

LEGAL AND JURISPRUDENTIAL PERSPECTIVES ON DIVORCE, MAINTENANCE AND CUSTODY UNDER ISLAMIC FAMILY LAW IN NIGERIA

By

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Abstract

This paper explores the legal and jurisprudential dimensions of divorce, maintenance, and custody within the framework of Islamic law as practiced in Nigeria. It critically examines how Islamic family law, derived from the Qur'an, Sunnah, and classical juristic interpretations, is applied within Nigeria's plural legal system, particularly in states operating Shari'ah courts. The study analyzes Islamic principles as relates to the rights and responsibilities of spouses during and after divorce, including the enforcement of maintenance (nafaqah) and the principles guiding custody (hadanah) of children. Adopting a doctrinal research methodology, the paper relies on the analysis of primary sources such as the Quran, Hadith, relevant Nigerian statutes, and judicial decisions, as well as secondary sources. The paper contributes to ongoing debates about the efficacy and consistency of Islamic family law adjudication in Nigerian court. The findings reveal that while Islamic family law provides comprehensive guidelines for regulating marital dissolution and the welfare of children, challenges such as inconsistent judicial interpretation, cultural influences, and limited legal awareness sometimes hinder its effective application. The paper therefore recommends greater judicial training in Islamic family jurisprudence, improved public legal awareness on marital rights and obligations, and enhanced harmonization between Islamic legal principles and Nigeria's constitutional legal frameworks to ensure justice, fairness, and the protection of family welfare.

Keywords: Divorce, Maintenance, Custody, Islamic Law, Nigerian Law

1.0 INTRODUCTION:

Nigerian legal system is a complex tapestry of English common law, statutory law, customary law and Islamic law. This pluralistic legal framework is particularly evident in family law, where issues of wife and child maintenance and custody are governed by diverse legal principles. Islamic law (*Sharia*), predominantly followed in the Northern states and other parts of Nigeria, provides unique guidelines for the welfare of wife and the upbringing and welfare of children before and after the dissolution of marriage (divorce), which includes; maintenance of wife and children, and custody of children (*Hadanah*).

Islamic law provides the Muslim wives and children with a legal right of maintenance and custody which devolves upon the husband, which is exclusively created by a valid marriage, and wife is entitled to this right during the subsistence of the marriage and after divorce, that is, during *iddah* period as well as determination of maintenance and custody

of a child. The enforcement of these rights has become day-to-day event which presented in our various courts, particularly in Sharia and Area courts sitting over Islamic matters, an appeal of which brought to Sharia Court of Appeals. Though, the judiciary of many countries, in trying to ensure the enforcement of these rights, has put in place certain mechanisms in the legal procedures.

This paper therefore explores the concept of divorce, its legal basis and its classification as to the legal positions. The paper also discusses the conceptualization of maintenance and custody, and the intricate legal framework governing the maintenance of a divorced wife during *iddah* or the pregnant or nursing mother after the divorce, as well as maintenance and custody of both legitimate and illegitimate children under Islamic law within the Nigerian context. It delves into the principles derived from the Quran and Sunnah, the interpretations and views proffered by various Islamic schools of thought. The paper equally examines factors that determine the quantum of maintenance of a divorced woman and judicial oversight and roles of *Qadis* in enforcement of these rights. The paper also concludes and suggests certain mechanisms in ensuring the enforcement of rights of wife and children as relate to maintenance and custody to assist the judicial officers in determination of such cases presented before courts.

2.0 CONCEPTS OF DIVORCE UNDER SHARIA:

To do justice to the topic of the discourse “the maintenance and custody under Islamic law (Sharia), it is paramount to briefly explain divorce which, in most circumstance, gives rise to the right for maintenance and custody.

The term “divorce” which is otherwise in Arabic terminology called *Talaq* has its origin from the pre-Islam era when Arabs used it to mean the separation of the wife from her husband until Islam adopted the term and introduced certain reformation to the practice.¹

Talaq literally means ‘to release’, ‘to let loose’, or ‘to free’. Though, different scholars offer different definitions, but it is technically defined as “to release from marriage-tie or terminate the marital relationship between a husband and wife.”² In other words, the word “*talaq*” is defined as “to release from marriage-tie, either immediately or eventually, by use of certain words, whether spoken or written, by the husband of a valid marriage contract.”³

It must be noted that there are other terminologies in Arabic language with different implications used for the word “divorce”, such as *Mubarah* (mutual divorce), *Khul'* (divorce by ransom) depending on the circumstances. This therefore indicates that there are forms of divorce under Islamic law.⁴

It can be deduced from the above that, *talaq* (divorce at the instance of husband) has four elements namely; the husband who will initiate the divorce, the wife who is the subject of *talaq*, formula, that is, the expression through which the *talaq* is conveyed and lastly the intention.

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¹ A Al-Jaziri ‘Kitabul-Fiqh ala Madhahib-Ar’ba’, vol. 5 (Darul Fajri, Beirut, 2003) 278

² IA. Aliyu, ‘Termination of Marriage and Its Legal Consequences Under Islamic Law’ being a Ph.D Thesis submitted at Faculty of Law, A. B. U Zaria, (1975) 241

³ KN Ahmed, ‘Muslim Law of Divorce’ Kitaba Bhavan, New Delhi, 1981) 28

⁴ H. Raza ‘Divorce Under Muslim Law’ International Journal for Multidisciplinary Research (2022) 4.

2.0.1 LEGAL BASIS OF *TALAQ*:

Divorce, even though was ignorantly practiced before the advent of Islam, finds its legality from the Quran, the Sunnah of the Prophet (S.A.W) and the *Ijma'* as several textual authorities and implications unequivocally permit divorce as the last means to be resorted to.

Allah says

“Divorce is permissible twice, after that the parties should either hold together on equitable terms or separate with kindness.”⁵

Muslim scholars held divergent opinions on the legal position of *talaq*, whether it is obligatory, forbidden (*haram*), permissible (*Mubah*), recommended (*Mandub*) or reprehensive (*Makru'*). Therefore, the Hambali school of jurisprudence classified *talaq* into the followings;

- a- *Talaqul-Wajib* (Obligatory divorce): *Talaq* is considered obligatory one in a situation whereby two arbiters have been appointed to settle the marital crisis between the couples as recommended by Allah, but the effort spent is proved abortive.⁶ In this case, *talaq* will be considered as a suitable means of ending the crisis. For instance, where a husband makes a pledge or take an oath that he, despite the interference of the arbiters, will not cohabit with his wife.⁷
- b- *Talaqul-Muharram* (Forbidden Divorce): It is forbidden for a husband to divorce his wife without no cogent or a reasonable justification as provided under Islamic law (Sharia). For instance, a man pronouncing divorce to his wife without any legal justification than to marry another wife, when he knows he cannot equitably feed two wives at a time.⁸
- c- *Talaqul- Mubah* (Permissible Divorce): divorce is said to be permitted if the husband pronounces it based on legal justification such as when a wife is of a bad character and it will be at the detriment of the husband if the wife remains with him.⁹
- d- *Talaqul Mandub* (Recommended Divorce): it is recommended for a husband to divorce his wife when the wife neglects or fails to perform obligatory acts due to Allah, after several efforts have been made to change her but proved abortive.¹⁰

It must be put on record that the pronouncement of *talaq* is not strictly considered as a final termination of marital relation until it is proven that the irrevocable one is made. In view of this, this paper deals with an irrevocable divorce the consequence of which gives rise to maintenance and custody.

3.0 MAINTENANCE AND CUSTODY UNDER SHARIA: CONSEQUENCES OF DIVORCE (*TALAQ*)

⁵Suratul-Abaqarah, verse 229

⁶ Qur'an. (Trans. Yusuf Ali) The Holy Qur'an: Text, Translation and Commentary (Amana Publications, 1989) Suratu Nisa 4 verse 35

⁷Suratul- Baqarah verse 226 - 227

⁸ S Sabiq, '*Fiqhus-Sunnah*' vol. 2, (Darul-Kitabul-Arab, Beirut, 1975) 243

⁹ Ibid.

¹⁰ Ibid

There are certain events immediately follow divorce (*talaq*) under Islamic law which are referred to as the consequences of divorce initiated at the instance of the husband, namely; *Iddah* (waiting period), maintenance during *Iddah*, custody, maintenance and suckling of children. Therefore, maintenance and custody as topic of this discourse suggests, is basically predicated on divorced wife and children of divorced marriage.

Islam has for long laid down certain rights and responsibilities for Muslim couples in the quest to achieve peace, love and harmony in their matrimonial homes and to protect the interest of the children born in such a valid marriage.¹¹

Maintenance and child custody are two thematic concepts addressed under Islamic family law as parts of components of Sharia. These two words are interrelated and often discussed together by Muslim scholars.

The word “maintenance” is an Arabic word which denotes “*an-Nafaqah*”, that is, a sum spent by a person over his family.¹² Some scholars defined maintenance as all items necessary for one’s survival which includes food, clothing, an accommodation and other essential needs such as medical care, education amongst other things.¹³

The concept of custody, according to *LisanAl-Arab* is derived from the root verb ‘*hadana*’ which literally mean to clasp in one’s arm, to embrace, or to hug someone, and this word has also been used to imply to nurse, to bring up, or to raise a child.¹⁴ The word ‘*hadanah*’ also means raising, bringing up, or nursing and looking after a child as relates to his or her welfare.¹⁵ Therefore, custody implies looking after a child such as maintaining where he resides, preparing his bed, food, taking good care of his dress and at the same time his personal hygiene.¹⁶ In other words, custody means the protection and shielding of the young ones from the hazard of life at their tender age.

Stemming from the above, the two, in respect of a child, are closely related. Taking into account that a child is considered weak and therefore needs proper protection, and *hadanah* is calculated to means a duty similar to the obligation to maintain a child.

4.0 MAINTENANCE (*NAFAQAH*) OBLIGATIONS:

Generally, and during subsistence of marriage, it is a responsibility of a husband to maintain his wife such as feeding her, clothing her, protecting her, providing her accommodation, amongst other things that fall within the meaning of maintenance.

Allah says:

“Men shall take full care of women with the bounties which Allah Allah has bestowed in abundance on one above, other, and with what they spend out of their possession.”¹⁷

And in Sunnah of the Prophet when he was asked about the responsibilities of a husband to his wife, and he answered:

¹¹ MI Abdullah, ‘A Comparative Study of Wife’s Right to Maintenance in Islamic and Statutory in Nigeria: A Case Study of Zaria and Sabon-Gari Communities of Kaduna State’ being a dissertation submitted to the school of postgraduate studies, Ahmadu Bello University, 2015) 33

¹² A Kumar, ‘Analytical Study of Maintenance Under Muslim Law’ (2022) 7 (7) International Journal of Scientific Development and Research. 127

¹³ Ibid.

¹⁴ Y Khaiyyatt and N Mar’ashi, (ed) ‘*Lisa Al-Arab Al-Muheat*’ (Dar Lisan al- Arabi, Beirut, vol. 1, 1988) 661 - 662

¹⁵ AM Al-Jarjani, ‘*Kitab al-Ta’rifat*’ (Dar al-Kutub al- Ilmiyyah, Beirut, 1995) 88

¹⁶ MA. Ambali, ‘The Practice of Muslim Family Law in Nigeria’ 3rdedn., (Princeton & Associates Publishing Co. Ltd., 2013) 325

¹⁷ Suratu Nisai’ verse 34

“To feed her the way you feed, to cloth her the way you clothe (yourself) and not to slap her on the face and not use insulting words against her.”¹⁸

In the case of **Farukuk Ubandoma Tambuwal v. Zainab Aliyu Tambuwal**¹⁹ It was held that Islamic Law imposes a duty on the husband to maintain his wife. This duty arises as soon as the marriage contract is completed and continues until the contract is completed and continues until the contract of marriage ends either through separation or death.

4.0.1 Post-Divorce Maintenance During and After *Iddah*:

Iddah denotes the waiting period legally imposed on a woman either as a result of divorce or death of her husband to ascertain the purity of her womb.²⁰ Jurists are unanimously agreed that observance of *Iddah* is obligatory placing their reliance on the following textual authorities;

“And the divorced women should keep themselves in waiting for three courses; and it is not lawful for them that they should conceal what Allah has created in their wombs....”²¹

It was equally reported that the Prophet (S.A.W) instructed Fatima Bint Qais to observe her *iddah* in the house of Umm maktum.²²

Iddah period is therefore considered advantageous for certain reasons, namely;

- (i) To ascertain whether the divorced wife or the woman whose husband died is pregnant or not.
- (ii) To ensure the parties reconcile and resume their marital relationship again in the case of revocable divorce.
- (iii) It also shows the importance of marital relations as same should not be promptly put to an end.²³

The maintenance of a divorced wife during *Iddah* is said to include feedings, clothing and lodging, and this is considered in both revocable and irrevocable divorce.²⁴ Therefore, Islam enjoins Muslims that all revocably and irrevocably divorced women are entitled to maintenance during their waiting period (*Iddah*) irrespective of whether or not they are pregnant.

Allah says in the Quran:

“...Let them live in the same style as you live....everyone should expend according to his means”.²⁵

In another verse, Allah says:

¹⁸ Ibn Majah, “*Sunan Ibn Majah*, Book 9, Hadith

¹⁹ (2021) LPELR-55025 (CA)

²⁰ HA Al-Kishnawi, ‘*Ashal- Madarik –Sharhu Irshad Salik*’ (Vol. 2, Darul-Fikri, Beirut) 183

²¹ Quran 2 verse 228

²² S Abdullahi, ‘*Sahih Muslim* (English Translation), vol. 2, (Kitab Bhavan, New Delhi, 2004) 911

²³ HA Al-Kishnawi (n. 19) 183

²⁴ *Ibid*

²⁵ Suratut- Talaq, verse 7

“...and if they carry life (baby) in their wombs then spend your substance on them until they deliver their burden...”²⁶

Scholars of different schools of jurisprudence, however, hold divergent views as to the entitlement of an irrevocably divorced woman who is not pregnant. Imam Malik and Shafi'i are of the view that irrevocably divorced woman who is not pregnant is not entitled to feeding and clothing, but her entitlement is restricted to accommodation.²⁷ This view is placed on the above verse which reads “.....if they carry your baby in their womb” as a condition precedence for feeding and clothing.²⁸

Whereas, Imam Abu Hanifah holds that an irrevocably divorced woman is entitled to full maintenance irrespective of whether or not she is pregnant. Abu Hanifah argues that since the woman during her waiting period is prohibited from contracting another marriage with other man, the husband is still of a duty to feed and clothe her while observing her *Iddah*.²⁹

From the foregoing scholarly views, the divorced woman is entitled to remain in their matrimonial home pending the end of her waiting period. In the other words, the husband must accommodate such a divorced woman during her *iddah* except where it is not practicable, such as when she is prone to danger.³⁰

Going by the view held by Abu Hanifah on the entitlement of a divorced woman who is not pregnant to be fed, clothed and accommodated, this entitlement will lapse immediately after the *iddah*. As the divorced woman who is pregnant, her right to the maintenance continues till she delivers the baby, but after the delivery, the suckling mother is also entitled to the payment of wages for breastfeeding of the baby, such as paying them for suckling your children.³¹

Allah says:

“... then if they suckle for you, give them their recompense...”³²

As to the divorced woman whose marriage has not been consummated, needs no waiting period (*Iddah*) and no maintenance should be given to her. What is recommended is that she should be given a parting gift which comes in form of prize.³³

“O you who believe! When you marry the believing women, then divorce them before you touch them, you have in their case no term which you

²⁶ Suratut- Talaq, verse 6

²⁷ HA Al-Kishnawi (n. 19) 574

²⁸ AO Salaudeen, ‘An Assessment of Talaq and Its Consequences in Islamic Law: Kano State as a Case Study’ being a thesis submitted to the School of Post Graduate Studies, ABU, Zaria, (2015) 64

²⁹ Ibid.

³⁰ YA Abdullah., ‘The Holy Qur’an- Text, Translation and Commentary, (Amana Corporation, Brentwood, Maryland, U.S.A, 1989) 345

³¹ Ibid

³² Suratu Talaq verse 6

³³ AO Salaudeen, (n 27)

should reckon; so make some provision for them and send them forth a goodly sending forth.”³⁴

4.0.2 Quantum of Maintenance of Wife Under Sharia:

Islam does not state a specific quantum for maintenance of woman. However, two factors must be put into consideration while determine the quantum of maintenance, namely;

- (i) Financial capacity of the husband
- (ii) Status of the wife according to the established custom.³⁵

The above position is proffered in line with the textual authority, the Almighty Allah provides;

“Let man of wealth spend according to his wealth, and he whose provision is restricted, let him spend from what Allah has given him. Allah does not charge a soul except according to what He has given it. Allah will bring about, after hardship, ease.”³⁶

It was also reported that the Holy Prophet (SAW) said to Hind bint Otbah, the wife of Abu Sufyan, on her complaint as regards maintenance. The prophet said: “take from his property what is required for your needs and needs of your children equitably”.³⁷

The indications from the combined reading of the Quranic text and Sunnah provided above, the two (2) factors which to be considered in determining the maintenance of wives during the subsistence of the marriage and after the divorce are reasonably deduced.

Hon. Justice M. A Ambali of blessed memory said more to this position;

“To determine the standard of maintenance to which a woman is entitled, the first factor is the financial capacity of the husband. The other factor is the consideration for the status of the woman. These factors are her beauty, nobility of birth, education and wealth. Next is the degree of urbanization of life in the community where the couple lives and finally, is the prevailing cost of living at any given time. As all these situations change from time to time, upward or downward reviews are due in the standard of maintenance expected from a husband. As wives can request for upward review of maintenance as they move from rural to urban area, so the husband too can ask for its downward reviews if he suffers a reversal of fortune.”³⁸

In strengthening the above position, it was held in case of **Adedayo v. Afolabi**³⁹ that no controversy over the obligation of the father of the children of a dissolved

³⁴ Suratu Ahzab verse 49

³⁵ YA Abdullah (n 29)

³⁶ Suratu Talaq verse 7

³⁷ A. Al-Asqalaini, (nd) ‘*Fathul-Bari bisharhi Sahihil-Bukhari*’ vol. 9, (Salafiyyah Publishing Press, Cairo) 509

³⁸ MA Ambali (n 16) 238- 239

³⁹ (2020) KSCALR page 18 @ page 34

marriage to cater for the maintenance of the children based on his financial capacity.

4.0.3 Maintenance and Custody of a Child:

Having discussed the maintenance of a mother through whom a child comes into an existence and on whose arm he lives, the child's right to maintenance under Islamic law derives its legality from the Quran, Sunnah, Ijma and Ijtihad of the jurists.

The Almighty Allah says in Quran:

“Men shall take full care of women with the bounties which God has bestowed more abundantly on the former than the latter, and with what they spend out of their possession.”⁴⁰

Allah in another verse says:

“And mothers shall give suck to their children for two whole years; this is for those who desire to complete the sucking. And the man to whom the child belongs shall be responsible for their food and clothing according to usage.”⁴¹

Undoubtedly, the above two verses make reference to the fact that the husband as a father is of responsibility to provide what is considered reasonably sufficient for both the child and the mother according to his means. It is equally noted from the verses that the maintenance of a mother determines the maintenance of a child, especially when the child has not reached the age of puberty.

It is a collective responsibility of parents to look after their children, especially when the marriage between them subsists. In other words, a child of a valid marriage is jointly brought up under the care of his parent, but maintenance (*nafaqah*) is a sole responsibility of the father⁴² In a situation whereby the two are legally separated either through *talaq* or *khul'u* (divorce), the mother according to Sharia becomes the custodian while the father provides necessary facilities for the welfare of the child.⁴³

The hadith of Hind bint Oqbah, the wife of Abu Sufyan mentioned above is relevant to the determination of child maintenance; where the prophet instructed Hind to take from her husband property based on her needs and that of her children equitably and according to the tradition known to them.

From this reported hadith, it shows that it is a legal responsibility of the father to provide for the maintenance of the wife and the children during the subsistence of the marriage, and for the child after the divorce.

⁴⁰Suratu Nisai, verse 34

⁴¹Suratul Baqarah, verse 233

⁴² M Rohanee, A Mohamad and K Mutsalim, “Children Maintenance: The Rights in Islamic Family Law and the Law of Thailand” (2015) 6 (4) Mediterranean Journal of Social Sciences, 193

⁴³ U Multazam, ‘The Concept of Child Custody (Hadhanah) After Divorce in the Perspective of Islamic Law’ Indonesian Journal of Islamic Law, Vol. 7, no. 1, 2024, 28 - 29

It must be noted from the textual authorities mentioned above that making provision for the maintenance of a child depends on the financial means of the husband. Therefore, certain factors are to be considered which are; the financial ability of the husband and the prevailing customs and tradition in the society, provided that such custom does not offend any Islamic principles.⁴⁴

According to juristic opinions, the maintenance of a child is calculated to include the followings; feeding, clothing, lodging, medication or medical treatment, amongst other things as time may introduce.⁴⁵

The maintenance is a responsibility placed on the shoulders of the father to provide for his children until they become independents. The male child, either rich or poor, considered dependent of his father till he attains the age of puberty and become capable of earning a living on his own.⁴⁶ It must be noted further that, if a child becomes an independent, and later becomes incapacitated, the responsibility does not fall back on his father as a compulsory act rather, a recommended.⁴⁷ The responsibility of father to his female child is on the shoulders of the father until she is married. After the marriage, her maintenance automatically shifted on her husband.⁴⁸

4.0.4 Custody of A Child:

Islamic law has made provision for how the child's custody is determined before and after the dissolution of a valid marriage between the father and mother.⁴⁹ It is said that there is no direct verse of the Quran on custody. However, Muslim jurists have carefully deduced it through the one of rules of interpretation known as *Dalalat an-Nass* (the inferred meaning) from the below verse;

“The mother should breastfeed their infants for two complete years.”⁵⁰

One can safely read into the text to fulfil the proper objective of the text that the message conveyed therein includes whom to be entrusted with the custody of a child.

Considering the narration of Abdullah bn Amru of an episode which involved a woman who brought her husband before the Prophet Muhammad (SAW) when her husband wanted to force her to surrender the custody of their child.

“.... O Messenger of Allah my womb was a vessel to this son of mine, my breasts were a means of quenching his thirst, and my lap was a place of protection for him. Yet his father has divorced me and wants to take him away from me. The prophet (SAW) said: you have more right to him as long as you have not married another person.”⁵¹

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ MA Ambali (n 16) 233

⁴⁷ Ibid

⁴⁸ Ibid. AO Zakariya, ‘Appraisal of the Paramount Interest of A Child as Precursor to Grant of Custody of A Child Under Shari’ah’ *LexScriptio*, Journal of the Department of Jurisprudence and Public Law, KWASU, Vol. 2, no. 1, 2025

⁴⁹ MUC Ramadhan, TRF Hayati and BN Azizah, ‘Comparative Normative Study on Child Custody and Guardianship in Islamic Family Law: Lessons from ASEAN and Europe’ *ASEAN Journal of Islamic Studies and Civilization (AJISC)*, Vol. 2, no. 2, 2025

⁵⁰ Suratu Baqarah, verse 233

⁵¹ As-Sayid Sabiq, ‘*Fiqhus-Sunnah*’, vol. 2, (4th Edn., Darul Fikr, Lebanon, (1403H/1983) 289

Combined reading of the verse and hadith reveals that Islam entrusts the custody of a child at their tender age to the most lenient, tender and safe hands of his mother.

The child custody is one of the basic rights which every child needs to enjoy and he must not be deprived of such. This right enjoys statutory flavor under different laws and statutes in Nigeria such as Marriage Act wherein the interest of a child is given priority in the determination of child custody.⁵²

Sharia has given preference to the mother in the event of dissolution of marriage, provided that the mother has satisfied certain conditions.⁵³ The Maliki school of thought is of the strong view that before child custody can be awarded to the mother, the following conditions must have been fulfilled for the best interest of the child; that is, sanity of the mother, her characters, such as being trustworthy person, her health status and marital status, amongst others⁵⁴ Though, the conditions as to re-marry and difference of religion remain subjects of debate among scholars.⁵⁵

It must be noted that despite the fact that the mother is awarded with a child custody, the father remains his guardian, that is, the father still has a right to supervise and control over the well-being of his child.

In a situation whereby the mother loses her right to the child custody, the father is not a next person to be awarded with the custody; the custody will be awarded in the hierarchical orders as provided under Islamic law.

4.0.5 Qualifications of the Custodians in the Hierarchical Orders;

The custodian of a child must be an adult, sane, fit and capable, that is, old, ill, or blind persons are not qualified to be given a custody of a child.⁵⁶ The custodian must be a pious person who lives in a secured place and must not have infectious diseases etc.

The followings are the people who are entitled to the custody of a child in order of priority;

- (i) Mother
- (ii) Grandmother
- (iii) Great grandmother
- (iv) Maternal aunt (either full sister to the mother of the child or half-sister from either the father or mother side of the child)
- (v) Full maternal aunt
- (vi) Father's mother
- (vii) Father
- (viii) Full sister
- (ix) Half-sister from the father side
- (x) Half-sister from the mother side
- (xi) Paternal aunt

⁵² UY Abdulsalam, 'Determination of Child's Custody Under The Marriage Act and Islamic Law' <https://thenigerialawyer.com/determination-of-childs-custody-under-the-marriage-act-and-islamic-law/> accessed 6th May, 2024

⁵³ M Al-Kafiy, *'IhkamulAhkam*, Commentary on *Tuhfah*' (Darul Fikr) 108

⁵⁴ Ibid. See also H. Ijaya and H. Ijaiya, 'Child Custody (*Hadanah*) in Islamic Family Law: An Anatomy of Women's Rights in Nigeria and Malaysia' *Islam and Civilisational Renewal*, Vol. 9, no. 1, 2018, 69

⁵⁵ W Al-Azzuhaili, *'Al-Fiqhul-Maliki Al-Muyassir*' vol. 2 (Daru Al-Kalam, 1413H/2010) 295

⁵⁶ SA Al-Azhariy, *'Jawahirullklil*' Commentary of *Mukhtasar Khalil*', 408 - 409

- (xii) Niece through the child's brother
- (xiii) Niece through the child's sister
- (xiv) An appointed Guardian by the court
- (xv) Full brother.⁵⁷

Furthermore, the mother has no permanent custody of her children, right to custody of her child lapses immediately a male child attains age of puberty while female child custody terminates as soon as she is married and the marriage is consummated.⁵⁸

4.0.6 Maintenance and Custody of an Illegitimate Child:

Islam attributes only a legitimate child to the father who legally married to the woman and thereafter consummated the marriage. Therefore, a child born out of wedlock, that is, without a valid marriage is considered as an illegitimate child under Islamic law, and such a child will be attributed or ascribed only to his mother.⁵⁹ The same principle applies to a child who is a subject of *lian* (a child whose paternity is denied by his purported father).

It is, therefore by implication, settled that under Islamic law, the maintenance of such a child is on the neck of the mother and his custody goes automatically to the mother, and if she is, due to certain factors, not qualified to have the custody of the child, her relatives take the custody in order of priority as previously stated.⁶⁰ This position was held in the case of **Adelani Aminat v. Sarafa Adelani**⁶¹

5.0. JUDICIAL OVERSIGHT AND ROLE OF *QADIS* IN DETERMINATION OF MAINTENANCE AND CHILD CUSTODY IN NIGERIA

Sharia/ Area courts have power to entertain and determine matters involving questions of Islamic personal law which includes, matrimonial causes, dissolution of marriage, maintenance and guardianship and custody of a child amongst other matters.⁶² These courts are expected to base their decision on the Quran and Sunnah of the prophet in determination of matters stated above.

Judicial officers are ordinarily expected to determine any dispute between them through the application of rules and procedures.⁶³ However, judges in Sharia/Area courts are of the duty to adjudicate the Islamic matters based on Islamic provisions and due verification of facts or evidence adduced by them.

Litigants or their respective legal representatives, in some occasions, may want their case to be decided in line with their desire or eloquence as it is against the provision of Islamic law,

⁵⁷ Ibid

⁵⁸ AA At-Tasuli, 'Al-Bahjah Commentary on Tuhfah, (Mustafa Al-Babi Al-Halabi and Sons Press, Cairo, 1370/1951) 57

⁵⁹ UY Abdulsalam (n 50)

⁶⁰ U Abdulhameed, DO Abdulsalam, AM Ishaq, and SA Badmus, 'A Comparative Study of Child Custody Under Islamic and Nigerian Laws' Al-Mahkamah: Islamic Law Journal, Vol. 3, no. 1, 2025, 51

⁶¹ (2020) Kwara State Sharia Court of Appeal's Law Report (KSCALR), p. 44 @ para. 58

⁶² A Rafiq, 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World: An Analysis' (2014) 4 (5) International Journal of Humanities and Social Science, 267. Section ... of the 1999 Constitution of Federal Republic of Nigeria (as amended)

⁶³ YA Abdullah, (n 29) 1483

it is therefore a judicial duty of judge in Sharia/Area court to refer them to the position of Sharia.

Islamic law has made it known that the father is under obligation to look after the upbringing of his children during the subsistence of the marriage and after divorce has been pronounced irrespective of whether or not the children are under his custody. In most cases, the divorced women, even though are entitled to maintenance during their *iddah* period, are denied of that right because they are divorced in an atmosphere of anger and hatred that lead to divorce. Some of them do not even know that they are so entitled to it.⁶⁴

It is not a new phenomenon that the litigants (husband and the divorced wife) hardly reach an agreement on the amount of money to be paid for the maintenance of a child who is in custody of a divorced woman, and the issue often settled by the courts after considering the financial capacity and earning of the father and the economic reality in the country.⁶⁵

There are different occasions where, after the decision of court on maintenance, the father fails to pay for feeding allowance of his child as at when due or pay lesser amount contrary to what is ordered by the court which usually affects the upbringing of a child with its deer consequences for the society.

One of the duties owed by Sharia/Area Courts and Sharia Court of Appeal is to carefully consider principles of Islamic law in determination of matters so that the ridiculous amount will not be awarded by the court for the maintenance allowance of children under the custody of the divorced wives.

It was reported in case of *Balogun v. Sambo*⁶⁶ in this case, the trial court failed to ascertain or verify the source of income of the husband in determining the maintenance of the children of dissolved marriage. On appeal, Sharia Court of Appeal sitting in Ilorin, conducted further verification to ascertain the ability and capability of the husband in discharging his responsibility as to the maintenance. The court therefore investigated the actual income of the father by demanding for his salary pay slip from his place of work. It was later realized that the evidence presented by the wife about the financial status of the husband was totally incorrect. The court later relied on its sole investigation and slightly review the amount previous awarded by the trial court.

As commendable as the above decision of Kwara State Sharia Court of Appeal, there are many Nigerians who still have serious reservations about the performance of the judicial officers. Many divorced wives believe that some of these decisions are compromised, simply because, amounts awarded by courts as to the maintenance are very low to the needs of the children of dissolved marriage, while the children of other or new wives enjoy better.

6.0 CONCLUSION AND RECOMMENDATIONS

Marriage is legalized under Islamic law (Sharia) for certain objectives and divorce is equally permissible to protect the couples from the possible evils that may result from the marital

⁶⁴ AO Salaudeen (n 32) 96

⁶⁵ Ibid, 98

⁶⁶ (2016) KSCALR

crises. Therefore, Sharia provides for rules that regulate divorce and the consequences, that follows it such as maintenance and custody of a child.

In Nigeria, the maintenance of wife, maintenance and custody of children under Sharia are guided by principles that prioritize the welfare of the children. Generally, Islamic law imposes the duty to maintain children primarily on the father, who is responsible for providing for their basic needs such as food, clothing, and shelter.

Custody, on the other hand, can be a more complex issue. While the father is responsible for maintenance, custody of the children may be granted to the mother, especially for younger children. The mother's right to custody does not deprive the father of visitation rights, and he remains obligated to provide maintenance for the children during this period.

It is paramount to note that these principles can be influenced by the specific circumstances of each case and the interpretations of Islamic law by various courts. For instance, the maintenance and custody of children under Islamic law in Nigeria are subject to a multifaceted legal regime that seeks to balance religious principles with the best interests of the child. While Sharia provides a foundational framework, it is interpreted and applied within the broader Nigerian legal context, which is influenced by various legal traditions and the overarching need to protect the welfare of children.

This paper therefore suggests as follows;

1. That judicial officers should work towards the enforcement mechanisms for maintenance of a divorced wife during her *Iddah*, and maintenance and child custody whenever such is brought before them.
2. Lack of maintenance of wives and children contributes to marital crises which leads to divorce. Therefore, the judicial officers should block the means to dissolution of marriage at the time cases of maintenance are brought before them, by granting the claim of who lodges a complaint as to that regards by strengthening the enforcement of maintenance orders.
3. That parents should be enlightened and encouraged to discharge their respective duties and obligations as to the maintenance and custody, in the quest to reduce the number of vagabonds in our society, who as a result of nonchalant attitudes of parents towards the welfare of children became nuisance in the society.
4. The laid down principles of Islamic law should not be substituted with the cultural milieus of various tribes when it comes to maintenance and custody rights. In some cases, the family of a divorced woman may advise the woman to forfeit her right and that of her child in order to avoid further humiliation.
5. The parents should be educated in courts that divorce does not result in the loss of a father's obligation to provide for his children
6. The court has important role to play to ensure full compliance of the rules of maintenance by introducing prescribed and adequate sanctions for the violators of the rules.
7. A room should be given for financial disclosure of the father and review of the maintenance allowance as the father's earnings increase or as the prevailing economic reality changes.