind peer review were considered for publication. The articles, which are written by the distinguished and versed contributors in their respective areas, examine various areas in Islamic law such as Islamic Law Perspective of Polygamy, Ijtihad: Scopes, Modes & Legislative Value in Islamic Jurisprudence, Shariah Legal Framework for the Protection of Women's Rights, Islamic International Law, An Exploration of Dispute Resolution Mechanisms in Islamic Commercial Transaction, and others that contribute to the advancement of Islamic law.

The contributors themselves are responsible for the views and opinions expressed by them in their respective articles published in this Journal. Nevertheless, I guarantee that you will find those articles informative and educative.

Dr. U. S. Muhammad
Editor-in-Chief (HUJIL)
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APPRAISAL OF MISCONCEPTION OF RETIREMENT OF WIFE (*ISTIBDĀLUZ-ZAWJAH*) AND INCORRECTLY PRACTICE OF *WĀRE* UNDER ISLAMIC FAMILY LAW

ELESIN, AbdulWahab Muhammad Jamiu (PhD)*

ABSTRACT

Marriage and divorce are parts of the natural identity of human beings that has been given ample attention within socio-cultural, religious and political studies. The position of Islamic law is that "Female vulva is prohibited in principle الأَصْلُ فِي الأَبْضَاعِ التَّحْرِيمُ*". As a result, Islam vehemently prohibits free intermingling between people of opposite sex. Permissibility of sexual and all other marital relationships with a woman are strictly restricted into only two means viznikāhand milkul-yamin. Sūratul-Muminun23, verses 5-7. Therefore, marriage under Islamic law is "a contract for the purpose of legalising sexual intercourse and the procreation of children. It is purely a civil contract, the terms of which depend, within very wide limits, on the will of the consenting parties, and to the validity of which no religious ceremony is necessary". Lawful cohabitation of husband and wife relies on existence of the bond of marriage. Once it broke via any means, man and woman can no longer legally cohabit. However, the practice of "wāre" which is retirement of a wife and replace her with another wife, seems to be a misconception, misunderstanding, misinterpretation of aim of istibdāluz-zawjah subsequently misapplication and therefore, an inconsistent with the laws regulating nikāh and talāq, to the extent that it may lead to marrying more than four wife at time. This paper reviewed the practice. Our findings revealed that there is misapplication along the line and therefore made recommendations accordingly.*

Key words: Family law, matrimonial rights and obligations, polyginious practice, *istibdāluz-zawjah* (retirement/replacement of wife) *nikāh*, *talāq*

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INTRODUCTION

The "retirement of wife" "*Istibdāluz-Zawjah*" in the Qur'an[1], which conceptually means "*talāq*"[2] seems to be incorrectly misunderstood, wrongly interpreted and inconsistently practiced by some Muslims in Nigeria. The inconsistent practice is known as "*wāre*","*auren musanya*" or "*auren dandano*".[3] This paper appraises the concept of "*Istibdāluz-Zawjah*" and the incorrectly practice of "*wāre*" under Islamic Family Law.

The raison *d'etre* of lawful cohabitation of husband and wife is the existence of the bond of marriage. In our view, it is relevant to say that marriage, with all its legal implications, is probably the issue which has had, and will continue to have, the most bearing on the lives of Muslim women. Indeed it is within marriage, perhaps more than in any other area of a woman's life, where herrights and obligations under Islamic law and modern legislation are brought into play.

The Islamic marriage contract is unique in the sense that the rights and obligations of the man and woman whom are parties to it are dictated by the Lawgiver and cannot be subject to any contrary agreement between them.[4]Under the English law, marriage is defined as "the voluntary union of one man and one woman to the exclusion of others".[5]According to the classical juristic definition, marriage is "a contract prescribed by the Lawgiver, and it denotes the lawful

1Q4: 20-21

2 Jalalud-Din Al-Muhalliy (d. 864 AH), wa Jalalud-Din As-Suyuti (911 AH), Tafsiru Al-Jalalayn, ed. Muhammad Naim and Muhammad Ridwan, Muassasatur-Risalah, 3rd edition, (1418/1998), p. 81, Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), At-Tahrir wat-Tanwir, Tunis, daru Suhnun, (1984), vol. 2, p. 4, p. 288.

3"*wāre*", "*auren musanya*" or "*auren dandano*" research reveals that, these terms are used in some Muslim communities in Nigeria, to mean *istibdāluz-zawjah*; i.e. retirement of wife and replace same with other.

4 Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), At-Tahrir wat-Tanwir, Tunis, daru Suhnun, (1984), vol. 2, p. 4, p. 224.

5Matrimonial Causes Act enacted in 1970, now Cap. M7, Laws of the Federation 2004, part IV, s. 69.

entitlement of each of the parties thereto to enjoy the other in a lawful manner".[6]

As a social phenomenon, Islam exercises great influence on social practice where marriage, sexuality and divorce are concerned.[7] While some traditional religions have little difficulty in adjusting to social changes,[8] Islam has aimed at guiding changes in gender relationships and human sexuality.[9] The attention accorded issues of replacement of spouse in modern socio-cultural practice is evidence of the need to clarify the position of Islamic Law on such matter. In order to achieve this, this paper considered the following issues as determinant factors for husband-wife relationship: first is the concept and practice of *nikāh* in Islam followed by Islam's Reforms on Marriage. In the third part, *Ta'adduduz-Zawjāt* (Polygyny) in Islam its concept and practice was discussed. Part four provides answer to: What is *istibdāluz-zawjah*? How does it relate to *nikāh* and/or *talāq*? Part four discussed termination of *nikāh*forms of separation of spouse (*talāq, khul'u, faskh/tafrīq*). It also discussed effects of divorce: revocable and irrevocable. In the part five, practice of *wāre* was described and the implication on *istibdāluz-zawjah*. The part six is the summary, conclusion and recommendations.

CONCEPT AND PRACTICE OF *NIKĀH* IN ISLAM

The position of law is that "Female vulva is prohibited in principle الأَصْلُ فِي الأَبْضَاعِ التَّحْرِيمُ". As a result, Islam vehemently prohibits free intermingling between people of opposite sex. Permissibility of sexual

6Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), AT-Talqin fil-Fiqh Al-Maliki, ed. Abu Uwais Muhammad At-Tatwani, darul-Kutubi Al-Ilmiyyah, 1st edition, 1425/2004, p. 112, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), Al-Qawaninu Al-Fiqhiyyah (nd), p. 130.

7Ibid

8Since there is no binding scripture, as it is evident in Yoruba popular saying: "Yoruba kewu, sughon koni tira"; i.e. no scripture for Yoruba assertions. Relevant also is "Ilu tiko si ofin, ese ko sinibe"; i.e. a regulation free community has no prescribed crime.

9Al-Qadi Al-Baghdadi (d. 422 AH), op. cit. p. 112, Ibn Juzay (d. 741 AH), op. cit. p. 130.

and all other marital relationships with a woman are strictly restricted into only two means viz.[10] *nikāh*and *milkul-yamin*. *Sūratul-Muminun* 23, verses 5-7.[11] Therefore, marriage under Islamic law is "a contract for the purpose of legalising sexual intercourse and the procreation of children. It is purely a civil contract, the terms of which depend, within very wide limits, on the will of the consenting parties, and to the validity of which no religious ceremony is necessary".[12] Lawful cohabitation of husband and wife relies on existence of the bond of marriage. The most essential element of valid *nikāḥ* is *al-maḥallu* (subject-matter or place), which is the lady/girl and man/boy. Both man and lady must be vacant for *nikāḥ* and their free consent are principal elements and of paramount importance to the validity of *nikāḥ*. Other supporting elements are competent *waliy* (guardian), *ṣadāq* (bridal gift) and minimum of two men of impeachable character.[13] A valid *nikāḥ* made the couple lawful to each other, it legalizes marital cohabitation, creates marital obligations, duties and rights. *Nikāḥ* is meant to be permanent is Islam, however, where peaceful coexistence becomes unbearable between the couple, *nikāḥ* could be terminated unilaterally by husband known as "*talāq*" or on the instance/request of the wife called "*khul'u*" or "*fidyah*".[14]

10 Ibn Juzay, Abul-Qasim Muhammad ibn Ahmad (d. 741 AH), Al-Qawaninu Al-Fiqhiyyah, (nd), p. 130.

11 The Quranic passage reads:

{وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حافِظُونَ (5) إِلاَّ عَلى أَزْواجِهِمْ أَوْ مَا مَلَكَتْ أَيمانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ (6) فَمَنِ ابْتَغى وَراءَ ذلِكَ فَأُولئِكَ هُمُ العادُونَ (7)} [سورة المؤمنون (23): الآيات 5-7].

"And those who guard their modesty. Except with those joined to them in the marriage bond, or the captives whom their right hands possess; for their case they are free from blame". [Sūratul-Muminun 23, verses 5-7].

12Al-Qadi Al-Baghdadi (d. 422 AH), op. cit. p. 112, Ibn Juzay (d. 741 AH), op. cit. p. 130.

13 Ibn Abi Zayd, Abu Muhammad Al-Qayrawaniy (d. 386 AH), Matunr-Risalah, darul-Fikr (nd), p. 89-98, Ibn Juzay, Abul-Qasim Muhammad ibn Ahmad (d. 741 AH), Al-Qawaninu Al-Fiqhiyyah, (nd), p. 130-140.

14 Ibn Abi Zayd, Abu Muhammad Al-Qayrawaniy (d. 386 AH), Matunr-Risalah, darul-Fikr (nd), p. 89-98, Al-Qadi Abu Muhammad AbdulWahab Al-Baqhdadiy (d. 422 AH), At-Talqin fil-Fiqh Al-Malikiy, ed. Abu Uwais M., darul-Kutubil Ilmiyyah 1st edition 1425/2004, vol. 1, p. 124-131, Ibn Juzay, Abul-Qasim Muhammad ibn Ahmad (d. 741 AH), Al-Qawaninu Al-Fiqhiyyah, (nd), p. 150-159.

Islam's Reforms on Marriage

The Islamic marriage institution as it stands today came about with the advent of Islam.[15] Major reforms were introduced establishing rights for women which did not exist in pagan times.[16] Prior to this, pagan Arabs practised certain forms of marriage which were really quite extraordinary. One was known as *zawājul-aqat*, in which a deceased eldest son would marry his dead father's wife, whether she liked it or not, as part and parcel of his legacy. Or, if he wished, he could retain the *mahr* for himself, whilst choosing some other husband for her. However, the Qur'ān strictly forbade this form of marriage, describing it as ". . . shameful and most hateful, and an evil way." (4:22). Other forms of these shameful pagan practices was the "exchange" between two men of their daughters or their sisters. The women themselves, who were not consulted at all, were considered to be the *mahr* in this type of "offset" transaction. This is known as *nikāḥush-Shighār*.[17]

The other forms of reforms include restriction of unlimited numbers of wife to four. (Q4: 3) and limitation of endless numbers of *talāq* into only three times in the life of a *nikāh.* (Q2: 229-230). Islam declares that women are equal partners of men,[18] they share equal duties and rights only where specific evidence distinct between them.

Like Arabian custom, unlimited *ta'adduduz-Zawjāt* (polygyny) is part of widely practiced custom of Yoruba, Hausa and Fulani people of Nigeria

15Al-Qadi Al-Baghdadi (d. 422 AH), op. cit. p. 112, Ibn Juzay (d. 741 AH), op. cit. p. 130.

16Ibid.

17 Bukhāri M. I., Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, 1422, vol. 7 p. 15, no. 5127.

18 Abu Dāud Sulaiman S. (d. 275 AH), Sunanu Abī Dāud, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut, (nd), vol. 1, p. 61, no. 236, and Abū 'Isa at-Tirmidhiy, Suanaut-Tirmidhiy, ed. Ahmad M. Shakir et al, Cairo, 2nd edtion, 1395 AH/1975, vol. 1, p. 189, no. 113. Albāniy (d. 1420 AH) graded the ḥadīth sahīh (authentic) in his comment on the Book: "Huqūqn-Nisāi fil-Islam... by Muhammad Rashid Ridah, al-Maktabul-Islami, Beirut, 1404 AH", p. 8.
Sahīhu Abi Dāud, Muassasatu Gharas, Kuwait, 1st edition 1423 AH / 2002, vol. 7, p. 11.

before the coming of Islam.[19] It was generally believed that the Islamic compatibility with human's nature which reflects in the endorsement of polygyny among others, serves as major factor which made Islam attractive to Nigerian Muslim communities. According to Opeloye, permissibility of polygyny by Islam gives the religion fast acceptance by many Nigerians.[20] However, Islam regulates the pre-Islamic practice of unlimited polygyny and forbids marrying more than four wives at a time. Islam further allows replacement of a wife with another on certain conditions. Research reveals that such replacement is called *istibdāluz-zawjah* otherwise known as *"wāre"*,*"auren musanya"* or *"auren dandano"* among some Nigerian Muslims. Usually, when a man with four wives decides to marry another wife, he retires one of the four, usually, the oldest one to escape prohibited polygyny, he is said to have practiced *wāre* or *auren musanya*.

As part of marriage reforms under the Islamic law, certain passages of the Qur'ān discuss occasions of *istibdāluz-zawjah* as follows:

Sūratun-Nisāi;

> "O you who believe! You are forbidden to inherit women against their will; and you should not put constrain upon them so you may take away part of the *mahr*you have given them, unless they commit immoral conduct such as open illegal sexual intercourse; live with them honorably. If you dislike them, it may be that you dislike a thing and Allāh brings through it a great deal of good".[21]

19 A. M. J. Elesin, (2015), Polygynious Marriage and Women Participation in Nations Development, Book of Program and Abstract, "A National Conference on Women and Development", Faculty of Social Sciences, Nasarawa State University, Keffi, Nasarawa State, Nigeria, (2nd – 5th November, 2015), NSUK/FSS/CONF/1547, pp.103-113.

20 Opeloye O. Muhib, "The Yoruba Muslims Cultural Identity Question", Ilorin Journal of Religious Studies (IJOURELS), vol. 1, No. 2, December 2011, Department of Religions, University of Ilorin, Ilorin Nigeria, p. 5, 7.

21(Q4: 19).

By the revelation of this verse, Allāh aims at dealing with women's affairs and their problems. Before the coming of Islam, women lived in wretched and unjust circumstances.[22] Allāh therefore revealed this verse in order to change such injustices. Women, for instance, were inherited like cattle if their husbands died.[23] At that time, a *waliy* could simply have or take them automatically - like a king. If women objected to this, the *waliy* could "inherit" them by force. If the women were married, the *waliy* would take the *mahr* for himself. Objections to such treatment went unheard.[24] Therefore, after declaring *"La yaḥillulakum an tarithun-nisā-a karhan"*; "it is not permissible for you to inherit women against their consent" (the first law) Allāh added *"wa la ta'ḍulūhunna"*; "nor maltreat them" (as the second law).[25]

Such behavior was customary in *jāhiliyyah* time (pre-Islamic period), but we are not allowed to behave like *jāhiliyyah* people. Islam does not permit women to be treated in any unruly manner, for instance, to marry them or to marry them to someone else (to sell or give them to another), or to make it difficult for them to marry whom they like. Such behavior is indeed heinous.[26]

The phrase *"wa la ta'ḍulūhunna li tadh-habū bi b'aḍi ma ataytumūhunna"* in this verse, means "it is not permitted to make trouble or difficulties for women, so that they must ransom themselves by giving away their fortune or bride gift". It was common practice during the *jāhiliyyah* time (pre-Islamic period) for a man to marry a woman he liked and then later, when he is tired of her, to give her away to another man, to make it difficult for her to marry another man she liked, or to forbid her to remarry. Men did this in order to make her pay to free herself, either with her family's wealth or the dowry that she had received on her marriage.[27]

22 Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 224.

23 A. M. J. Elesin, (2015), op. cit. pp.103-113.

24Ibid

25Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 224.

26 A. M. J. Elesin, (2015), op. cit. pp.103-113.

27Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 224.

According to Sharawi, the meaning of *"wa la ta'ḍuluhūnna"* (and you should not put constrain upon them) in the verse, is that women must be permitted to have their basic rights (human rights) if their husbands die, for example they should be able to remarry whomever they want or someone who comes to them (proposes marriage to them). Allāh forbids men to do injustice to widows for example, the *waliy* should not retake some portion of what her former husband had given her *"litadhabū bib'aḍi ma ataytumūhunna"* (so you may take away part of the *mahr* you have given them). Therefore, Allāh revealed the verse to stop such injustice. However, such harsh treatment can only be meted out if a woman commits gross indecency *"fāḥishah"* or adultery *"zina"*, etc.

Some *ulama* (scholars) say that women have the right to demand what they need for themselves, both material and non-material, from their husbands; but if they commit adultery or other illicit acts, they may be punished through *fidyah*, which means dissolution of *nikāh* on the request of the wife.

The phrase *"wa la ta'ḍulūhunna"* in the verse is followed by *"wa 'āshiruhunna bil-m'arūf"*. The word *"m'arūf"* in this context, has a much wider and deeper meaning than *"mawadda"*. *M'arūf* means not only to love but also to give material things, such as food, clothes, good care, etc. This verse instructs men to have a very good relationship with women (wives). From the above, it is clear that the Q4:19 determines when a husband is allowed to sell the *talāq* for money.

CONCEPT OF *ISTIBDĀLUZ-ZAWJAH* IN SHARĪ'AH

Sūratun-Nisāi; Qur'ān 4, Verse 20-21

> "But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back; would ye take it by slander and a manifest wrong? And how could ye take it when ye have gone in unto each other and they have taken from you a solemn covenant?" (Q4: 20-21).

In the above verse, Sharawi says, if serious problems arise / occur between the couple, after living in harmony, but thereafter they afraid of doing things that are prohibited by Allāh, *istibdāluz-zawjah*(replacement) is thereby allowed. Replacement or *"istibdāl"* in this verse means divorce *"talāq"* by unanimous opinions of the jurists; but it should be borne in mind that in doing so men are encouraged to do absolute justice. Therefore, this phrase is followed by the phrase *"wa ātaytum iḥdāhunna qintāran falā ta'khuzu minhu shay'an"*. Etymologically, the word *"qintāran"*means "something great", but came to mean a large sum of money. *Qintāran* in this verse (context) means wealth *"al-māl"*, which Sharawi opines could be interpreted as *"mahr"* (mandatory bride gift). In other words, it means that if a man divorces his wife, he is not allowed to take anything from her, even if he gave her a large mandatory bride gift, because, this *mahr* is the recommended gift that men pay to be allowed to live with a woman, and which is only paid once.[28]

If a man wants to change or to replace his wife with a new one, because he does not like or love her any more, but the wife has done nothing wrong, a husband still owes her this great amount of money (mandatory bride gift) - whether she has already collected it from him or not. The husband is not allowed to reclaim anything from her. He has to give it all to her, since the divorce was not her fault.[29]

Siddiq says that traditionally, the pre-Islam Arabs could simply divorce their wives with an accusation of adultery. The wife then had to redeem herself by paying him the *mahr* she had received on her marriage. Meanwhile, it was well established in Islam that "The agreement that is accepted by women is a holy *fitra* (human right)".Therefore, Allāh illustrates in *sūratur-Rūm* as follows:

28Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 224.
29Ibid

> "And among his signs is this, that He created for you wives from yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect".[30]

Siddiq comes to the conclusion that through the verse Allāh stops Muslims from following the traditions of the pre-Islamic *jāhiliyyah* period, especially with regard to the bad treatment towards women and their property. Women in the time of *jāhiliyyah* were viewed as a kind of "moveable goods" that could be transferred or inherited. Thus, a *waliy* (close male relative) could legally have, possess or inherit the wife of his brother or father if he died.[31]From the above discussion, it is clear that the Q4:20 determines that sale of *talāq* is prohibited when a husband intends to replace his wife without her fault.

Reading the provision of Q4:19-21 and proceeding verse in *ejusdem*, it is clear that *istibdāluz-zawjah* was occasioned in revolutionary response to the unjust treatment meted against women in pre-Islamic *jāhiliyyah* period and early Islamic periods.[32] As it was said, *istibdāluz-zawjah* simply means divorce (*talāq*).[33] With the verse 19 of *sūratun-Nisāi*, Islam determines when a husband is allowed to sell the divorce (*talāq*) for money while verse 20 of the same surah determines when such sale of *talāq* is prohibited. In the verse 19, *talāq* was sanctioned due to *nushūz* (disobedience) from the wife, hence, husband is allowed to collect money for *talāq* even by frustration. The verse 20 prohibits collection of money for *talāq* by the wife if he divorces her willingly without her fault or when she requests for *talāq* due to husband's fault. The concept of *istibdāluz-zawjah* in Islam is therefore to balance justice between the spouses.

30Q30: 21

(31) Gunawan Adnan; Women and The Glorious Qurān: An Analytical Study of Women-Related Verses of Sura An-Nisa, erschienen in der Reihe der Universi tätsdrucke
des Universitäts verlages Göttingen 2004, ISBN 3-930457-50-4.

32Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 224.

33Jalalud-Din Al-Muhalliy (d. 864 AH), wa Jalalud-Din As-Suyuti (911 AH), op. cit. p. 81, Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 288.

Nikāh[Marriage] and Its Validity Conditions

Nikāh (marriage) in Islam is more than just a means of obtaining lawful sexual satisfaction; rather, it is an extremely important institution which safeguards the rights of men, women and legitimate children. For a marriage contract to be valid, certain conditions must be fulfilled.[34]One of the essential principles is to ensure that no impediments against the proposed marriage exist under the Sharī'ah. Marriage impediments are either temporary or permanent in nature. Theoretically, with the exception of a few cases due to divorce, the temporary impediments could be removed, thus allowing for a valid marriage to take place. Other temporary impediments involve unlawful conjunction and unlawful polygyny.[35]

For *nikāḥ* to be validly constituted, there must be *al-maḥallu*; i.e. subject-matter of *nikāḥ*. In this context, *al-maḥallu* means the man/boy and the lady/girl seeking to marry each other. *Al-maḥallu* must be free and vacant. In other words, the man should not have under his custody, four legal wives, otherwise, he is not vacant to be married since he has exhausted his quantum. Simultaneously, the lady/girl should be vacant; i.e. she should be free from marriage bound.[36]

It follows therefore, if a lady/girl is in an existing valid marriage, or she is observing her *'iddah* following a revocable or irrevocable divorce, or the death of her husband, then she is not free to marry another man until the marriage is dissolved, or she has completed her *'iddah*.[37] There are three verses from the Qur'ān which explicitly prohibit marriage in the circumstances mentioned above: "Also [forbidden are] women already married..." (4:24); "And divorced women shall wait [as regards their marriage] for three *qurū'* (purification) periods . . ."

34Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), op. cit. p. 112, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), op. cit. p. 130.

35Ibid

36Ibid

37Ibid

(2:228); and "And those of you who die and leave wives behind them, they [the wives] shall wait [as regards their marriage] for four months and ten days . . ." (2:234-235).

If by any chance a man should marry a woman in any of those situations, such marriage would be considered by the jurists to be an invalid contract, and the parties would have to separate on the authority of the legal maxim: "What is certain shall not be defeated by Uncertainty" (اليَقِينُ لا يُزَالُ بِالشَّكِّ) and the doctrine of "Presumption of Continuity" (اسْتِصْحَابُ الأَصْلِ). However, if the marriage had not been consummated, the couple would be ordered by the court to separate.[38] Meanwhile, there is a difference of opinions among the main *Sunni* schools of Islamic law as to what should happen next. The Shafi'is and Hambalis rule that the couple must initially be separated, but once the *'iddah* is completed, then the man can re-marry the woman, thus making this situation a temporary impediment.[39]However, the Malik disagree, they held that after the separation, the woman will be permanently prohibited from marrying the man again.[40] The modern personal status laws have adopted the provision prohibiting marriage to a woman in her *'iddah*.[41]

Nature and Effect of *Nikāh* (Marriage)

If a man marries a woman, he derives enjoyment (*mut'ah*) from her. This is also true for the woman; she equally derives enjoyment from

38Ibid

39 Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/227, Ibn al-Hajib, Jamalud-Din, Jamiul-Ummuhat, Beirut, 1419 AH / 1998, p. 282, 287, Ibn Quddamah, Ibn Quddamah, Abu Muhammad, Abdullahi ibn Ahmad, Al-Mughni, ed. Abdullahi A. Turki and Abdulfattah M. Halwu, daru Alamil-Kutub, 4th edeition, 1419 AH / 1999, 10/323.

40 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.301.

41Islamic Family Law, Syria (Syrian Arab Republic) (Art. 38), Jordan (Art. 30), Iraq (Art. 13), Morocco (Art. 29/6), Tunisia (Art. 20) and Kuwait (Art. 19). See: The Development of Islamic Family Law in the Legal System of Jordan, htps://www.jstor.org. Assessed, Friday, 21/10/2021, 11:11 am.

the man she marries. They obtain enjoyment from each other; they co-operate and greatly need one another as enshrined in the Qur'an.[42]Furthermore, it should be noted that legal obligations created by valid *nikāh* include maintenance, impediment from marrying another husband, legitimacy of child among others, with the *istibdāluz-zawjah*, such enjoyments cease.[43]

TA'ADDUDUZ-ZAWJĀT [POLYGYNY]

Since *istibdāluz-zawjah* (replacement of wife) relates directly to *ta'adduduz-zawjāt* (polygyny practice), it is pertinent to discuss the latter in this context. Polygyny is a custom in some societies in which someone can be legally married to more than one woman at the same time.[44]It is a form of marriage customary with virtually all ethnic groups Hausa, Fulani and Yoruba people of Nigeria inclusive.[45] Being a religion that allows reasonable tradition of the people, it is also well entrenched in the Islamic tradition.[46] Polygyny is allowed under Islam. However, it must not be forgotten that it is not only within Islam that marriage to more than one wife has been, or still is in some instances, allowed.[47]

Interestingly, it was under the Islamic law that the number of wives that a man could have, has become limited to four at a given time. Nevertheless, two conditions were attached to this limitation. The first condition is that the man should be able to do justice to/among his wives, and the second is that he should be able to provide

42(Q2:228).

43Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), op. cit. p. 112, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), op. cit. p. 130.

44 Kazeem Adekunle Adegoke, "The Practice of Ta'addud Al-Zawjah under Sharī'ah and Neo-Ijtihad Challengers among the Contemporary Muslims", Ilorin Journal of Religious Studies (IJOURELS), vol. 1, No. 2, December 2011, Department of Religions, University of Ilorin, Ilorin Nigeria, p. 37-43.

45 A. M. J. Elesin, (2015), op. cit. pp.103-113.

46Ibid

47Ibid

maintenance for all of them. Muslim men have since adhered to this stipulation to the extent that if a man were to become a Muslim whilst having more than four wives, he would be asked to choose four of them and release the others from his household. It was reported that in the days of the Messenger of Allāh (SAW), a prominent Arab poet from the district of *Tāif* on the Arabian Peninsula, one Ghaylān ath-Thaqafi, had ten wives when he embraced Islam, all of whom embraced Islam at the same time. The Messenger of Allāh (SAW) ordered him to keep four of them and release the other six.[48] In a similar situation, al-Hāris ibn Qais al-Asadi embraced Islam with all his eight wives, the Messenger of Allāh (SAW) instructed him to retain only four of them and release other four.[(49)]So, although there was no total Islamic prohibition against polygyny, a man wishing to have more than one wife had to strictly adhere to the regulations:

{وَإِنْ خِفْتُمْ أَلاَّ تُقْسِطُوا فِي الْيَتامى فَانْكِحُوا مَا طابَ لَكُمْ مِنَ النِّساءِ مَثْنى وَثُلاثَ وَرُباعَ فَإِنْ خِفْتُمْ أَلاَّ تَعْدِلُوا فَواحِدَةً أَوْ مَا مَلَكَتْ أَيْمانُكُمْ ذلِكَ أَدْنى أَلاَّ تَعُولُوا (3)} [سورة النّساء (4) : آية 3].

> "And if you fear that you shall not be able to deal justly with . . .marry women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly [with them], then only one... That is nearer to prevent you from doing injustice." [4:3].

This, obviously had the benefit of ensuring that no one wife be given preference over another. Imam Qurtubiy, a Maliki great jurist, quoted

48 Ibn Hibbān, Muhammad ad-Dārimī (d. 354 AH), ed. Shu'aib Arnaut, Muassasatur-Risālah, Beirut, 2nd edition, 1414 AH / 1993, vol. 9, p. 465, no. 4157. The ḥadīth was graded sahīh by Albāniy (d. 1420 AH) in Ghāyatul-Murām fi Takhrīji Ahādīth al-Halāl wal Harām, al-Maktabul-Islmāmi, Beirut, (nd.) 3rd edition 1405, vol. 1, p. 146, no. 226.

49 Abu Dāud Sulaiman S. (d. 275 AH), Sunanu Abī Dāud, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut, (nd), vol. 2, p. 272, no. 2241, and Ibn Mājah, M. Y. (d. 273 AH), Sunanu Ibn Mājah, ed. Muhammad Fuad A. dāru Ihyāi Kutubil-Arabiyyah, (nd) vol. 1, p. 628, no. 1952. Albāniy (d. 1420 AH) graded the ḥadīth sahīh (authentic) in his Sahīhu Abi Dāud, Muassasatu Gharas, Kuwait, 1st edition 1423 AH / 2002, vol. 7, p. 11.

the two great scholars of *tafsīr*; al-Hasan and aḍ-Ḍaḥḥāk saying: the Qur'ān chapter 4 verse 3 has abrogated the practice of unrestricted numbers of wife which was popular in the *jāhiliyyah* and early Islamic period and reduced it to four at a time.[50] Imam Qurtubiy further emphasised that the verse 3 of the Qur'ān chapter 4 does not in any way support marrying nine wives.[51]

In Islam, there are restrictions on a man having more than four wives at a time, which existed in traditional earlier Arab society.[52] Among various verses that generate discussion on this topic are verses (4:20-21). The verses are on the interest of a man to replace a wife with another (*istibdāluz-zawjah*) in verses (4:20-21), which is permitted under the condition that man should not withdraw whatever he has given to his present wife:

{وَإِنْ أَرَدْتُمُ اسْتِبْدالَ زَوْجٍ مَكانَ زَوْجٍ وَآتَيْتُمْ إِحْداهُنَّ قِنْطاراً فَلا تَأْخُذُوا مِنْهُ شَيْئاً أَتَأْخُذُونَهُ بُهْتاناً وَإِثْماً مُبِيناً (20) وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضى بَعْضُكُمْ إِلى بَعْضٍ وَأَخَذْنَ مِنْكُمْ مِيثاقاً غَلِيظاً (21)} [سورة النساء (4) : الآيتان 20-21].

> "But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for *mahr*, take not the least bit of it back; would ye take it by slander and a manifest wrong? And how could ye take it when ye have

50 Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 12.

51 Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 17.

52 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.305, al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, al-Ma'unah 'ala Madhab 'Alimil-Madinah, ed. Humaish A. darul-Fikr, Lebanon, 1415 AH / 1995, 2/809, ash-Shirashi, Abu Ishaq, Ibrahim ibn Ali, Al-Muhadhab, ed. Adil A. A. and Ali M. A., darul-Marifah, 1424 AH / 2003, 2/711, An-Nawawi, Yahyah Abu Zakariyah, al-Majmu'u, ed. Muhammad N. M. daru Ihyait-Turathil Arabi, Beirut, 1422 HA / 2001, 18/104, Al-Bahuti, Mansur ibn Yunus, Sharhu Muntahal-Iradat, ed. Abdullahi A. Turki, Muassasatur-Risalah, 1st edtion, 1421 AH / 2000, 5/169.

gone in unto each other and they have taken from you a solemn covenant?" [Q4: 20-21].

Some scholars are of the opinion that the verse no.3 of *sūratun-Nisāi* is not aimed at instructing the conduct of polygyny; it is just a *rukhṣah* (exception or a contingency arrangement).[53] Since this verse was revealed in relation to the matter of taking good care of women and orphan-girls, one must be able to catch and recognise the spirit behind the revelation of this verse i.e. to protect women and to treat them justly. Furthermore, both the commentators emphasised that a man is required to be just, fair and successful in the first marriage as the prerequisite of conducting polygyny. As a logical consequence, if a man fails in doing so, he cannot be permitted to practice polygyny i.e. to marry a second or up to four wives.[54]

The replacement is a solution to the problem of marrying more than four wives as practised before Islam, and the inability to marry more than one wife where there is problem with the existing wife.[55] The verse should not be read in isolation from human behaviour and nature, i.e. disloyalty, loss of beauty, inability to attain sexual satisfaction and financial capability, as well as rights to separation, and the control of Islam over gender relation and sexuality. The above verse is connected to husband rights to separation (*talāq*). It is not unconnected to verse (2:229) where a wife is also granted rights of separation from her husband (*khul'u*): "There is no blame on either of them if she gives something for her freedom." Here, she is also allowed to sacrifice financially for her own liberation. The husband is not supposed to withdraw any given favour in case he seeks a divorce: "It is not lawful for you, (men), to take back any of your gifts (from your wives)", while the wife will have to return what the husband has given her when she is faulty and she initiates separation.[56]

53 Qurtubīy M. A. (d. 671 AH), op. cit. vol. 5, p. 17, Jalalud-Din Al-Muhalliy (d. 864 AH), wa Jalalud-Din As-Suyuti (911 AH), op. cit. p. 81, Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 288.

54 Ibid

55 Ibid

56 Ibid

Cultural influence is present in interpreting a phrase in verse (4:20) which justifies men's replacement of wives, without considering context of the verse 4: 19, and without considering conventional practices of early Muslims. It is an established law that cohabitation with a lady is prohibited unless by *nikāḥ* or possession of hand.[57]

TERMINATION OF *NIKĀḤ*[*TALĀQ*] NATURE AND EFFECTS

Istibdāluz-zawjah simply means "*talāq*" which is termination of *nikāh* after which replacement can take place.[58] Muslim scholars unanimously agreed that the meaning of "*istibdāluz-zawjah*" is "*talāq*".[59] The term for termination of *nikāh* in Islam is "*talāq*". It is known in English as "repudiation". The English definition of "repudiation" is a rejection, a denunciation, a refusal to acknowledge, or a casting off, *but* according to the Sharī'ah, *talāq* is defined as "formal ending to a marriage unilaterally by a husband or by law".[60] It puts an ends to *nikāh* and prohibits all forms of marital relations between the spouses, such as privacy, accompanying her in travel and inheritance.[61] In other words, *talāq* is ". . . the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorised by him to do this, using the word *talāq*, or a derivative or a synonym thereof."[62]In order to analyse the definition of *talāq* (repudiation) in detail as it relates to *istibdāluz-*

57 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.301.

58 Ibid

59 Qurtubīy M. A. (d. 671 AH), op. cit. vol. 5, p. 17, Jalalud-Din Al-Muhalliy (d. 864 AH), wa Jalalud-Din As-Suyuti (911 AH), op. cit. p. 81, Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 288.

(60) Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/227, Ibn al-Hajib, Jamalud-Din, Jamiul-Ummuhat, Beirut, 1419 AH / 1998, p. 282, 287, Ibn Quddamah, Ibn Quddamah, Abu Muhammad, Abdullahi ibn Ahmad, Al-Mughni, ed. Abdullahi A. Turki and Abdulfattah M. Halwu, daru Alamil-Kutub, 4th edeition, 1419 AH / 1999, 10/323.

(61) Al-Kāsāni (587 AH), *Badā'iu As-Sanā'u fi Tartīb Ash-Sharā'i*, dāru Ihyā At-Turāth Al-'Arabi, Beirut, Lebanon, 2nd edition 1419 – 1998, vol.2, p. 284.

62 Ibid

zawjah, following three terms were discussed viz. the valid marriage contract, the husband who pronounces the *talāq*, and the formula used:

Valid Contract of Divorce

Talāq(repudiation) is an effect of a valid marriage contract whereby the duties and rights emanating from the state of marriage are either terminated forthwith in an irrevocable divorce or in the case of a revocable divorce, are terminated after the end of the *'iddah*;

In the contrast, a non-valid marriage cannot end in a proper repudiation but only in annulment, whether the married couple have separated on their own accord, or by court order, and whether the marriage is ended before or after consummation.

The Husband Who Pronounces *Talāq*

On the authority of ḥadīth Abdullah ibn Abbas (RA), repudiation (*talāq*) is the right of the husband[63] on fulfilling certain requirements; i.e. maturity, sanity, and acting of his own free will totally without coercion. Regardless of whether or not he is of legal capacity or has been placed under interdiction (legal sanction) on the grounds of mismanagement or lunacy, he must be aware of his utterances of repudiation. If any of these requirements is missing, then the *talāq*(repudiation) will not be valid.[64]

63 In that *hadīth*, a man (slave) reported to the Messenger of Allāh (SAW) that his master married his female slave to him (the male slave), then the same master decided to separate them. In response, the Messenger of Allāh (SAW) climbed up the platform then said: "O people! Why one of you would married between his own female and male slaves then decide to separate them, meanwhile only one who owns the leg (wife) can validly divorce".
Ibn Mājah (d. 273 AH), *Sunanu ibn Mājah*, Ihyāul-Kutubil Arabiyyah, Faisal Isa al-Bābi al-Alabi, vol. 1, p. 672, no. (2081). Albāni (d. 1420 AH) graded it Hasan (good) *hadīth* in Irwāil-Ghalīl, al-Maktabul-Islāmī, Beirut, 2nd edition, 1405 AH / 1985, vol. 7, p. 108, no. 2041.

64 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.301.

The Formula

The formula to be used by the husband when pronouncing repudiation includes the medium of expression and the grammatical construction. It can be through any medium denoting the termination of the marital relationship, by word of mouth, in writing, or by gesture if he is incapable of either of them.[65]

The words used may be explicit (*ṣarīḥ*) or implicit (*kināyah*). An explicit pronouncement must use the word *talāq*, or a derivative of it, and shall take effect regardless of the intention (*niyyah*), according to all the Sunni schools and the modern laws[66]

The Sunni schools of law allow the formula used in a divorce pronouncement by the husband to be either absolute or unconditional with immediate effect (*munjaz*), or contingent(*mu'allaq*), i.e. subject to a condition in the form of an oath, or assigned to some future event. The word "oath" is used in its broader context here, meaning simply a declaration or promise. In terms of their legal effect, all forms of marriage dissolution are either revocable, (*raj'iy*), or irrevocable, (*bāin*).

Dissolution by Mutual Agreement of the Spouses — *Fidyah/Khul'u*

Other than a divorce unilaterally effected through the husband, a marriage may be dissolved by the wife literally paying her husband for her freedom (*fidyah*), under the Qur'ānic ruling to be found in *sūratul-Baqarah* 2, v. 229, which states:

{الطَّلاقُ مَرَّتانِ فَإِمْساكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسانٍ وَلا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئاً إِلاَّ أَنْ يَخافا أَلاَّ يُقِيما حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلاَّ يُقِيما حُدُودَ اللَّهِ فَلا جُناحَ عَلَيْهِما فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلا تَعْتَدُوها وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولئِكَ هُمُ الظَّالِمُونَ (229)}[سورة البقرة (2) : آية 229].

65 Ibid.
66 Ibid.

> "The divorce is only permissible twice, after that, the parties should either hold together on equitable terms, or separate with kindness. Meanwhile, it is not lawful for you [men] to take back [from your wives] any of your *mahr* which you have given them, except when both fear that they would be unable to keep within the limits ordained by Allāh [e.g. to deal with each other on a fair basis] if you (judges) do indeed fear that they would be unable to keep the limits ordained by Allāh, then there is no sin on either of them if she gives back [the Mahr or a part of it] for her talāq (divorce/freedom). These are the limit ordained by Allāh, so do not transgress them. If any do transgress the limits ordained by Allāh, such persons wrong themselves as well as others"[67]

According to Al-Qadi AbdulWahab, a great learned Maliki jurist, *al-Khul'u* is permitted. It is where a man divorces his wife for consideration made by the wife. In other words, *khul'u* is dissolution/ termination of marriage at the instance/request of the wife. As a result of that, it is an irrevocable divorce according to Maliki School. However, it should be noted that taking ransom by the husband is prohibited where the husband is the cause of divorce / *khul'u* without his wife being faulty.[68]*Talāq* through *fidyah* was further supported by ḥadīth 'Abdullah Ibn 'Abbas (RA) reporting the case of wife of Thābit ibn Qais (RA) who approached the Messenger of Allāh (SAW) and said to him:

> عَنِ ابْنِ عَبَّاسٍ، أَنَّ امْرَأَةَ ثَابِتِ بْنِ قَيْسٍ أَتَتِ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، فَقَالَتْ: يَا رَسُولَ اللَّهِ، ثَابِتُ بْنُ قَيْسٍ، مَا أَعْتِبُ عَلَيْهِ فِي خُلُقٍ وَلاَ دِينٍ، وَلَكِنِّي أَكْرَهُ الكُفْرَ فِي الإِسْلاَمِ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ((أَتَرُدِّينَ عَلَيْهِ حَدِيقَتَهُ؟)) قَالَتْ: نَعَمْ، قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ((اقْبَلِ

67. [Q2: 220]

68 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.328-330, An-Nawawi, Yahyah Abu Zakariyah, al-Majmu'u, ed. Muhammad N. M. daru Ihyait-Turathil Arabi, Beirut, 1422 HA / 2001, 18/104, Ibn Uthaimin, Muhammad ibn Salihu, Ash-Sharhul Mumti', daru Ibn Jawzi, 3rd edition, 1433 AH, 12/455-463.

> الحَدِيقَةَ وَطَلِّقْهَا تَطْلِيقَةً)). قَالَ أَبُو عَبْدِ اللَّهِ: ((لاَ يُتَابَعُ فِيهِ عَنْ ابْنِ عَبَّاسٍ))، [البخاري 46/7، برقم:5273].

> From 'Abdullah Ibn 'Abbas (RA) said that the wife of Thābit ibn Qais (RA) approached the Messenger of Allāh (SAW) and said to him: "O Messenger of Allāh! I observe no taint of moral and religious corruption in Thābit ibn Qais. Nevertheless, I reject act of Kufr after being a Muslimah, (indicating her intention to discontinue their nikāh). Having considered her plea, the Messenger of Allāh (SAW) asked her whether she is ready to pay back Thābit's garden which was given to her as bridge gift, which she did. And therefore, the Messenger instructed Thābit to divorce her once and he complied accordingly".[69]

For further clarification, we find it particularly noteworthy to differentiate between *fidyah* and *khul'u*.[70] In Nigeria, a Muslim wife always gets release from an unhappy marriage if she can provide suitable financial compensation. Sometimes a woman will be in a position to provide such compensation from her own resources, however, in most cases, the compensation is paid by her guardian or her family.[71] It is to be noted that the vast majority of divorces in Northern Nigeria are at the instance of the wife out of frustration by the husband.

Above was the complete *talāq* which constitutes beginning of the process that a man who intends to replace a wife must take. Our findings reveal that, in many cases, there was no *talāq* i.e. valid

69 Bukhāri M. I., Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, 1422, vol. 7 p. 46, no. 5273.

70The rule in *sūratul-Baqarah* 2, verse 229 and *Sūratun-Nisāi* 4, Verse 19 is *fidyah* while that of *Sūratun-Nisāi* 4, Verse 20 is *khul'u*. In *fidyah* the wife is guilty of violation of marital duties and she is obliged to pay ransom while she is innocent in *khul'u*, hence, husband is barred from any demand.

71 Qurtubīy M. A. (d. 671 AH), op. cit. vol. 5, p. 17, Jalalud-Din Al-Muhalliy (d. 864 AH), wa Jalalud-Din As-Suyuti (911 AH), op. cit. p. 81, Ibn Ashur; Muhammad ibn Tahir (d. 1393 AH), op. cit. vol. 2, p. 4, p. 288.

disengagement of the existing *nikāh* before husbands embarked on *wāre*. Having discussed the procedure of valid *talāq*, next is whether a man can marry another wife in place of the divorced one immediately or there are other conditions. It is therefore important here to discuss types of divorce and their effects.

Types and Effects of Divorce [Revocable and Irrevocable]

Ruling on marrying a fifth wife during the *'iddah* following divorce of the fourth wife. If a man has four wives and he divorces one of them, is it permissible for him to marry other woman during the *'iddah* period of the divorced wife? What is the *dalīl* (authority)?If the answer is no; i.e. it is not permissible for him to marry another woman during the *'iddah* period, will that last marriage be valid and what should be done to rectify the situation according to the Qur'ān and Sunnah?

To answer the question, it is pertinent to discuss types of *talāq* (divorce) in addition to its above discussed concept. According to Q2: 229, a husband owns total number of three *talāq*. The first and second *talāq* are known as revocable divorce (*talāq raji'y*) while the third is known as irrevocable divorce (*talāq bāin*).[72]Qur'an further prescribes a three *qurū* (three purification or menstruation) known as *'iddah* (mandatory waiting period) for a divorced Muslim lady.[73] During the *'iddah* from revocable divorce, the divorced woman remains legal wife to her husband until the passage of *'iddah* period. After that, she becomes a free and unmarried woman. Whether to remarry or not becomes her absolute choice. If she decides to remarry, her previous husband can equally join other proposing men with a fresh proposal as a suitor.[74] However, unlike revocable divorce, in irrevocable divorce, the previous husband is barred from remarrying her until after she had

72 Al-Quduri Abul-Hasan, Ahmad ibn Muhammad, Mukhtasarul-Quduri, ed. Kamil M. M. Uwaidah, darul-Kutubil Ilmiyyah, Beirut, 1418 AH / 1997, p. 159. Ibn al-Hajib, Jamalud-Din, Jamiul-Ummuhat, Beirut, 1419 AH / 1998, p. 303-305.

73 Qur'an2:228

74 Al-Kāsāni (587 AH), *Badā'iu As-Sanā'u fi Tartīb Ash-Sharā'*i, dāru Ihyā At-Turāth Al-'Arabi, Beirut, Lebanon, 2nd edition 1419 – 1998, vol.2, p. 283, 291.

married another husband and the marriage was consummated.[75] This injunction takes its authority from *sūratul-Baqarah* 2 v. 230 and the ḥadīth 'Āishah (RA) reporting the decided case of wife of Rifā'at (RA).[76]The fact of the ḥadīth reads as follows:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا: أَنَّ رِفَاعَةَ القُرَظِيَّ طَلَّقَ امْرَأَتَهُ فَبَتَّ طَلاَقَهَا، فَتَزَوَّجَهَا بَعْدَهُ عَبْدُ الرَّحْمَنِ بْنُ الزَّبِيرِ، فَجَاءَتِ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ: يَا رَسُولَ اللَّهِ، إِنَّهَا كَانَتْ عِنْدَ رِفَاعَةَ فَطَلَّقَهَا آخِرَ ثَلاَثِ تَطْلِيقَاتٍ، فَتَزَوَّجَهَا بَعْدَهُ عَبْدُ الرَّحْمَنِ بْنُ الزَّبِيرِ، وَإِنَّهُ وَاللَّهِ مَا مَعَهُ يَا رَسُولَ اللَّهِ إِلَّا مِثْلُ هَذِهِ الهُدْبَةِ، لِهُدْبَةٍ أَخَذَتْهَا مِنْ جِلْبَابِهَا، قَالَ: وَأَبُو بَكْرٍ جَالِسٌ عِنْدَ النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، وَابْنُ سَعِيدِ بْنِ العَاصِ جَالِسٌ بِبَابِ الحُجْرَةِ لِيُؤْذَنَ لَهُ، فَطَفِقَ خَالِدٌ يُنَادِي أَبَا بَكْرٍ: يَا أَبَا بَكْرٍ، أَلاَ تَزْجُرُ هَذِهِ عَمَّا تَجْهَرُ بِهِ عِنْدَ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، وَمَا يَزِيدُ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ عَلَى التَّبَسُّمِ، ثُمَّ قَالَ: ((لَعَلَّكِ تُرِيدِينَ أَنْ تَرْجِعِي إِلَى رِفَاعَةَ، لاَ، حَتَّى تَذُوقِي عُسَيْلَتَهُ، وَيَذُوقَ عُسَيْلَتَكِ))، [البخاري 22/8، برقم: 6084، ومسلم 1055/2، برقم: 1433].

From 'Aishah (RA) said that Rifa'ah al-Qurazi (RA) divorced his wife irrevocably. Then she remarried to AbdurRahman ibn Az-Zubayr (RA). Thereafter she came to the Apostle of Allah (SAW), while Abu Bakr (RA) was present, and she said: O Messenger of Allah (SAW)! She was under the custody (wife) of Rifa'ah, thus he divorced her the last divorce. Thereafter, AbdurRahman ibn Az-Zubayr (RA) married her, but by Allah O Messenger of Allah (SAW) AbdurRahman only has something like this fringe of garment. She showed the fringe of her veil by way of illustration. (i.e. his sexual organ is minute like a string). Khalid ibn Sa'id ibn Al-'As (RA) who was standing at the door, awaiting permission to enter, heard her statement and said: O Abu Bakr! Why do you not stop this lady from

75 Al-Quduri Abul-Hasan, Ahmad ibn Muhammad, Mukhtasarul-Quduri, ed. Kamil M. M. Uwaidah, darul-Kutubil Ilmiyyah, Beirut, 1418 AH / 1997, p. 159.

76 Bukhāri M. I., Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, 1422, vol. 3 p. 168, no. 2639 and Muslim ibn Hajar, Sahīhu Muslim, ed. Muhammad Fuda Abdulbaqi, dāru Ihyāit-Turāthi al-Arabiy, Beirut, (nd), vol.2 p. 1055 no. 1433.

> saying such things openly before the Messenger of Allah (SAW). No. by Allah, the Messenger of Allah (SAW) did nothing but smiled. Then he said to the lady: **"Perhaps you want to remarry/return to Rifa'ah? That is impossible unless you enjoy his 'uzaylah and he enjoys your 'uzaylah"**. (i.e. AbdurRahman must have consummated his marriage with you by having complete sexual intercourse with you).[77]

Having understood the revocable and irrevocable divorces, we go further to say, if the divorce that has been issued to the fourth wife is a revocable divorce – i.e., it is the first or second *talāq* – then the scholars have unanimously agreed that a woman who has been given a revocable divorce is still be considered a wife until her *'iddah* is over.[78]If it is proven that she is still a legal wife, then it should be noted that, the scholars agreed that it is not permissible for a free man to have more than four wives at one time, on the authority of the above quoted ḥadīth of Ghaylān ibn Salamah at-Thaqafi and al-Hāris ibn Qais al-Asadi.[79]

It is clear from the above that, it is not permissible for a Muslim to marry another lady during the *'iddah* of a wife who has been given a revocable divorce, because by doing so he will have five wives at the same time, and the *Sunni* schools are agreed, in word and deed (principle), that it is not permissible for a man to have more than four wives at one time, except for the Messenger of Allāh (SAW).[80]Shaykhul-Islam Ibn Taymiyah opined that the great Tābi'iy

77 Bukhāri M. I., Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, 1422, vol. 8 p. 22, no. 6084, and Muslim ibn Hajar, Sahīhu Muslim, ed. Muhammad Fuda Abdulbaqi, dāru Ihyāit-Turāthi al-Arabiy, Beirut, (nd), vol. 2 p. 1055 no. 1433.

78 Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/193, Ibn Quddamah, Al-Mughni, 7/104.

79 Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 17.

80(Q33:50).

'Ubaydah s-Salmāni said: "The companions of Muhammad (SAW) did not agree on anything as much as they agreed that a fifth lady cannot be married during the *'iddah* of the fourth, and a woman cannot be taken as a co-wife with her sister." Whoever wants to have more than four wives is going against the Book of Allāh and the Sunnah of His Messenger Muhammad (SAW), and is going against Ahlus-Sunnah wa'l-Jamā'ah.[81]

PRACTICE OF *"WĀRE"*, *"AUREN MUSANYA"* OR *"AUREN DANDANO"*

It is difficult to deny cultural and linguistic influences on the views and practices of some Muslims concerning *istibdāluz-zawjah*. This influence, however, is not restricted to traditional Arabian culture, Muslim regional cultures and adopted foreign cultures may also influence this culture of *"wāre"*,*"auren musanya"* or *"auren dandano"*. It obvious that the Islamic legislation, on *istibdāluz-zawjah*, in Q4:20-21, seems to be practiced incorrectly among some Muslims ethnic tribes in some parts of Nigeria. Some Nigerian Muslims understand *istibdāluz-zawjah* to mean "retirement of a wife to replace her with another wife". To a large extent such understanding is correct in our opinion. However, proper checking and explanation of this practice is necessary. Such practice is known as *"wāre"*,*"auren musanya"* or *"auren dandano"*. Eleyinla,[82]observes that, *"wāre"* is a Hausa/Fulani word. It is commonly used for the unpopular practice of replacement of an old wife with another wife (*istibdāluz-zawjah*). According to him, when a Muslim with four wives intends to marry another wife, he retires one, usually the oldest one among his four wives. Surprisingly, Ariyibi[83] reveals, the traditional practice allows the retired wife to remain in her matrimonial home with the man who has retired her.

81 al-Fatāwa al-Kubrah (4/154), Fatāwa al-Lajnah ad-Dā'imah, al-Fatāwa al-Jāmi'ah li'l-Mar'ah al-Muslimah, 2/641.

82 Eleyinla, Ustaz Ibrahim A. is a Muslim scholar, a PhD holder and senior lecturer in the Department of Mass Communication, University of Ilorin, Ilorin, Nigeria, interviewed 13th April, 2019.

83 Ariyib, Ustaz Ishaq is a Muslim scholar, a secondary school principal and Alangwa Onire, interviewed 13th April, 2019.

She lives and participates in all domestic works like a full legal wife. Akorede[84] adds that some see nothing wrong in cohabiting with the retired wife only that maintenance is not mandatory. Shege[85] confirms the assertion saying that an outsider may think the retired wife remains a legal wife. By implication, the practice leads to the abrogated practice of marrying more than four wives a time.

There is no specific modus operandi for the practice of "*wāre*","*auren musanya*" or "*auren dandano*". Often times, it takes simple internal arrangement between the husband and the wife. The husband informs his wife of his intention to marry additional wife and that she is going to step aside with no *talāq ṣarīḥ* (explicit divorce). She would be rather told that the home is hers and that nobody is ejecting her. It is immaterial whether they were living in the same home or not.

In the "*wāre*","*auren musanya*" or "*auren dandano*"practice, *'iddatut-talāq* is usually neglected by the retired wife. Surprisingly, if the man who has retired her dies, she observes *'iddatul-wafāt* (prescribed waiting period after the death of a valid husband). Also in "*wāre*", at times, the retired wife and the man who retired her inherit each other.[86]

From the above mentioned practices, it could be inferred that, *wāre* seems to become a semi-*nikāh/talāq*. This constitutes a serious implication under Islamic family law.

Another form of *istibdāluz-zawjah* in our opinion, is where the wife is suffering from illness whose effect can either be serious or not, also the wife may be suffering from disease of a particular kind of illness caused by bacteria or an infection or suffering from infertility. In any of

84 Akorede, Ustaz Abdulgany Abdulhamid Agbarigidoma is a Muslim scholar, a PhD holder and senior lecturer in the Department of Arabic, Al-Hikmah University, Ilorin, Ilorin, Nigeria, interviewed 13th April, 2019.

85 Shege, Ustaz Ishaq Ibrahim is a Muslim scholar and the principal of Muhyiddin College of Arabic and Islamic Studies, Kulende, Ilorin, interviewed 13th April, 2019.

86Ibid.

these cases, a husband usually resorts to termination of the *nikāh* (marriage) and replace the barren wife with another wife. Wife also usually seeks for *khul'u* so that she would be able to try another man. In this case, *istibdāluz-zawjah* does not necessarily lead to marrying more than four wives.

Our experience further reveals that another circumstance of *istibdāluz-zawjah* is the condition of couple's life; e.g. where a spouse works in a distant place and husband cannot support more than one wife. Husband/wife usually resorts to *talāq/khul'u* so that he/she would be able to marry another partner where he/she lives. In this case, marrying more than four wives is not generally an issue.

Sayuti[87]opines that social-cultural factor is another reason for *istibdāluz-zawjah* by some people. Some men develop impression that they cannot hold a wife more than certain period of time, they have to replace wife with another wife like consumer goods. Although this may not necessitate marrying more than four wives, notwithstanding, there is gross abuse of right of *talāq* which was *ab initio* vehemently discouraged by the Lawgiver.[88]

Tanko[89] and Hauwa[90] inform that "*Auren Dandano*" is another form of *istibdāluz-zawjah*. According to them, "*Auren Dandano*" another Hausa/Fulani word, is where a man divorces his wife when, but not limited to, she becomes pregnant from him. Supporting the argument, Kambari[91] says the reason is that the husband only wants her for sex. This practice is also a gross abuse of right of *talāq*. It contradicts the

87 Sayuti, Ustaz Abdullahi is a Muslim scholar and a staff, Al-Hikmah University, Ilorin, interviewed 6th June, 2019.

88 Reference

89 Tanko, Muhammad Adamu is a Muslim scholar and lecturer in the Department of Islamic Studies, Nsarawa State University, Keffi (NSUK), interviewed 10th June, 2019.

90 Hauwa Mai Nunu (Kindirimo) is a married Agwai (Fulani) woman. She sells Kindirimo in Keffi, Nsarawa State, interviewed 10th June, 2019.

91 Kambari Mualim is a Muslim scholar and lecturer in the Department of Islamic Studies, Nsarawa State University, Keffi (NSUK), interviewed 10th June, 2019.

objective of Sharī'ah which says *nikāh* should be a permanent contract and productive. Olugbon[92] opines that ignorance as well as misinterpretation of *sūratun-Nisāi*, is responsible for the inconsistent practice.[93]

Legal Implication of "*Wāre*", "*Auren Musanya*" or "*Auren Dandano*"

Among major implications of the practice of "*wāre*", "*auren musanya*" or "*auren dandano*" is that it goes contrary to the Islamic objective of *nikāh* to be permanent, hence, the Lawgiver calls it "solemn covenant".[94]It should therefore be considered as breach of such solemn covenant if it was done without legally admissible justification fulfilling other requisite conditions.

It was discovered that the practice of "*wāre*", "*auren musanya*" or "*auren dandano*" involves *talāqghayru ṣaḥīḥ* (improper disengagement of the existing *nikāh*). Also, the retired wife usually neglects observation of prescribed *'iddatut-talāq* while the husband marries another wife. Hence, such practice is capable of leading to the prohibited marrying more than four wives at a time.

Further, the legal implication of marrying another lady during the waiting period of the fourth revocable divorce is that, the last marriage contract is invalid, hence, the husband must leave her until the *'iddah* of the divorced wife is over.[95] If he has consummated the marriage with the fifth lady, then he has to give her the *mahr* that is given to ladies of her social standing (*mahr mithliy*). The fifth lady has to

92 Olugbon, Murtadho Abdulraheem is a Muslim scholar and the principal of Imam Sahban College of Arabic and Islamic Studies, Idi-Orombo, Ilorin, interviewed 13th April, 2019.

93Qur'ān chapter 4 verse 20

94 Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 13, p. 272.

95Ibid

observe special *'iddah* known as *istibrāu*.[96] If after that, the man wishes to marry her, he must make a fresh marriage contract with her, meeting all the conditions prescribed in Sharī'ah for a marriage contract.[97]

On the contrary, if divorce of the fourth wife is an irrevocable divorce i.e., a third divorce (*talāq bāinu*) then the opinions of scholarly differs as to whether it is permissible to marry a fifth lady during the *'iddah* of the fourth wife following a third *talāq*.[98] The basis of their current argument is whether a lady in the irrevocable divorce is wife or not. The Hanafis and Hambalis opine that she remains a legal wife, hence it is not allowed for him to marry fifth lady during the fourth wife's (divorcee)*'iddah*.[99] Shaykh 'Abdul-'Aziz ibn Baz (RA) supported this opinion.[100] On this basis, the ruling is the same as that described above in the case of a revocable divorce. When the *'iddah* of the lady who has been divorced for a third time comes to an end, it is then permissible for him to make a marriage contract with her (the fifth lady).[101]

96Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), AT-Talqin fil-Fiqh Al-Maliki, ed. Abu Uwais Muhammad At-Tatwani, darul-Kutubi Al-Ilmiyyah, 1st edition, 1425/2004, p. 112, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), Al-Qawaninu Al-Fiqhiyyah (nd), p. 130.

97Ibid.

98Ibid.

99 Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/193, Ibn Sas, Jalalud-Din Abdullah, 'Iqdul-Jawairi Thaminah fi Madhahibi 'Alimil-Madinah, darul-Gharbil Islami, 1423 AH / 2003, 2/412-413, al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.303, Ibn Quddamah, Abu Muhammad, Abdullahi ibn Ahmad, Al-Mughni, ed. Abdullahi A. Turki and Adbulfattah M. Hulw, daru Alimil-Kutubi, 5th edition, 1426 AH / 2005, 10/547, 553-555, al-Fatuhi, Taqiyud-Din, Muhammad ibn Ahmad, Muntahal-Iradat, ed. Abdullahi A. Turki, Lebanon, 1st edition, 1421 AH / 2000, 2/179.

100 Kitaab Fataawa al-Talaaq by Shaykh Ibn Baaz, 1/278.

101 Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/193, al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.299, 348, Ibn Quddamah, Al-Mughni, 7/104.

Conversely, the Malikis and Shafi'is hold that it is allowed for a man to marry another wife during the *'iddah* of his irrevocably divorced fourth wife. According to them, that does not amount to fifth wife. They argue that, any prohibited *nikāh* on the ground of combination becomes lawful when the cause disappears.[102] Ibn Quddamah, an Hambali jurist, favour this opinion, saying: a lady in an irrevocable divorce is not a wife,[(103)] hence, unlawful combination does not exist.

It is unanimously agreed that a man with four wives is prohibited from marrying another wife unless one of them dies or is divorced and completes her *'iddah*.[104] Equally, it should be noted that a woman in her *'iddah* is prohibited from marrying another man because she remains legal wife.[105]Once the *nikāh* ceases, all the legal effects of valid *nikāh* cease as well. Hence, matrimonial relation, conjunction, privacy and cohabitation become *harām* between the retired wife and the man who has retired her. However, this is not the case in practice of "*wāre*", "*auren musanya*" or "*auren dandano*" where the retired wife continues to live with who retired her like a full legal wife. This is considered inconsistent marital conjunction / cohabitation and lead to *zina*.

102 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, al-Ma'unah 'ala Madhab 'Alimil-Madinah, ed. Humaish A. darul-Fikr, Lebanon, 1415 AH / 1995, 2/810, ash-Shirashi, Abu Ishaq, Ibrahim ibn Ali, Al-Muhadhab, ed. Adil A. A. and Ali M. A., darul-Marifah, 1424 AH / 2003, 2/711, An-Nawawi, Yahyah Abu Zakariyah, al-Majmu'u, ed. Muhammad N. M. daru Ihyait-Turathil Arabi, Beirut, 1422 HA / 2001, 18/291-293.

103 Ibn Quddamah, Abu Muhammad, Abdullahi ibn Ahmad, Al-Mughni, ed. Abdullahi A. Turki and Abdulfattah M. Halwu, daru Alamil-Kutub, 4th edeition, 1419 AH / 1999, 10/555.

104 Al-Marghinani, Bahahud-Din Ali ibn Abi Bakr, Al-Hidayah sharhu Bidayatil-Mubtadah, Al-Maktabatul Islamiyyah, (nd) 1/193, al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p. 309, Ibn Sas, Jalalud-Din Abdullah, 'Iqdul-Jawairi Thaminah fi Madhahibi 'Alimil-Madinah, darul-Gharbil Islami, 1423 AH / 2003, 2/412-413, 543, Ibn Quddamah, Al-Mughni, 7/104,

105 al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, At-Telqin fil-Fiqhl Maliki, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.303, 306, 309.

Another serious implication is that the subsequent (fifth) *nikāh* is irregular and invalid. Hence, the children would be considered illegitimate on the authority of ḥadīth 'Āishah which dictates that child only legally follows the bed, i.e. the husband. The ḥadīth reads as follows:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، قَالَتْ: كَانَ عُتْبَةُ عَهِدَ إِلَى أَخِيهِ سَعْدٍ: أَنَّ ابْنَ وَلِيدَةِ زَمْعَةَ مِنِّي، فَاقْبِضْهُ إِلَيْكَ، فَلَمَّا كَانَ عَامَ الفَتْحِ أَخَذَهُ سَعْدٌ، فَقَالَ: ابْنُ أَخِي عَهِدَ إِلَيَّ فِيهِ، فَقَامَ عَبْدُ بْنُ زَمْعَةَ، فَقَالَ: أَخِي وَابْنُ وَلِيدَةِ أَبِي، وُلِدَ عَلَى فِرَاشِهِ، فَتَسَاوَقَا إِلَى النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ سَعْدٌ: يَا رَسُولَ اللَّهِ، ابْنُ أَخِي، قَدْ كَانَ عَهِدَ إِلَيَّ فِيهِ، فَقَالَ عَبْدُ بْنُ زَمْعَةَ: أَخِي وَابْنُ وَلِيدَةِ أَبِي، وُلِدَ عَلَى فِرَاشِهِ، فَقَالَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ((هُوَ لَكَ يَا عَبْدُ بْنَ زَمْعَةَ، الوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الحَجَرُ)) ثُمَّ قَالَ لِسَوْدَةَ بِنْتِ زَمْعَةَ: ((احْتَجِبِي مِنْهُ)) لِمَا رَأَى مِنْ شَبَهِهِ بِعُتْبَةَ، فَمَا رَآهَا حَتَّى لَقِيَ اللَّهَ. [البخاري 153/8، برقم: 6749، ومسلم 1080/2، برقم: 1457].

From 'Āishah (RA) said: 'Utbah, in his will, has instructed his brother; Sa'd, that the son of female slave of Zam'ah belongs to him ('Utbah), therefore take to your custody. When it was the year of opening of Makkah (8th AH), Sa'd claimed the boy and said: he is son of my brother who has instructed me to look after him. Therein, 'Abd ibn Zam'ah stood up and said: he (the boy) is my brother he is a son of female slave of my father, born on his bed. So, they dragged themselves to the Prophet (SAW). Sa'd O Messenger of Allah (SAW)! He is son of my brother, and he has instructed me to look after him. 'Abd ibn Zam'ah made his counter claim that: he is his brother he is son of my father's female slave, born on his bed. Thereafter, the Prophet (SAW) held in favour of 'Abd ibn Zam'ah and said: "The boy belongs to you O 'Abd ibn Zam'ah, because legitimacy of child follows the bed (i.e. the owner of the bed, who is husband, owns the child) while prostitute is to be stoned". The Prophet (SAW) however said to Sawdah bint Zam'ah: "veil or hide yourself from him", because of

> the child biological resemblance to 'Utbah. The boy never saw Sawdah until he died.[106]

The inconsistent *tawāruth* (inheriting each other) by the retired woman and the man who retired her is another implication.*Asbābut-Tawāruth*(bases of inheritance) under Islamic law aremajorly three viz. *naṣab* (kinship), *nikāh* (valid marriage) and *walāu* (special religious affiliation).[107]In *"wāre"*, *"auren musanya"* or *"auren dandano"*, none of the bases is available, hence, no entitlement to *mīrāth* (inheritance).

Replacement after Death of a Wife

In the case of the death of the fourth wife, it is permissible for the husband to get married after she dies, because the marriage is no longer considered to remain in effect in this case.

CONCLUSION

The research reveals that, although, Q4:20 pronounces *istibdāluz-zawjah* (replacement of a wife with another wife), the verse does not imply retirement of a wife otherwise known as *"wāre"*, *"auren musanya"* or *"auren dandano"*as it is been practiced by some Muslims in the study area. Rather, the verse actually means nothing more than *talāq* (divorce) in Islam. A husband can divorce his only wife and marry another one. Before a Muslim can validly retire a wife and replace her with another wife certain conditions must be fulfilled such as: the first *nikāh* must be validly discharged either by death or by divorce or *khul'u* and that the widow or divorced wife must have observed her prescribed waiting period (*'iddah*). This brings a valid end to the *nikāh* and each party is free to remarry. It was however, discovered that the practice of *"wāre"*, *"auren musanya"* or *"auren dandano"* involves

106 Bukhāri M. I., Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, 1422, vol. 8 p. 153, no. 6749 and Muslim ibn Hajar, Sahīhu Muslim, ed. Muhammad Fuda Abdulbaqi, dāru Ihyāit-Turāthi al-Arabiy, Beirut, (nd), vol. 2 p. 1080 no. 1457.

107Al-Ghamidiy, Nasir ibn Muhammad, ed. Abdullahi ibn Sulayman Al-Muniu, daru Taybah Al-Khadra, Makkah Al-Mukarramah, 2nd edition (1421), p. 55.

talāqghayru ṣaḥīḥ (improper disengagement of the existing *nikāh*). Also *'iddatut-talāq*is oftenneglected. The retired wife remains without observance of *'iddatut-talāq* while the husband remarries as well before *'iddatut- talāq.*

The study further reveals that the practice of *"wāre"*, *"auren musanya"* or *"auren dandano"* (*istibdāluz-zawjah*) by some Muslims in Nigeria is inconsistent with the Islamic injunction.*"Wāre"*,*"auren musanya"* or *"auren dandano"* is a tactic run-away from the prohibition of marrying more than four wives. Thus it is considered to be abuse of *ta'adduduz-zawjāt*.

The study therefore recommends that the Muslim jurists, Qur'ānic commentators, *quḍāt* (judges), Muslim lawyers, Departments of Islamic Law, various emirates and other relevant individuals and institutions should educate Muslim communities on the proper meaning, practice and application of *istibdāluz-zawjah* under Islamic law.