

# [It her husband only where the marriage is](https://assignbuster.com/it-her-husband-only-where-the-marriage-is/)

It is interesting to note that in maintenance, the wife is preferred even over the young children because wife is considered to be the source or root (asl) and a child is the offspring or a branch (fara). Wife’s right of maintenance is regulated by Muslim personal law and also by the statutory provisions of the Criminal Procedure Code, 1973 (Sections 125-128).

#### Conditions for the Wife’s Right of Maintenance:

It is implied in every contract of marriage that husband would maintain his wife throughout her life.

Wife’s right to claim maintenance from her husband is an independent right. This right does not depend on an separate agreement for maintenance. The husband is bound to maintain her even if there is no agreement. The wife’s right exists whether she is Muslim or a non-Muslim, rich or poor, of sound health or invalid, young or old. However, the wife’s right to maintenance is subject to following conditions: (1) Under Muslim law, the wife is entitled to maintenance from her husband only where the marriage is valid (sahih). If the marriage is void (batil) or irregular (fasid), the husband is under no obligation to maintain the wife. However, according to Tyabji, where the marriage is irregular merely because of the absence of witnesses, the wife is entitled to claim maintenance. A Muta marriage is also valid under Shia law.

But the wife is not entitled to maintenance under Muslim personal law. However, since Muta-marriage is recognised as a valid marriage, it had been held that, a Muta-wife may claim maintenance from her husband under Section 488 of the Criminal Procedure Code, 1908. (2) The husband’s duty to maintain commences only from the date when the wife attains puberty (fifteen years) and not before that.

Where a wife is too young for sexual intercourse and lives with her parents, she has no right to claim maintenance. (3) Although a Muslim wife’s right to be maintained by her husband is an absolute right yet, she must be faithful and obedient to him in respect of all the matrimonial affairs. In other words, the right to be maintained by husband is subject to wife’s corresponding obligation to be faithful and obedient to her husband. Section 125(4) of the Criminal Procedure Code, 1973 provides that no wife shall be entitled to receive any maintenance from her husband if she is living in adultery.

If the wife herself does not discharge her own matrimonial duties, she has no right to claim maintenance from her husband. For example, if she does not allow her society to the husband and refuses cohabitation without any excuse, she is not entitled to maintenance. Similarly, if she refuses to obey the reasonable orders of the husband or lives separately without any reasonable justification, her right of maintenance against the husband is lost. The simple rule is that a Muslim wife cannot claim maintenance from the husband if her own conduct is violative of her matrimonial obligations. What conduct is to be regarded as justified and what is to be regarded as unjustified, is determined by the courts on the basis of the facts and circumstances in each case. (4) If the wife’s conduct is justified in the eyes of law, the husband is bound to maintain her, although for some reasons, he himself may not be able to exercise his matrimonial rights over his wife.

In such circumstances; the wife would not lose her right of maintenance. According to Tyabji, a wife would not lose her right to maintenance in the following cases: (a) Where she refuses access to her husband on some lawful ground, or (b) Where the marriage cannot be consummated owing to (i) the husband’s minority; or (ii) due to her absence from him with his permission, or (iii) because of her illness, or (iv) due to malformation (defect) in wife’s organs. A wife, whose marriage has not been consummated, may lawfully leave the husband’s house or may refuse cohabitation to him if her Prompt Dower is not paid by the husband on demand.

As non-payment of the Prompt Dower is a lawful ground for living separately or refusing her society to the husband, her right of maintenance is not lost and the husband is bound to maintain her. Similarly, where a wife lives separately because of the cruel behaviour of her husband, she is entitled to be maintained by him. One of the basic obligations of a wife is to allow the husband to cohabit with her. Her refusal to give her company to the husband without any reasonable justification disentitles her from her right of maintenance. But, if the consummation is not possible due to wife’s own ill- health or old age or faulty organs of the wife, she is not guilty of transgressing her matrimonial obligations towards the husband and may lawfully claim maintenance from the husband. In Itwari v.

Asghari, the Allahabad High Court observed that although under Muslim law a limited polygamy is allowed but a second marriage by a husband is a ‘ continuing wrong’ against the first wife. Therefore, a Muslim wife whose husband has married a second wife is justified in living separately and claiming maintenance. Similarly, it has been held that a Muslim wife has a just ground for refusal to live separately and claim maintenance if the husband keeps mistress.