

An Examination of Procedural Law in Marital Disputes under Maliki Jurisprudence in Kadhis Courts in Kwara State of Nigeria

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Abstract

Procedural law is a vital aspect of Islamic legal system. This paper seeks to examine the issue concerning to the effect of procedural law on marital disputes under the Maliki jurisprudence in Kadhis Courts in Kwara State of Nigeria. Maliki jurisprudence is the statutorily recognized jurisprudence of the people of Nigeria. Kadhis Courts are known as Sharia or Area Courts in Nigeria. Procedural law means the laid down rules and regulations to be used in an action in civil judicial proceedings. Procedural law for our purpose is as it affects marital disputes and marital rights in which both parties belong to Maliki jurisprudence. This article examines procedural law in marital disputes from Maliki school of thought perspectives. The article uses of doctrinal approach by using recently decided case from Kwara State of Nigeria to examine the position of Maliki jurisprudence. The paper evaluates procedural law in Marital Disputes under Maliki jurisprudence in the light of contemporary era expectation.

Keywords: Maliki Jurisprudence; Mutual Rights; Marital Disputes; Kadhis Courts; Kwara State.

Introduction

Islamic Jurisprudence recommends guidelines on marital relationship concerning the social and legal consequences of a marriage contract that has been properly consummated. The legal consequences of a valid marriage under Islamic jurisprudence is the fact that the wife enjoys the right to maintenance and her prompt portion of the bride price.¹ Besides, sexual relationship becomes legal and the children of the union are seen as legitimate. The husband has marital power and privileges with his status as the head of the household. The woman enjoys her basic identity: such as the use of her father's name, her religious status or school of jurisprudence and her legal status or personality.² Besides, the mutual rights of inheritance are permitted if the couples are Muslims. After the death of the husband or divorce, the wife enjoys the right to the deferred portion, if any, of the bride price, and may not remarry before the observation of the legal waiting period.³ The moral norms of marital responsibilities of the husband and wife relationship are divine guided. This is to promote peace and tranquility, a union of mutual affection and empathy. The husband is expected to treat the wife with mutual respect tolerant, and be patient in marital matters.⁴ The husband must make sure that the wife is free from domestic hardship and maintain a cordial relationship with the wife.⁵ The wife enjoys vital position in marital matters, but the husband has an overwhelming privileges over the wife. ⁶ *Maliki* jurisprudence supports their position on the matter with textual verses from the Quran.

The Quran suggests that the virtuous a wife is expected to be sincerely willing to comply with the instructions of the head of the family.⁷ This paper discusses mutual rights in marital relationship under Islamic law. It also explains lineage and protection of children in marriage and assesses marital disputes under Islamic law. The paper highlights on the position of *Maliki* jurisprudence on marital matters, with the aid of a recently decided case law from Kwara State of Nigeria. The article explains access to justice, significance of administration of justice, and administration of justice concerning Muslim personal matters. Finally, the discourse evaluates marital disputes under Maliki jurisprudence in the light of the contemporary era expectations.

¹ Al-Mutairi, M. R H. A Study of the wife's rights in Islamic Fiqh. PhD Thesis, Birmingham, University of Birmingham, 2004, pp.180-195.

² Ibid.

³ Ibid.

⁴ Quran 30:21 and Quran 2:184.

⁵ Quran 2:232 and Quran 4:19

⁶ Quran 30:21; Quran 2:184; 2:232; and Quran 4:19

⁷ El-Alami, D. S. The Marriage Contract in Shariah and the Ahwal Shakhsiyyah Laws of Egypt and Morocco: A Comparative Study. Ph.D. Thesis, Faculty of Arts, University of Glasgow, March, 1990, p, 173-198.

Marital Mutual Rights Under Islamic Jurisprudence

Mutual rights are classified under Islamic jurisprudence. The first type of mutual rights is the solemnization of the couple. By extension, mutual gratification, in this regard is a basic human behavior that happens on a legitimate basis.⁸ This is as it relates to vital goals for which marital union is ordained, to provide reproduction, and preservation of the children of the marriage. *Maliki* jurisprudence explains that the physical union is a right or a duty entrusted to the husband and wife. *Maliki* jurisprudence argues that the physical union is the right of husband and wife and each party may request this right and constrain the other by law⁹ The position of *Maliki* jurisprudence is that the husband is allowed to have intercourse with the wife at any time, except under the following conditions: menstruation, childbirth or illness.¹⁰ *Maliki* agrees that the husband has exclusive right to have, intercourse and make use of verses from the Quran to illustrate their position.¹¹ However, in the exercise of the right, no injury or harm must be sustained by the wife. It is accepted that sexual desire is unisex, not performing the duty by the husband may result in injury to the wife.¹² Islamic jurisprudence forbids the right of the husband as regard that he may not engage in intercourse with the wife in a manner which may cause harm to her. A case in point, is the situation where the wife is too weak for such exercise. In such situation the wife is not expected to consent to the husband's request for intercourse.¹³ Other grounds of exemption from intercourse is if such a relationship would cause injury to the wife especially in the situation where the husband suffers some sexually transmitted diseases.¹⁴ Injury caused to the wife due to the husband's negligence and the probable cause of death is sexually transmitted diseases from the man. The husband may be liable to pay blood wit, depending on the cause of the probable death.¹⁵ The rule is that though the husband has right to intercourse with his spouse but must not result in injury or death.¹⁶ Another platform of examining the mutual rights of intercourse is the scenario where the husband withholds from the exercise of his exclusive right to sex with his spouse, depriving her of enjoying her natural desires.

This not allowed under Islamic jurisprudence, a situation permits the wife's right of divorce on the ground of injury to her desires. Scholars argue that if it is seen as the right of the husband alone, it is not operational in reality since its variable is in fact outside the influence of law and it's safeguarded by estimation. The confirmation of which is the union of connection formed between the families of the couple. As a result of this, marriage becomes prohibited between the husband and the female line of a lineage of the wife and vice versa. Similarly, one vital consequence of marriage is lineage and it is to ensure the protection of the offspring of the union and stipulate for their case and protection from birth to the age of majority. *Maliki* jurisprudence regards this position of law as the basic step for prescription of all matters relating to the offspring. Lineage under Islamic jurisprudence is guided by three main conditions. The first condition, is the fact that the child of the union belongs to the marriage bed. *Maliki* concurs to the fact that lineage as established by the contract stipulating that it was in reality, possible for the husband and wife to have had intercourse.¹⁷ The second condition, is connected with the minimum time of pregnancy which *Maliki* jurisprudence agrees to be at least six months. The jurisprudence supports its position concerning the matter to verses from the Quran.¹⁸ The third condition, this deals with the maximum duration of the pregnancy, here *Maliki* jurisprudence recommends is based on a five- year duration.¹⁹ The second approach of establishing lineage is by declaration. *Maliki* jurisprudence explains declaration by one party of the union of the existence of solemnization between himself and the woman or vice versa.²⁰ Under Islamic jurisprudence, such relationship is classified into two types: the first is the relationships that exist between father and son. The second is not a direct relationship, this is relationship with siblings and those with common descendants such as brothers, sisters, uncles,

⁸ Hammudah, A. *The Family Structure in Islam*. Lagos, Islamic Publication Bureau, 1982, op.cit, p. 105.

⁹ El-Alami, D.S *The Marriage Contract in Islam*, op.cit, 173.

¹⁰ *Ibid*, p. 174.

¹¹ *Ibid*, 175.

¹² Hammudah. A, op.cit, p.169-170.

¹³ *Ibid*.

¹⁴ *Ibid*, p. 176.

¹⁵ *Ibid*, p. 177.

¹⁶ Hammudah, A. *The Family Structure in Islam*, op.cit, pp. 168-178.

¹⁷ El-Alami, D.S. *The Marriage Contract in Islam*, op.cit, pp. 178-180.

¹⁸ Quran 46:5 and Quran 3:1415.

¹⁹ El-Alami, D. S. *The Marriage Contract in Shariah*, op.cit. p.180.

²⁰ *Ibid*, 180.

and nephew Conditions are guiding this classification. Firstly, that a person who is explained to be the son of another individual is expected to be of formerly not known lineage. Secondly, that such lineage should be achievable and that such a person could be the son of an individual. The person indicating the declaration in this regard the age should be within a satisfactory range for it to be feasible. Thirdly, that the person testifying the declaration should state nothing but the truth on the matter, and should be a person of worthy character. Fourthly, is the person making the declaration should not mention that the child in question is a product of adultery.²¹ *Maliki* jurisprudence stipulates some incidental evidence in the situation where the circumstances negate the declaration, such as the offspring is an abandoned child and the father known to be unable to reproduce.

The third approach of establishing lineage is by evidence. This may constitute the testimony of two males or one male and two females. If an individual argues that another person is his offspring or his father and the other disclaims the position. If the claimant then presents tangible evidence which is acknowledged, here the lineage is said to be properly established. *Maliki* jurisprudence accepts the position and explains that it is an established tenet that in a claim of lineage evidence shall be listened to no matter the denial of the marriage upon which is argued as this paramount a claim of lineage not necessarily a claim regarding marriage. The contract of marriage also establishes mutual rights of inheritance on the basis that the physical union consists of a union between a man and a woman which is similar to blood kinship. If the husband establishes the right of inheritance, the same applies to the wife.²² Despite the aforementioned safeguards for peaceful co-existence in marriage as recommended by the Quran and Sunnah. Disputes however, may still occur as a result of conflicts of interest in the exercise of mutual rights or not fulfilling duties and responsibilities expected of the parties involved in marriage.²³

Marital Disputes Under Islamic Jurisprudence

Under Islamic jurisprudence in a situation that dispute takes place within the marriage adequate provisions are made on how best it should be settled either through the mutual meetings or open conversation.²⁴ However, in difficult situations, when the woman has engaged in immoral conduct to overlooking marital involvements, a multi-step approach is recommended by the Quran. Furthermore, no matter the level of misconduct on the part of the woman, the Quran caution on any form of a physical attack against the woman. The multi-step approach was recommended to reduce the limit of unnecessary physical assault at the material time of conflict. First, the husband is expected to discuss the matter with the parents and if the approach cannot resolve the dispute the couple should stop sleeping together for the time being. If the dispute is unsettled, the next step is symbolic canning and the final mode of settlement.²⁵ Again, if the conflict is unresolved, the man or woman is advised to approach a family member to assist in resolving the matter. In the situation where the dispute is rather difficult to be settled, divorce is the ultimate option.²⁶ Islamic jurisprudence presents alternatives once the husband and wife have endorsed the marriage contract which solemnizes their union and decides to divorce. If, however, the union has not been perfected and the bride price estimate has not been known, the husband is expected to give a reasonable gift to the wife. Furthermore, if the husband and wife have not perfected their relationship and a specified bride price, the husband is expected to give half of the known bride price unless the wife rejects it.²⁷

The Position of Maliki Jurisprudence on Marital Disputes

On domestic matters, such as the husband is the breadwinner and the wife regarded as house wife both living under a common roof with the responsibility to perform domestic chore. Maliki jurisprudence examines the social background of the wife. Whether or not the wife is of a social class that would waive such assignment such a wife should be exempted from domestic chores due to her family background. On the abuse of the right to the discipline

²¹ El-Alami, D.S. The Marriage Contract in Shariah, op.cit, pp.180- 182.

²² Farah, Madelain. Marriage and Sexuality in Islam. A Translation of Al-Ghazali's Book on the Etiquette of Marriage from Ihya. Utah, 1984, pp. 102-105.

²³ Al-Mutairi, Mastora R.H. A Study of the Wife's Rights in Islamic Fiqh, op.cit, pp.180-208.

²⁴ Alkhateeb, M. Islamic Marriage Contracts: A Resource Guide for Legal Professionals, Advocates, Imam and Communities. Peaceful Families Project, Asian & Pacific Islander Institute on Domestic Violence, and Battered Women's Justice Project. www.apiildv.org/violence/muslimwomen.php Accessed on 17th January, 2019.

²⁵ Quran 4:34; and Quran 4:35

²⁶ Alkhateeb, M. Islamic Marriage Contracts: A Resource Guide for Legal Professionals, op.cit, p.7.

²⁷ Quran 2:23; and Quran 2:237

of the wife, *Maliki* jurisprudence position is that if the wife sustains injury from the act of discipline of the husband. The wife may seek divorce on the ground of abuse committed by the husband. The issue of the wife leaving marital home without the consent of the husband, and suspension or forfeit of maintenance. *Maliki* jurisprudence endeavors to distinction on the ground whether the woman is in-state or not. If in-state maintenance is absolutely compulsory. If on the other hand, the woman is not pregnant the woman maintenance shall be forfeited accordingly.²⁸ On provision of domestic servants if the husband is affluent and if of poor status not required to make such provision. *Maliki* jurisprudence subscribes to the provision of domestic servants to assist the wife in domestic chores with the additional specifications. The husband should bear the medical bills and other related expenses are regarded as the responsibilities of the husband. In the situation of which the husband is absent from home without arrangements for maintenance. *Maliki* jurisprudence position is they may approach the Kadhi and exercise her right to request for separation and the Kadhi is expected to acknowledge her request accordingly. The husband is divorced after been communicated to the status of his marriage. This is on the ground that his destination is known and after a reasonable time frame has passed for the transmitted message to have reached the husband. What amounts to be the reasonable time according to *Maliki* jurisprudence is one year of waiting for the husband.

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Court Holding

AbdulRasheed AbdulKadir and Aminat AbdulRasheed.³⁰ Concerning Maintenance and Custody of the Child

The facts of the case

The summary of the facts of the case was deduced from the content of petition written by the respondent to the case. The couple got married in 2013 in accordance with Islamic rites and the marital union was blessed with a boy given the name Hamzah Abdul Rasheed who was a year and half at the of initiating the suit. She petitioned that the marital relationship lacked love and was often assaulted and maltreated by the husband. She explained that whenever her parents wanted to resolve the dispute, they were badly treated by her husband. The Upper Area Court upheld her petition. The aggrieved party, the appellant filed an appeal the following after the judgment of the lower court, for the Sharia Court of Appeal to overrule the decision of the Upper Area court and rule in his favor.

Ruling of the Kwara State Sharia Court of Appeal, Ilorin

On the first issue of instant judgment, the trial judge at the Upper Area court was rather unnecessarily in a hurry to deliver judgment whatever were the reasons. The claims were placed before him, yet judgment was made on the same day. The court ruled that this contrary to the Sunnah of the Prophet. For according to the Prophet, God hate the sight of divorce no matter the situation. The court ruled that what was regarded as an ugly matter in eyes of our creator needed to be treated with great caution. Another oversight of the lower court was fundamental procedure of Islamic jurisprudence was ignored. The option of reconciliation was not given consideration with the hasty decision of the court. In any dispute under Islamic jurisprudence reconciliation was regarded as a viable option. On the second claim, the award of 15000 naira as cost for maintenance allowance for the only child of the marriage. With the quick delivery of decision on the matter, the court failed to properly investigate the issue before expressly arriving at a decision. This this court ruled was an error in adjudication process of the Upper Area court decision. With the aforementioned considerations, the court granted the appeal of the appellant and ordered that the same Upper Area court should rehear and address the issue of maintenance in the case *DE novo*. The court ordered that proper investigation of the financial capability of the appellant was required in order to determine a fair and just decision. The court ruled that the Appeal of the case granted.

Analysis of the Case

From the review of the case study, the following were identified as oversight of Sharia Court of Appeal. In the first instance, the Record of Proceeding of the lower court was not clinically addressed. Though items marked in

²⁸El-Alami. *The Marriage Contract in Islam*, op.cit, pp.181-182.

²⁹ Al-Azhari, S. *Jawahr al-Iklil Sharh al-Allamah Khalil Min Maddhab al-Imam Maliki*. Vol 1, Beirut, Dar Al-Kutub Al-Ilmiyyah, 1997, pp.550-553.

³⁰ KWS/SCA/CV/AP/IL/02/2015.

red mentioned which was not enough. Those items marked in red ink and in upper case by the lower court.³¹ This was not taken into consideration in the ruling of the court.³² Under Islamic procedural law, this was an error. The red ink marks indicated pre judgment for parties to properly rest their case. This is common to pre judgment writing to Maliki jurisprudence. This was ignored by the court; such decision was not good enough overlooking a fundamental procedural step known as *izar* under Islamic jurisprudence. This may assist the court in arriving at a reasonable decision. The red marks were not for cosmetic purpose but it serves to assist the court ruling. Another issue from the decision of the court was the maintenance cost awarded by the lower court overruled. From the record of proceedings, the appellant twice ignored the summons of the lower court. Attendance of the court may have given him the privilege to make counterclaims on the matters before the lower court. After all, as the saying goes you cannot eat your cake and have it. Again, possibly the lower court has taken inflationary trend into consideration in arriving at the estimate for maintenance cost of 15000 naira per month. If the maintenance is looked from this stand point, the best the Sharia Court of Appeal can do on the matter was to specify the cost, that 5000 naira for feeding, same amount of clothing and other related matters and another 5000 naira to take care of contingencies like medical treatment. In this wise, referring the matter back to the same court to investigate the maintenance allowance in line with the financial status of the appellant was not only time wasting but making cost of litigation on marital disputes rather expensive. This paper argues that there is a need to make provisions for marriage counseling whereby parents are advised on mutual responsibilities and parental care to their children.

Access to Justice Under Islamic Jurisprudence

Scholars are of the opinion that the phrase access to court is a significant aspect of modern democracy and rule of law. This is more vital under Islamic jurisprudence because the prerogatives and exemptions which the English legal system allows some to conceal under are not usable under Islamic jurisprudence. Everybody has access to justice under Islamic jurisprudence. Scholars explain that judicial adjudication is not necessarily the best approach of settling disputes, particularly those dealing with marital relationship and related matters. They submit that arbitration is a better option. Islamic jurisprudence approaches is that arbitration is utilized before judicial ruling on marital disputes. However, in some circumstances, judicial approach is inevitable to resolve marital disputes.³³ Scholars are critical of the reputation of the Kadhi courts which are in most cases nearer to the general public, especially people of the rural areas. The Kadhis courts are found wanting, this is because they argue that the courts are not only corrupt, but pervert justice in some circumstances. The litigation procedures are slow, expensive and full of technicalities.³⁴ However, what made access to justice rather complicated for Muslim women are cultural limitations. Again, women are often exploited of the rights given to them by Islamic jurisprudence, and more often than not men use religion to take advantage of Muslim women. The position of scholars is that most of these shortcomings will fade away, with education and economic power of women. It is argued that in situation, a woman has access to adjudication process the pertinent question, is whether the woman will have access to justice. The submission of modern scholars is that this depends on the quality of the Kadhi and on the law.³⁵ For the purpose of this thesis, access to justice is used in the context of access to court or access to judicial adjudication of marital disputes and access to justice in court.

Significance of Administration of Justice Under Islamic Jurisprudence

Judiciary is in vital position to inject in the citizens the admiration for the constitution and the human rights, and obligation to lawfulness and equilibrium generally.³⁶ The orientation of the citizens both leaders and followers

³¹ Azad, G. M. *Judicial System in Islam*. Islamabad, Islamic Research Publications, 1987, 15-20.

³² *Izar* is a procedure under Islamic law whereby the Kadhis writes in red ink before ask party's questions related to the matter. Daura, U. M. *Jagorar Masu Hukunci: A Hausa Commentary on Tuhufatul Hakkam*, Zaria, Al-Huahuda Publishing Company, 1996, p. 7.

³³ Ezeilo, J.N, et al *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*. Abuja, Women's Aid Collective (WACOL) & Women Advocates Research & Documentation Centre, 2003, pp.47-48.

³⁴ Oba, A.A. *The Due Process of Law and Key Factors in the Application of the Concept in Area Courts*. Paper presented at a Workshop for Area Court Judges from Five States. Organized by the Nigeria Bar Association, Ilorin Branch & Sponsored by Women, Law and Development, held at Kwara Hotel, Ilorin, 8th-9th June, 2000.

³⁵ Ezeilo, J.N, et al. *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*, op.cit, pp. 47-48.

³⁶ Mohammed. I.T. *Application of the Sharia in Northern Nigeria: Role of the Judiciary in a Constitutional Democracy*. Keynote Address by Justice, Court of Appeal, Abuja Division at the Proceeding of a two- day conference on Women's Rights and Access to Justice under the Sharia in Northern Nigeria. Organized by WACOL, Enugu and WARDC, Lagos in Collaboration with ABU, Zaria with support from Heinrich Boll Foundation at Rockview Hotel, Abuja, 25th-28th February, 2003, p.12-16.

alike towards the constitution is programmed to a great extent in manner in which the constitution is explained and addressed by the courts.³⁷ This means that the individuals who shall operate the judiciary Kadhis must be persons of solid integrity, straight forward, not biased, God fearing and uncompromising in approach to issues.³⁸ A jurist argue, that judges should try to be guided by the oath of office of their positions and to ensure that justice is applied without any partiality, emotions or self-interest and ensure that the law should assist in unity of the nation on the basis of democracy justice and equity.³⁹ The rule of law forms the solid rock of a democratic system of government in contemporary era. The vital role of a judge is in protecting the rule of law. This is the approach by justice is granted.⁴⁰ In order to execute its undertaking the judiciary needs to remain autonomous of any interference or force from the executive, from individuals to litigation and free itself from any act of lobbying.⁴¹ The ultimate goal of judiciary power is to ensure sine quo non peace and stability for the state. The Kadhis are set with high standard, in relation to moral virtue, knowledge, and deportment is unequalled.⁴² An individual is not eligible to be a judge, if he is not knowledgeable, an individual jailed of any of the notable criminal offences is never recommended to hold the position of a Kadhi.⁴³ The courts operate as monitor over the executive and the legislative arms of government. It restricts them through construction and assures them of their constitutional expectations.⁴⁴ Justice under Islamic jurisprudence is regarded a divine trust, a duty entrusted upon man to be used most truthfully, and unbiased. Justice is the attribute of being ethically just and pitiful in granting to individuals what is due them. The Quran was sent down as guidance to mankind, to judge in accordance to God's dictates. According to Islamic jurisprudence Justice is mandated by God and uprightness is expected of any person who shoulder the responsibility of justice.⁴⁵ According to verses from the Quran to do justice amount to get rid of injustice. Administration of justice under Islamic jurisprudence is seen as one of the significant roles of any Islamic government.⁴⁶

In fact, the sole responsibility of the caliph or the leader of the society under Islamic setting is to ensure justice among the citizens of the society.⁴⁷ This noble role is best performed through a list of officers, the caliph nominates. Kadhis not only administer justice, but must ensure that this is done in accordance with Islamic jurisprudence. Other outstanding functions of the Kadhis include resolving marital disputes and other related matters. The Kadhi also negates act of injustices and ensure the protection of vulnerable members of the society against the strong individuals. The center-piece of Kadhi roles in Muslim society is to protect the Muslim community.⁴⁸ Kadhi must abide by the prudent legal process in determining cases. Besides, he must ensure that all his judgments are in accordance to the guidelines of Islamic jurisprudence as stipulated in the Quran, the Sunnah of the Prophet and the consensus of the Muslim society.⁴⁹ Except, when there no relevant provisions on the matter at hand in theses fountain heads that the Kadhi is allowed to make use of the derivation of trivialities of law from the sources of Islamic jurisprudence.⁵⁰ The administration of justice is a notable subject to Islam, thus, in a Muslim state setting, the procedural aspects must abide to the laid down rules of Islam. The Quran recommends that justice must ensure if need be by force on the Muslim community. In fact, the Quran suggests that it sent the Prophets

³⁷ Ibid.

³⁸ Ibid.

³⁹ Bello, M. An Opening Address at All Nigeria Judges Conference, held at Kano, 30th October- 4th November, 1995.

⁴⁰ Mohammed, I. T. Application of Sharia in Northern Nigeria: Role of the Judiciary in a Constitutional Democracy, op.cit, p.13.

⁴¹ Ibid p. 14.

⁴² Ibid, p. 15

⁴³ Ibid, p.16.

⁴⁴ Ibid, p. 17.

⁴⁵ Quran5:9

⁴⁶ Ladan, M. Tawfiq. Concept of Justice under Islamic Law and its Relevence in Modern Nigeria. An Unpublished LL.M. Thesis, Faculty of Law, A.B.U., Zaria, April, 1990, pp.128-130.

⁴⁷ Ladan, M. T. Women's Rights, Access to and Administration of Justice under the Sharia in Nigeria. In Ezeilo, J.N, et al, Eds. Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice. The Proceedings of a two-day conference on Women's Rights and access to Justice under the Sharia ii Northern Nigeria. Organized by WACOL, Enugu and WARDC, Lagos in collaboration with A.B.U, Zaria with support from Heinrich Boll Foundation at Rock view Hotel, Abuja, 25th-28th February, 2003, pp. 19-21.

⁴⁸ Ibid, p. 20.

⁴⁹ Ibid, p. 21.

⁵⁰ Ibid, p. 21.

with relevant notifications and guided with revelations and the degree of judgment to ensure that mankind may be steadfast in justice and provided fist, for its usage and other uses for human beings.

God in its ultimate mercy knows who will assist him and those he has sent in the Unseen. Scholars contend that there is no legal system, be it contemporary or ancient that could claim persistence where it discovered lacking in procedural justice, not resisting that the modes of its embodiments differ from one legal system to another. Procedural justice scholars explain is the outside aspect of legal system by the nature of which substantive justice is achieved. This aspect of justice system is often referred to formal structured justice is detected in the level of consistency, soundness, and fairness in the application of the justice system.⁵¹ With its absence, the principles of justice would be seen as mere academic exercise, just as a concealed treasure possession which loses its worth except it is in usage. Even if an atom weight or no principles of justice were to be in existence in law, the person could obtain fulfillment if the law were used with regard to orderliness and farness. Procedural justice in Islam, shows cognizant again of the affirmation that ancient cultural setting was regularly inclined to trust the Kadhi who receives good ethical integrity than to invest trust in the procedural system. This expectation is more transparently shown in the special attention given to the legal conditions and qualifications of Kadhis and witnesses in the adjudication process.⁵² Although, the organization of the court was relatively of characteristic of the earlier stage, the attributes of the Kadhis were explained with great caution.⁵³ This was because the Kadhi was seen as the main figure in the adjudication process under Islamic jurisprudence.⁵⁴ The growth of the judicial organization is limited to the establishment of the auxiliary judicial bodies working autonomously from the court system. However, no distinctive features or compatibility in procedural justice in reality simply due to the fact that the Kadhis were not requested by such guidelines as the doctrine of *stare decisis* which would ensure that their rulings are in harmony with one another on matters of marital disputes.⁵⁵ As a result, procedural justice was supported not by an oneness judicial approach but by a complicated system, not completely judicial and partly administrative in nature. Nor was the laid down rules codified in the contemporary sense of the word, and inclined uniformly as an orderly method everywhere in the Muslim world.⁵⁶ There were disagreement in judicial Islam, that the *Sunni* and *Shii* and also differences between the schools of jurisprudence. More importantly, disagreements on creedal and legal foundations inevitably resulted to difference in the administration of justice from one region to another region.

Procedural justice under Islamic jurisprudence needless to remark, demonstrated deficiency for the prerequisites of justice. Neither in organization, nor in operating were the courts satisfying the goals of procedural justice. In overall form, it is not unitary because the judicial aspect was not related and the Kadhi was disadvantage. With kind of structure disputes inevitably occurred. In its operation, the procedural justice was hindered by political interferences, though in theory the Kadhi was not vulnerable, and the religious leader imam was entrusted with the role to safeguard the accomplishment of justice in harmony with judicial tasks. Political office holders often endeavoured to put pressure on the judicial procedure. Kadhis appointment and dismissal were at the mercy of men and women with political authority.⁵⁷ According to scholars, with political independence, regions like Zanzibar and Kwara State of Nigeria have adopted the doctrine of separation of powers.⁵⁸ Despite this laudable facelift, Kadhi courts have not totally free from political influence. In most Muslim regions, the leadership have acknowledged the doctrine of separation of powers, yet the courts are not yet free the political influence.⁵⁹ Contemporary scholars argue further, that it the blame game was not exclusively that of the leadership and political office holders of the shortcomings of procedural weaknesses.⁶⁰ The Kadhis, muftis and others were also responsible for procedural deficiencies, after they claim to be the protectors of legal justice.⁶¹ However, scholars

⁵¹ Ladan, M.T. Concept of Justice under Islamic Law and its Relevance in Modern Nigeria, op.cit, pp.128-130.

⁵² Ladan, M.T. Women's Rights Access to and Administration of Justice under the Sharia, pp26-. 28.

⁵³ Khadduri, M. The Islamic Conception of Justice. London, John Hopkins University Press, 1984, pp. 135-6

⁵⁴ Ibid, p. 136.

⁵⁵ Ladan, M.T. Women's Rights, Access to and Administration of Justice under the Sharia in Nigeria. Ibid, p.27.

⁵⁷ Khadduri, M. The Islamic Conception of Justice. London, Hopkins University Press, 1984, pp134-135.

⁵⁸ Ladan, M. T. Women's Rights, Access to and Administration of Justice under the Sharia in Nigeria, op.cit, pp.27-28.

⁵⁹ Ibid, p. 27.

⁶⁰ Ibid, p. 28.

⁶¹ Ibid, p. 28.

recommend independent thinking which assist to ensure the pliability of the legal system and the authorized decrees are steadily included into the law.⁶² Their stand point against unfairness and undue political influence was justified, as they speak in one voice in their stand to elevate the rule of law.⁶³ Notwithstanding, disagreements on legal principles, which were seen required for legal rulings in relation with the reality.⁶⁴ Muslim regions have not yet overcome the unnecessary undue political influence, it is certainly clear that the judiciary must be free in order to achieve legal justice for its citizens.⁶⁵ This is because legal justice is an inevitable legal rights of each individual and the person is indebted to pay the price for injustice that he may compromise.⁶⁶ Other aspects of justice cannot justify similar attributes, except it is incorporated or related with legal justice which is made up of only those principles that society has acknowledged as enforceable.⁶⁷ Those principles, the society has not recommended as binding may be evaluated as either rational or ethical composition of justice.⁶⁸ Legal justice is the standard of the instant desire of society. In contrast, rational, ethical considerations, or any other nature of justice are an explanation of anticipations.⁶⁹

Administration of Justice Under Islamic Jurisprudence

Islamic jurisprudence sees God as the sole legislator of law,⁷⁰ and the divine entrusted in the Prophet the position of a judge during his life time in Medina, when an Islamic state emerged.⁷¹ Muhammed was given the Scripture by God and the Balance that mankind can have a system of justice.⁷² The conceptual framework and process of justice under Islamic jurisprudence rests on the following pivots: the judge whose person and process of holding the office meet up with the established rules and regulations, the applicable substantive law and parties involved in the matter.⁷³ Other foundations of Islamic jurisprudence are: the issue in dispute, and the procedure to be used to achieve at fair decision.⁷⁴ According to Islamic legal history, Prophet Muhammed during his life time laid the procedural rules for Islamic jurisprudence for he was the greatest of judges while he occupied the position in Medina.⁷⁵ Islamic legal historians explain that of rules of procedure laid by the Prophet was adhered to by the Rightly Guided Caliphs.⁷⁶ The successors of Muhammad also remained the head of state of the Muslim society and continued to appoint judges.⁷⁷ The first successor of the Prophet was Abu-Bakr al-Siddiq, who ruled in accordance with the Quran, and the traditions of the Prophet Muhammad.⁷⁸ Khalifah Umar was the successor of Khalifah Abu-Bakr in 634 A.D and continued with the adjudication process left by the first successor of Muhammad. One of Umar's outstanding achievements was making the judiciary an independent entity, free from the state and the governors.⁷⁹

Historians acknowledged the legacy of this rule on his correspondence on adjudication process under Islamic jurisprudence with one his governors, governor of Kufa, Abu Al-ash'ari. Khalifah Umar, emphasized the significance of equality before the law and that the burden of proof was on the plaintiff and the defendant may be put on oath.⁸⁰ Also, Khalifah Umar suggested that time was of essence when evidence was tendered before Kadhis courts in order enhance fair decision on a matter.⁸¹ Besides, Khalifah Umar initiated the precedent of use of the

⁶² Ladan, M.T. Conception of Justice under Islamic Law and its relevance to Modern Nigeria. Op.cit, p. 35.

⁶³ Ibid, p. 36.

⁶⁴ Ibid, p. 36.

⁶⁵ Ibid, p. 37.

⁶⁶ Ladan, M.T, op.cit, p. 28.

⁶⁷ Ladan, M.T, op.cit, p. 29.

⁶⁸ Ibid, p. 30.

⁶⁹ Ibid, p. 31.

⁷⁰ Quran 65:18.

⁷¹ Al- Tasuli, A.A. Al-Bahiah. Commentary on the Tuhufah, Vol. 1, Cairo, Mustafa Al-Babi, Al-Halabi & Sons Press, 1951, p.25.

⁷² Ibid, p. 26.

⁷³ Ibid, p. 27.

⁷⁴ Ibid, p. 28.

⁷⁵ Mahmud, A.B, op.cit, pp.117-118.

⁷⁶ Ibid, p. 118.

⁷⁷ Ibid, p. 119.

⁷⁸ Quran 58:17; and Quran 53: 3-4.

⁷⁹ Mahmud, A.B, op.cit, p. 120.

⁸⁰ Ibid, p. 121.

⁸¹ Mahmud, A.B, op.cit, 21.

evidence of an expert in adjudication process under Islamic jurisprudence.⁸² Islamic judicial process continued to be reformed throughout the classical Islamic, particularly during the Umayyad and Abbasid eras.⁸³ During the golden Islamic era, the period of Abbasid reign, the office of Chief Justice was created.⁸⁴ The Chief Justice was given the mandate to appoint and remove judges. Other responsibilities of the Chief Justice included supervising their behavior and monitoring their sense of responsibilities while holding the position.⁸⁵ The first person to be appointed to the position of Chief Justice in Islamic legal history was Abu Yusuf.⁸⁶ Thereafter, the legacy of Islamic judicial system continued to spread throughout the Muslim regions of the world. This trend continued to exist up the collapse of the Ottoman Empire.⁸⁷

Evaluation of Marital Disputes Under *Maliki* Jurisprudence

This paper addresses the evaluation under two broad dimensions; from marital disputes under *Maliki* jurisprudence and the procedural law guiding the Kadhis Courts in Kwara State of Nigeria. Although Islamic jurisprudence makes provisions for mutual rights in marital relationship that are the social and legal consequences of marriage. Yet, the laid down rules are not necessarily made known to the parties before marriage is consummated. In most cases, it is when there are disputes that the couples become aware of their shortcomings and ignorance of what it takes to be married under Islamic jurisprudence. The paper argues that such vital provisions on marital matters if made available might safeguard conflicts since each party would be familiar with the red lines of marital relationship. Thus, before the recital of marriage details of rules and regulations guiding marriage are read to the couples, for them to sleep over it. Not knowing the details of the contractual marital relationship, it is argued by this thesis is a fact that contributes to frequent marital disputes under *Maliki* jurisprudence. Disputes are common phenomena in marital union due to individual differences and different socio-economic backgrounds. *Maliki* jurisprudence makes efforts to address the matter with the aid of the Quran and Sunnah, yet disputes are still prevalent in marital relationship in Kwara State of Nigeria. This paper submits that the classic jurists approach needs a totally overhauling to make it relevant to the modern situations concerning marital matters. The paper posits that marriage in the contemporary era gives women a lot of freedom and equality in the practical sense of the words. Hence, looking at a woman from the housewife perspective is totally irrelevant. The paper contends that in the contemporary era, the husband has no monopoly of being the breadwinner of the family.

Indeed, both parties in marriage are seen as breadwinners of their family. The man being solely the breadwinner in the modern era is regarded as a conservative approach to marital matters. This paper contends that due to the demands of modern times, women are equal partners in marital relationship with a balance of power in decision making on matters concerning the family. On issue of discipline of the wife, the paper argues if really, they are equal partners in marriage, why the man having the monopoly of discipline in marriage union. Such so call discipline if not well managed, the paper submits may be tantamount to assault of which the wife may seek proper legal redress. The paper argues further jurists that the husband uses of discretionary power, such as withhold of maintenance allowance if the absent from home without permission. As the saying goes, the paper argues absolute power corrupts absolutely. This paper maintains that this amounts to the violation of the woman's right of quiet enjoyment in marital relationship. The paper observes that procedural law on marital disputes under *Maliki* jurisprudence gives a lot of discretionary powers to the husband as the lord of the house. The concentration of discretionary powers in the hands of the husband, this paper argues amounts to the fact that marital relationship under Islamic jurisprudence is nothing but master and servant relationship. If evaluated from the premise of the contemporary era demands of marital relationships. The paper submits that the procedural law of Kadhis Courts has some unique characteristics. This is because the court system is flexible and free from procedural challenges peculiar to the common law. The paper argues that this uniqueness hinders transparency and gives to discretionary approach to the Kadhis Court system. This often results into arbitrariness and ultimately encourages pervasive norm of judicial corruption. Another attribute of the procedural law of the Kadhis Courts is that its fluidity of its

⁸² Ibid, p.22.

⁸³ Al-Bahaqu, A.H, op.cit, pp.197-198.

⁸⁴ Ibid, p. 198.

⁸⁵ Ibid, p. 198.

⁸⁶ Mahmud, A.B, op.cit, p. 25.

⁸⁷ Ibid, p. 25.

proceedings. This is totally different from that the common law system. The contention of this paper is that the Kadhis are actively involved in the adjudication process. This approach denies the beauty of the legal process whereby arguments and counter arguments are generated to guide the judicial process to the logical conclusions.

The paper makes the submission that such situation may tint court process in favor one party or the other. This the paper contends that it is not to the advantage of the justice system on the long run. Next, this paper observes that there are many unwritten procedural rules and in some cases such rules vary from court to court. Court proceedings are unnecessarily informal in outlook, Kadhis appears in traditional outfit and no formal dress code for the advocates appearing before the Kadhis. The temple justice, the paper argues needs to be respected and accorded its honor in all its ramifications. Besides, the paper points to the use of vernacular as the language of business of the court. In the contemporary era, paper argues, societies are becoming more cosmopolitan in outlook. Courts system needs to move with dynamics of the changing era. Though provisions are made for an interpreter during the court proceeding, usually the court clerk, not professional linguistic expert. The paper posits the court system needs to wake up from traditional setting position and blend with the changes of modern era. By and large, whatever are the inherent weaknesses of the procedural law of the Kadhis Courts system in Kwara State of Nigeria, the paper submits that the courts' system provides alternative option for adjudication process particularly on marital matters. This on the long run assists to enhance peaceful co-existence among the people of Kwara State of Nigeria.

Conclusions

Procedural law is an important aspect of Islamic law adjudication process on Muslim personal matters in Kadhis courts in Kwara State of Nigeria. There are divine laid down rules by the Quran and Sunnah guiding marital matters. Procedural law guides how best to conduct adjudication process in Kadhis courts on Muslim personal matters. Islamic jurisprudence provides for mutual rights in marital relationship and highlights on rules on how to establish lineage to safeguard the protection of the children in marriage. Islamic jurisprudence has laid down regulations concerning marital disputes to protect cordial marital relationship for the well-being of the people. The standpoint of *Maliki* on marital matters assist Kadhis in decision making on marital disputes and other related matters. Though the jurisprudence is of classic origin, the theory is of great value to adjudication process in Kadhis' Courts. Administration of justice is of great importance to Muslims society. To this end, there are Islamic code of ethics for Kadhis in order to have justice administered at all times in Kadhis' Courts. *Maliki* jurisprudence marital disputes perspective is part of the legacy of Islamic legal tradition that are still applicable in Kadhis' Courts in Kwara State of Nigeria till modern era.

Recommendations

This paper suggests that there is the need for the comprehensive review of the legal framework and the institutional arrangements to meet the changing trends in the modern era, especially now that the world is becoming a global village. Professional legal training should be given to those that hold the position of the Kadhis. This may enhance job mobility within the judiciary. There is the need for the refresher training programs be packaged for the Kadhis from time to time and they should be exposed to international conferences, workshops and regional interaction on matters related to Islamic jurisprudence. In addition, the paper recommends more research works in *Maliki* jurisprudence in order to expand the frontiers of knowledge for the well-being of the people of Kwara State of Nigeria and other States in Northern Nigeria. To be able to achieve this laudable goal, all published works in relation to *Maliki* jurisprudence written in Arabic be translated into other languages for these works to be useful and accessible to the jurists and scholars without the knowledge of Arabic. Kadhis courts are faith-based adjudication mechanisms. Religion should therefore be used in the promotion of peaceful co-existence of the people Kwara State of Nigeria and other Northern States of Nigeria. It is also a recommendation of this study that there is need to depart from conservative aspects of jurisprudence as it relates to marital disputes because women enjoy more rights in modern times than it was the case in the classical era. Modern world entrusted more rights and responsibilities on women than was the case during the times of the Prophet. By and large, this paper suggests that the Kadhis are given comprehensive computer training to assist them in their daily assignments. In fact, their offices as a matter of urgency need to be connected to the internet in order for them to have contemporary touch of development on marital jurisprudence in other Muslim regions of the world.

Also, the study recommends that women be appointed as Kadhis due their advancement in education in the recent times. This will assist the courts to be in compliance to the international expectations in the modern era. This research recommends the need to harmonize the position of *Maliki* jurisprudence. This can be done with organization of international fora for jurists, scholars and experts in international law and international human rights norms and other related experts on the courts system. Such international meetings may result in useful blue-prints on the current positions of Islamic jurisprudence particularly as it relates to matters concerning marriage the guardianship for the future improvement on marital jurisprudence. Besides, the study suggests that these regions require as a matter of urgency the promotion of the girl child education to safeguard the health and the future employment prospects of this category of women in the regions. The research recommends that what is most required is the appropriate political will on the part of the government of these regions of Africa. The study recommends that in the light of the fact that the contemporary women are not only highly educated but hold responsible positions locally and internationally. Women status in a marriage has changed. Jurists and scholars need to reflect on the way forward to make the settlement of marital disputes conform to the expectations of the modern society.

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