

CONTEMPORARY ISSUES IN ISLAMIC FAMILY LAW, PROPERTY AND FINANCE TOWARDS ACHIEVING MAQASID AL-SHARIAH

This book gathered chapters on various contemporary issues relating to Islamic law namely family, property and finance within the context of *Maqasid al-Shariah*. These chapters are a compilation of working papers presented at the International Conference of Family Law, Family Justice and *Maqasid al-Shari'ah* 2021 (ICFL 2021) which have been thoroughly reviewed for the purpose of publication. For easy reference, the subject matters are classified into five main subtopics namely; Rights and Responsibilities in Marriage and Divorce, Children's Rights and Protection, Alternative Dispute Resolutions, Islamic Law of Property and Succession and Islamic Banking and Finance. Written in 20 chapters by distinguished reputable authors, the book provides useful reference for those who are in the legal fraternity including judges, legal and *Shari'ah* practitioners, academicians, students, researchers and public as a whole.



CONTEMPORARY ISLAMIC FAMILY LAW, PROPERTY AND FINANCE

EDITORS

AZIZAH MOHD
ROSLINA CHE SOH
NAJIBAH MOHD ZIN
AKMAL HIDAYAH HALIM

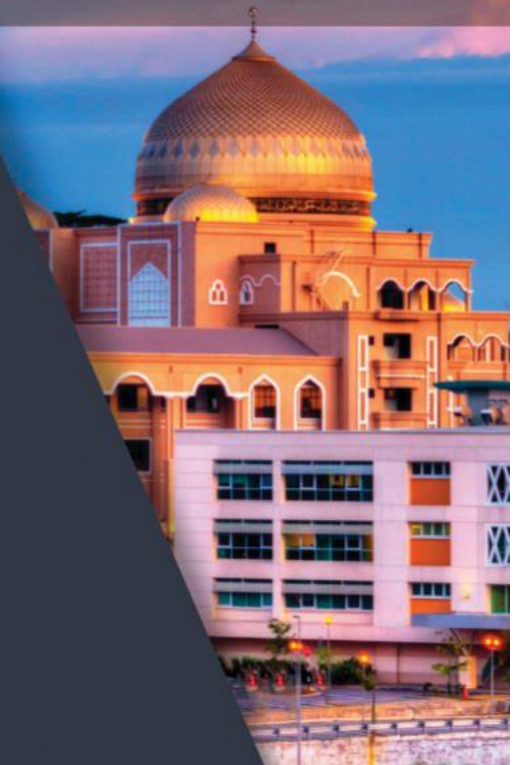


TOWARDS ACHIEVING MAQASID AL-SHARI'AH



CONTEMPORARY ISSUES IN

ISLAMIC FAMILY LAW, PROPERTY AND FINANCE



***CONTEMPORARY ISSUES IN ISLAMIC
FAMILY LAW, PROPERTY AND FINANCE
Towards Achieving Maqasid al-
Shari'ah***

EDITORS

AZIZAH MOHD
ROSLINA CHE SOH
NAJIBAH MOHD ZIN
AKMAL HIDAYAH HALIM

Published in 2021 by
Jabatan Kehakiman Syariah Malaysia
Blok C, Kompleks Islam Putrajaya
No 20, Jalan Tunku Abdul Rahman, Presint 3,
62100, Putrajaya, Malaysia
&
Ahmad Ibrahim Kuliyah of Laws,
International Islamic University Malaysia,
Jalan Gombak,
53100 Kuala Lumpur,
Malaysia

Perpustakaan Negara Malaysia Cataloguing-in-Publication Data
CONTEMPORARY ISSUES IN ISLAMIC FAMILY LAW, PROPERTY
AND FINANCE : Towards Achieving Maqasid al-Shari'ah / EDITORS
AZIZAH MOHD, ROSLINA CHE SOH, NAJIBAH MOHD ZIN,
AKMAL HIDAYAH HALIM.

ISBN 978-967-0870-86-1

1. Domestic relations (Islamic law).
 2. Marriage (Islamic law).
 3. Marital property (Islamic law).
 4. Maqasid (Islamic law).
- I. Azizah Mohd. II. Roslina Che Soh.
III. Najibah Mohd. Zin. IV. Akmal Hidayah Halim.
346.1767015

©2021 JKSM and AIKOL; individual chapters, the contributors

All rights reserved. No part of this book may be reproduced or transmitted in any form or by other means, including photocopying and recording, without the written permission of the Publishers. Such written permission must also be obtained before any part of this book is stored in a retrieval system of any nature.

Printer arrangement by: Kedepan Enterprise, No 23-A, Jalan Kajang Perdana
2/3 Kajang Perdana 43000 Kajang Selangor. email: kedepanent@gmail.com

TABLE OF CONTENTS

<i>Editors...</i>	i
<i>List of Contributors.....</i>	iii
<i>Foreword (1).....</i>	vii
<i>Foreword (2).....</i>	ix
<i>Preface.....</i>	xi
<i>Abbreviations.....</i>	xvii
<i>List of Cases.....</i>	xxiii
<i>List of Statutes.....</i>	xxvii

PART I RIGHTS AND RESPONSIBILITIES IN MARRIAGE AND DIVORCE

Chapter 1 RIGHTS, DUTIES AND OBLIGATIONS OF SPOUSES (*HUQUQ AL-ZAUJIYYAH*) IN THE LIGHT OF *MAQASID AL-SHARI'AH*

<i>Muhammad Miftahu Bello & Imam-Tamim, Muhammad Kamaldeen.....</i>	1
---	---

Chapter 2 ANALYSIS OF THE OBJECTIVES OF *SHARI'AH* AND THE PERSPECTIVE OF NIGERIAN MUSLIM WOMEN ON POLYGAMY

<i>Imam-Tamim, Muhammad Kamaldeen & Aderemi, Atiyah tul Manan.....</i>	21
--	----

Chapter 3 RESPONSIBILITY TO MAINTAIN PARENTS IN THE LIGHT OF *MAQASID AL-SHARI'AH*

<i>Badrud din Hj Ibrahim & Azizah Mohd.....</i>	53
---	----

Chapter 4

SHARI'AH LAW THE SAVIOUR: ENFORCEMENT AND EXECUTION OF SYARIAH NAFKAH ORDERS

Kamilia Ibrahim.....69

Chapter 5

TRIPLE TALAQ: REVOCABLE OR IRREVOCABLE? AN ANALYSIS IN THE LIGHT OF MAQASID APPROACH

Zulqernain Haider Subhani, Bouhedda Ghalia and Mohammed Farid Ali al-Fijawi.....89

Chapter 6

REFORM OF UNILATERAL DIVORCE IN THE MALAYSIAN SHARI'AH FAMILY LAW

Najibah Mohd Zin..... 111

Chapter 7

RELATIONSHIP BETWEEN BANKRUPTCY AND FAMILY LAW: ISLAMIC LAW PERSPECTIVE

Ahmad Azam Othman.....127

PART II CHILDREN'S RIGHTS AND PROTECTION

Chapter 8

MAQASIDI APPROACH TO CHILD MARRIAGE WITH SPECIAL REFERENCE TO THE PRESERVATION OF LINEAGE (HIFZ AL-NASL)

Halima Boukerroucha.....149

Chapter 9

AN APPRAISAL OF CHILD PROTECTION THROUGH ADOPTION UNDER MALAYSIAN REGISTRATION OF ADOPTIONS ACT 1952 AND KAFALAH IN MOROCCO

Nadhilah A.Kadir & Azizah Mohd.....171

PART III
ALTERNATIVE DISPUTE RESOLUTIONS

Chapter 10

**THE ROLE AND METHODS OF RECONCILIATION
CENTER IN ALTERNATIVE DISPUTE RESOLUTIONS
BETWEEN SPOUSES: CASE STUDY OF SAUDI ARABIA**

Somih Alzahrani & Ramizah Wan Muhammad..... 199

Chapter 11

**ALTERNATIVE DISPUTE RESOLUTION IN FAMILY
DISPUTES: AN APPRAISAL OF FINANCIAL AND
PROPERTY RIGHTS OF MUSLIM WOMEN IN NIGERIA**

*Aishat Abdul-Qadir Zubair & Kudirat Magaji Owolabi-
Wopa*..... 213

Chapter 12

**ONLINE MEDIATION IN FAMILY SUPPORT DIVISION
(BSK), DEPARTMENT OF SYARIAH JUDICIARY
MALAYSIA: ITS APPLICATION IN POST COVID-19**

*Jazilah Mohd Saad@Mat Saud, Hanna Ambaras Khan, Nora
Abdul Hak*..... 235

Chapter 13

**THE IMPLEMENTATION OF *TAHKIM* UNDER THE
HAKAM (STATE OF SELANGOR) RULES 2014**

Kamarulzaman Ali & Norjihan Ab Aziz.....249

Chapter 14

**CONSTRAINTS AND PROBLEMS ENCOUNTERED IN
THE EXECUTION AND ENFORCEMENT OF MEDIATION
IN CHILD CUSTODY DISPUTES IN THE SYARIAH
COURTS: A PILOT STUDY**

*Ahmad Mukhlis Mansor, Nora Abdul Hak, Saodah Wok & Roslina
Che Soh@ Yusoff*.....267

Chapter 15

THE DEVELOPMENT OF SYARIAH COURT-ANNEXED SULH (MEDIATION) IN MALAYSIA

*Kamarulzaman Ali, Nora Abdul Hak, Shaiful Azli Jamaludin &
Khairul 'Azmi Mohamad.....287*

PART IV

ISLAMIC LAW OF PROPERTY AND SUCCESSION

Chapter 16

THE EXECUTION OF *HIBAH* AS AN INSTRUMENT FOR ISLAMIC ESTATE PLANNING IN MALAYSIA WITH SPECIAL REFERENCE TO *HIBAH RUQBA*

Shaiful Azli Jamaludin & Akmal Hidayah Halim.....313

Chapter 17

THE INFLUENCE OF THE ARAB JAHILIYY CUSTOMARY PRACTICES OVER THE ENTITLEMENT OF MUSLIM LEGAL HEIRS TO THE DECEASED MUSLIM'S ESTATES IN ISLAMIC LAW OF SUCCESSION: A FACT OR A MYTH?

Mohamad Asmadi Abdullah.....327

Chapter 18

ANALYSIS OF THE RIGHT TO AFFORDABLE HOUSING FROM THE CONTEXT OF HUMAN RIGHTS AND *MAQASID AL-SHARI'AH*

Norlaili Mat Isa.....343

PART V
ISLAMIC BANKING AND FINANCE

Chapter 19

**MAQASIDIC MODEL IN PROTECTING ISLAMIC
BANKING CONSUMERS FROM UNFAIR CONTRACTS**

Noor Mahinar Abu Bakar & Norhashimah Mohd Yasin.....361

Chapter 20

**STANDARDIZATION OF THE ISLAMIC FINANCE
INDUSTRY'S GOVERNANCE FRAMEWORK IN
INTERNATIONAL FINANCE**

Mohamed Al Amine Sano..... 377

Akmal Hidayah Halim

CHAPTER 11

ALTERNATIVE DISPUTE RESOLUTION IN FAMILY DISPUTES: AN APPRAISAL OF FINANCIAL AND PROPERTY RIGHTS OF MUSLIM WOMEN IN NIGERIA

Aishat Abdul-Qadir Zubair &
Kudirat Magaji Owolabi-Wopa

ABSTRACT

In Nigeria, Muslim women hardly enjoy the rights which may avail them in *Shari'ah* during the marriage or at divorce. Financial support and property rights are fundamental issues that need to be resolved. Hence, depriving women of their entitlement of these rights often leave them at an economically disadvantaged position. The implication of this situation to the society at large cannot be overemphasised since women build generations in years to come. The current position of the Common law as well as the strict property rights approach of the courts clearly cannot offer justice to women. Hence, there is need for alternative route to access justice. The article aims to examine the aptness of Alternative Dispute Resolution (ADR) mechanisms in family disputes related matters and hindrances to the use of ADR to enforce financial and property rights of women in Nigeria. The article recommends among others the amendment of the Marriage Act, Matrimonial Cause Act and Matrimonial Causes Rule, Court Rules to capture both Islamic and conventional ADR mechanisms and enforcement of its outcome.

Keywords: alternative dispute resolution, property rights, women rights, inheritance, *sulh*, *tahkim*, *Shari'ah*

INTRODUCTION

Traditional African societies have nurtured age-long belief that women are inheritable items like properties in the event of their husbands' demise. This notion about women came to fore on their occasion of marriage as a matter of implication with apparent challenge to financial proprietary right. This custom has somewhat eroded the whole concept of financial and property rights in a marriage. This is because financial and property rights have been ceded to men alone. However, with civilization, this notion began to change gradually but not with its problems as issues continue to erode especially where the men continued with their African mentalities of total entitlement to everything including the wife as a property whom they have duly acquired by the payment of her dowry at the traditional wedding ceremony.

Before the advent of Islam namely in the period of the *Jahiliyyah* (ignorance), women were seen as mere objects of sex and entertainment and less of a serious entity that could own money or property. This period saw the female gender as a huge embarrassment so much that a father whose wife was said to have delivered a female child is ashamed to celebrate the birth but would rather have the female child buried alive to save his face amongst his clan and friends. This female infanticide is attested to in the Glorious Qur'an, thus:

*And when one of them is informed of (the birth of) a female, his face becomes dark, and he suppresses grief. He hides himself from the people because of the ill of which he has been informed. Should he keep it in humiliation or bury it in the ground? Unquestionably, evil is what they decide.*¹

The patriarchal cultural norms affected greatly the way a woman was treated and seen during this period. She had no mind of her own because she lived largely in the eyes of her father and brothers before marriage and lived through the eyes of her husband once she was married out. She did not partake in the caravan trade that was the main business and career of the Arabs of the time and was definitely not allowed to partake in any form of war as she was

¹ Qur'an, 16: 58-59.

apparently treated as the weaker sex compared to the men. Women's low social positions is said to be the resultant effect of the Pre-Islamic Arabia which is caused by social conditions and necessity of survival.² With the arrival of Islam and its principles of fairness and equity, women enjoyed a very high ranking position especially when a *surah* in the Noble Qur'an was named after the women, that is *surah al-Nisa'*. This was a very important beginning era for women emancipation globally and the era that marked a very significant turn-around for feminist and all human rights fighters for financial and property rights of women. However, after a long period the world seems to be gradually returning to the period of *jahiliyyah* (ignorance) and dark ages in terms of the right and ability of the women to own properties and be in charge of their financial dealings most especially when they are married.

Thus, this study examines the financial and property rights of Muslim women as guaranteed in the Glorious Qur'an. The status of women in the Nigerian cultural setting is analysed and juxtaposed against the status given to her under Islamic as enshrined in the Glorious Qur'an and the *Sunnah* of the Prophet Muhammad (SAW) In this relation, Alternative Disputes Resolution (ADR) mechanisms are also examined to show how they can be used in settling family disputes that relate to financial and property rights of Muslim Women in Nigeria.

FINANCIAL AND PROPERTY RIGHTS OF WOMEN IN ISLAM

It is said that there is lack of consensus on what status of women is.³ This is because it is a multidimensional concept that could be interpreted differently depending on the subject of discourse.⁴

² John L. Esposito, "Women's Rights in Islam" *Islamic Studies* 14, no. 2 (1975): 100, accessed September, 21, 2020, <http://www.jstor.org/stable/20846947>

³ Marida Hollos, "Migration, Education, and the Status of Women in Southern Nigeria" *American Anthropologist*, New Series 93, no.4, (1991): 853.

⁴ Ibid.

Therefore in this context we are not looking at the status of women with relation to politics or education, but this study examines the Muslim women in relation to her status of having financial independence and owning properties in her name.

The high status given to the male folk right from his birth as well as the numerous opportunities given to him that enable him to develop both socially and intellectually is unfortunately not given to women. This gives a false impression that the men are intellectually better than the women in terms of education status. The Muslim women's status is thus automatically affected by this notion.

The strict gender norms on marriage, divorce, child custody and inheritance which in a study is believed to be very restrictive for women is what permeates most cultures in Africa, and Nigeria is not an exception. Marriage is usually not by choice of the girl to be married but is dictated by culture⁵ where in most cases the girls are given out to older men right from their births and have no say in the selection of whom they are eventually married to. In addition, Bridal Gift in most cultures in Nigeria is given by the husband's family to the wife's family but nothing to the wife who it is meant for. There is also an issue of child custody which is automatically given to the father in the case of any eventuality like divorce. Women in addition have no individual property ownership and they lack inheritance rights.⁶ Married women become properties of their husbands so there is no way they could own any property as they are themselves most likely to be inherited.

There is no such thing as being financially independent for women in Africa, as this is often seen as almost impossible as it is believed in some quarters that the only way a woman can be financially independent is if she engaged herself in prostitution or

⁵ Yoruba culture, but traces of this is often seen in other cultures such as Hausa and Nupe culture and some parts of the Igbo tribe.

⁶ Abdul-Mumin Saad, "Traditional Institutions and the Violation of Women's Human Rights in Africa: The Nigerian Case," in *Africa Women and Children: Crisis and Response*, ed. Apollo Rwomire (Wespart: Praeger, 2001): 74.

having some rich men giving her gift of material things in exchange for some sexual favours from her. In some rare cases where the woman has some financial standing to her name, she has no absolute control of her money because she is expected to contribute to the running of the home. In a case study of Yoruba Women, it was discovered that the Yoruba ethnic group believes in marriage partners earning an income and contributing to the household expenditures.⁷ This has by implication exempted the men from taking full responsibility of the finances in the house. In some cases, the women who started off helping the men with the household responsibilities, ended up taking full charge as the men were seen to have left everything for the woman to take care of.

Unlike the situation highlighted above, Islam gives a high status to the woman. In the case of a marriage, she is not to be married out without her consent. She is in addition entitled to her bridal gift which must be given to her before the marriage is consummated except where she willingly gives that up. It is stated in the Glorious Qur'an that:

*And give the women (upon marriage) their (bridal) gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease.*⁸

This evidences the fact that the Muslim woman is a legal partner to the marriage contract rather than an object for sale as perceived in most cultural norms in Nigeria. It is also important to note here that one of the most important financial rights of Muslim women is her 'mahr' (bridal gift) for which she enjoys exclusive right over. She can do as she wishes with it and cannot be coerced to give it up on any expenses which she is not willing to spend it on.

This takes us to the discussion on the maintenance for the family which is the exclusive responsibility of the man. Financial responsibility of the house is solely on the man which he is not

⁷ Irene Van Staveren and Olasunbo Odebode, "Gender Norms as Asymmetric Institutions: A case study of Yoruba Women in Nigeria" *Journal of Economic Issues* 41, no. 4 (2007): 920

⁸ Qur'an, 4: 4.

expected to share with the wife. This is emphatically reiterated in a famous hadith of the Prophet Muhammad (SAW) which states thus:

*Narrated 'Abdullah bin 'Umar: Allah's Messenger (SAW) said: "Surely! Everyone of you is a guardian and is responsible for his charges: The Imam (ruler) of people is a guardian and is responsible for his subjects; a man is the guardian of his family (household) and is responsible for his subjects; a woman is the guardian of her husband's home and of his children and is responsible for them; and the slave of a man is a guardian of his master's property and is responsible for it. Surely, everyone of you is a guardian and responsible for his charges."*⁹

The idea of the man being entirely responsibly for financial responsibility in the home is stated in many verses of the glorious Qur'an one of which is stated thus:

*Mothers may nurse [i.e. breastfeed] their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is their [i.e. the mothers'] provision and their clothing according to what is acceptable.*¹⁰

This verse goes to show that even though breastfeeding a baby is natural to a woman, she is to be catered for during this period by the husband as it is his sole responsibility to do that. In another verse of the Glorious Qur'an, the reason for the responsibility of the man to take care of the woman is expressly stated thus: "*Men are responsible for women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means.*"¹¹

Divorce is often used to argue the inequality of women in Islam as it is believed in some quarters that a woman cannot ask to be

⁹ Muhammad Ibn Ismail Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, trans. Muhammad Muhsin Khan (Riyadh-Saudi Arabia: Darussalam, 1997), vol. 9, hadith 7138.

¹⁰ Qur'an, 2: 233.

¹¹ Qur'an, 4: 34.

divorced. This is however far from being the truth as stated in the Qur'an:

And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them-and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah-then indeed Allah is ever, of what you do, Aware.¹²

This verse aside from clearing the air about a woman's ability to ask for divorce or initiate a divorce process, also evidences the fact that even in the process of divorce, the man is to be nice to her and care for her. Most importantly, the maintenance of the woman still rests on the man during her 'iddah as she is to be domiciled in the house of her husband until she completes the term of 'iddah or he takes her back.¹³ In another verse of the glorious Qur'an it is stated that:

And when they have [nearly] fulfilled their term, either retain them according to acceptable terms. And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah. That is instructed to whoever should believe in Allah and the Last Day. And whosoever fears Allah-He will make for him a way out.¹⁴

A Muslim woman enjoys the right of inheritance just like her male counterpart. She can now inherit and be inherited as this is expressly stated in the glorious Qur'an thus:

For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much-an obligatory share.¹⁵

It is stated emphatically in the Qur'an that her property shall not be devoured by her guardian even when she is yet to come of

¹² Qur'an 4: 128

¹³ This is the waiting period for a woman when a revocable divorce has been pronounced.

¹⁴ Qur'an, 6: 52.

¹⁵ Qur'an, 4: 7.

age. The property in the care of the guardian is to be cared for and made to increase until she becomes mature and be ready to take over the property herself. The implication of this is that she is allowed and has a right to take charge of her finances and properties once she is matured and prudent. It is stated in Qur'an thus:

*And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor-let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant.*¹⁶

Obviously in Islam, a Muslim woman's property right is guaranteed regardless of the position she takes. This could be as a daughter, sister, wife, mother and even as a grand-mother. She enjoys the right to also use and dispose of the property so inherited as she wishes. She can also engage in business dealings and commerce as evident in a number of Qur'anic verses where Allah make references to this act without mentioning any gender. He uses the words "*O you who have believed....*"¹⁷ This evidently shows the equality in religious duty accorded to both sex in Islam. This is reiterated in the verse of the Glorious Qur'an thus:

*And whoever does righteous deeds, whether male or female, while being a believer-those will enter paradise and will not be wronged, [even as much as] the speck on a date seed.*¹⁸

It is therefore a settled argument that regardless of whether a woman is married or not, autonomous legal identity and separate property rights have been enjoyed by Muslim women since the

¹⁶ Qur'an 4: 6.

¹⁷ See e.g. Qur'an 2: 282-283; Qur'an 3: 130; Qur'an 4: 29; Qur'an 5: 1.

¹⁸ Qur'an 4: 124.

Seventh Century.¹⁹ Matters which some feminist group are now advocating for are settled matters in the Qur'an centuries back. In fact Muslim women have been found to have enjoyed these rights centuries before women in the West even in countries that are front liners in gender equality today.²⁰ Or what better gender equality and raising of women's status can be found elsewhere different from what has been given to women in platter of gold in Islam.

Muslim women therefore are expected to enjoy both property and financial rights accorded to them by Islam, however the exercise of such rights do lead to a number of dispute in many instances even in the Muslim majority countries.²¹ It is true that the onus of guaranteeing women's right to property and inheritance when women challenged male circumscriptions of their rights is on the judiciary. However, having such issue resolved by the court would definitely come with its own unique challenge. It is noteworthy that in some parts of Nigeria there are Islamic courts known as *Shari'ah* Courts which have the jurisdiction to hear and adjudicate 'personal matters' on Islamic family disputes. However, in states where the *Shari'ah* Court does not exist, where do the Muslim women resort to in cases of dispute? The practice is to opt for the common law courts where common law principles are applied to determine issues which are expressly Islamic in nature as well as manned by common law judges who are not knowledgeable in the field of *Shari'ah*. Thus, Islamic law presents ADR in family disputes as the basic tenet of civil justice.

¹⁹ Benjamin G. Bishin and Feryal M. Cherif, "Women, Property Rights, and Islam" *Comparative Politics* 49, no. 4 (2017): 506, <https://www.jstor.org/stable/26330985>

²⁰ Ibid., 501.

²¹ Ibid., 512

ALTERNATIVE DISPUTES RESOLUTION (ADR) IN FAMILY LAW DISPUTES

ADR operates as a tool for the disputing parties to settle their incongruities in an informal manner without the use of the court.²² What makes ADR stand out distinctively is the fact that the Qur'an and hadith give a detailed rule to regulate the legality and to assure of its divine approval of the process under the Islamic law.²³ This connotes that amicable settlements are encouraged in Islam for the sole purpose of nurturing and preserving human relationships.²⁴

As regards family law dispute, the *Shari'ah* is explicit in its objective among other to preserve and guide the welfare of the family institution; this is to ensure the smooth running of the family affairs in time of dispute or discord.

Specifically, exploring the use of ADR in family disputes comes with lots of benefits such as confidentiality and desires of the disputing parties to have greater control over the process.²⁵ Family disputes can be traumatic and emotional torturing particularly for newly separated couples. This is described as the most difficult time of their lives.²⁶ And it often comes with hurtful

²² Md Zahidul Islam, "Provision of Alternative Dispute Resolution Process in Islam," *IOSR Journal of Business and Management* 6, no. (3) (2012): 31; Idris Abdullahi Haroon, "The Use of Alternative Dispute Resolution (*Sulh*) in Sharia Cases," a paper presented at the *National Workshop for Area/ Sharia/ Customary Court, Judges, Directors and Inspectors of Area/ Sharia/customary Courts, Wuse, Abuja, 3-5th April, 2017*, 3.

²³ Qur'an 2: 182; Qur'an 4: 128; Qur'an 8: 61; Qur'an 48: 1-3; Qur'an 49: 9-10. See also Syed Khalid Rashid, "Alternative Disputes Resolution in the Context of Islamic Law," *The Vindobona Journal of International Commercial Law and Arbitration* 8, no. (1) (2004): 96.

²⁴ Syed Khalid Rashid, "Alternative Disputes Resolution," 98.

²⁵ Edwin Obimma Ezike, "Developing a Statutory Framework for ADR in Nigeria," *The Nigerian Juridical Review* 10, (2011-2012): 248-266, 255.

²⁶ Saodah Ahmad and Nora Abdul Hak, "Family Mediation and *Sulh*: An Alternative Dispute Resolution in Malaysia," *International Journal of Social Policy and Society* 7, (2010): 1-19.

mutilation on the children of the marriage because of their experiences and involvements in parental conflicts.²⁷ The stakeholders in the field of Family law express as follows:

*No area of matrimonial litigation better lends itself to fashioning ways to create a cooperative and conciliatory environment for the benefit of parents and children. Court administrators and personnel throughout the country have questioned whether courtroom is the best forum for the resolution of child custody issues and whether the traditional adversarial system is the most appropriate means for presenting the issues... The use of professionals trained to assist family members to resolve their problems is, in the Committee's opinion, an idea whose time has come.*²⁸

Interestingly, the existing law that regulates court cases and procedures does not consider the peculiarity and subtle nature associate with the family law disputes. In other words, the present position of the Nigerian legal system has the potential to further ignite anxiety, disappointment, sadness, anguish, anger and depression in family disputes when presented before the court.²⁹ Delay tactic is much expected in the court proceedings in form of filling pointless legal motions to obstruct the proceeding, re-litigating minor issues with the intent to cause commotion and failure to comply with judicial decisions. In Nigeria, the Judiciary is also structured in such a way that its personnels are not equipped with the required training to handle disputants who are emotional traumatised in family related disputes.³⁰

²⁷ Ibid.,7; Robert E. Emery, "Renegotiating Family Relationship-Divorce, Child Custody and Mediation," *Family Court Review* 43, no. (1) (1995): 30.

²⁸ "New Jersey Supreme Court Committee on Matrimonial Litigation: Phase Two Final Report," chmn. Morris Pashman, New Jersey State Library, June 10, 1981, 40-41, <http://hdl.handle.net/10929/42044>

²⁹ Saodah Ahmad and Nora Abdul Hak, "Family Mediation and *Sulh*," 6.

³⁰ Ibid., 8.

This situation explains the reasons why proponents of the ADR in the area of family law emphasised that ADR can easily combine its basic features of secrecy and inimitability with the legal aspects of the disputes thereby leading to a peaceful, cooperative and confidential problem-solving process.³¹ However, there are different mechanisms of ADR that can be used to deal with family disputes. These are:

- i. *Sulh*-Negotiation, Mediation and Conciliation
- ii. *Tahkim* (Arbitration)
- iii. Med-Arb

Application of *Sulh* (Negotiation, Mediation, Conciliation) in Family Law Disputes

Literally, *sulh* is an Arabic word that connotes peace-making.³² It is a method of dispute resolution embedded with compromises of the parties involved, in an exchange of settlement either directly between the disputants or with the help of a *Qadi*, a reputable member of the family or community elder.³³ *Sulh* can be achieved through the use of negotiation, mediation and conciliation. Qur'an 49:9-10 remains the legal basis for the justification of the *sulh* in Islamic Law. The Qur'an says:

*If two parties among the believers fall into a quarrel, make ye peace between...with justice and fair, for Allah loves those who are fair and just.*³⁴

*The believers are but a single brotherhood, so make peace and conciliation between two (contending) brothers, and fear Allah, that ye may receive mercy.*³⁵

³¹ Henry J Brown and Arthur L Marriott., *ADR Principles and Practice*, 2nd ed. (London: Sweet & Maxwell, 1999), 376.

³² Syed Khalid Rashid, "Alternative Disputes Resolution," 111.

³³ Saodah Ahmad and Nora Abdul Hak, "Family Mediation and *Sulh*," 8.

³⁴ Qur'an 49: 9.

Equally, the pronouncements of the Prophet Muhammad (SAW) are indications that the use of *Sulh* exists in Islamic legal system. Prophet Muhammad (SAW) on different occasions was reported to have said as follows: “*He who makes peace between the people by inventing good information or saying good things (in his attempt to please the disputants) is not a liar.*”³⁶

There is a *sadaqah* (charity) to be given for every joint of human or body and for everyday in which the sun rises there is a reward for the one who establishes reconciliation and justice among them.³⁷

Prophet Muhammad (SAW) emphasised and attached significant weight on the benefits and rewards await whoever acts as a Mediator, Conciliator or even as an Arbitrator between the disputant parties for the purpose of establishing peace between them. The Prophet says:

*A deed more rewarding than fasting, observing or charity giving is the act of settlement between people, for bad relationships. This is because disputes are like a razor which can eliminate entire community.*³⁸

However, in family disputes *sulh* appears mostly the preferred choice of the disputants because of its flexibility and also the fact that fewer technicalities involve in it. *Sulh* promotes love, mutuality thereby strengthening cordiality among the disputants. It can be exercised in a dispute involving personal rights be it, property³⁹ or non-property rights.⁴⁰ Nonetheless, exercising *sulh* in

³⁵ Qur'an 49: 10.

³⁶ Muhammad Ibn Ismail Bukhari, *Sahih al-Bukhari (English Translation)*, trans. Muhammed Muhsin Khan (Beirut: Dar Al Arabia, 2015), vol. 3, 533.

³⁷ Ibid., 536.

³⁸ Sheikh Abd ar-Rahman Bin Nasir as Sa'di, *Tafsir As-Sa'di* (Floral Park, New York: The Islamic Literacy Foundation, 2012), vol. 1, 202.

³⁹ E.g. Maintenance for the children of the marriage.

⁴⁰ E.g. Consummation of marriage.

hudud cases⁴¹ is clearly forbidding in Islam.⁴² The sole reason for this is that *hudud* cases are crimes against God whose punishments are clearly stipulated in the Qur'an and hadith and it is considered to be 'claims of God.'⁴³ As regards claim on rights in family disputes, it may arise while the marriage is still in existence or after the divorce. *Hadhanah*⁴⁴ and maintenance during '*iddah*'⁴⁵ are good examples of rights that may exist after divorce. It is therefore pertinent to note that the final decision or agreement reached in the concluded *Sulh* must match with the stated principles in the *Shari'ah*.⁴⁶ However, some factors militate against the wider use of *sulh*. First, it's none binding force. *Sulh* remains a private arrangement method of disputes settlement despite its widely acceptance and its numerous advantages. The agreement/decision reached therein rest heavily on the good will of the disputants.⁴⁷ No external enforcement mechanism put in place for this purpose. Second, right of withdrawal is another factor; disputants have all the right in this world to withdraw their consents at any stage to the process which means that, a disputant who is aggrieved with the decision reached may withhold his/her consent just to avoid compliance. This explains reason Akeredolu advocates for institutionalisation of ADR into the public justice system.⁴⁸

⁴¹ Matters that relates to the rights of Allah.

⁴² Saodah Ahmad and Nora Abdul Hak, "Family Mediation and *Sulh*," 10.

⁴³ Etim E. Okon, "Hudud Punishments in Islamic Criminal Law," *European Scientific Journal* 10, no. 14 (2014): 228.

⁴⁴ Its means child custody.

⁴⁵ Waiting period for the wife before final dissolution of Islamic marriage.

⁴⁶ Syed Rashid Khalid, "Alternative Disputes Resolution," 101.

⁴⁷ Ibid.

⁴⁸ Alero Akeredolu, "Institutionalising Alternative Dispute Resolution in the Public Dispute Resolution Spectra in Nigeria through Law: The Lagos Multi Door Court House Approach," *US-China Review* 12, (2015): 114.

Application of *Tahkim* (Arbitration) in the Family Law Disputes

The concept of *tahkim* (arbitration) has been in existence since pre-Islamic days and after Islam came into being.⁴⁹ After the advent of Islam, arbitration took another dimension as this is evidenced in Qur'an that says:

*If ye fear a breach between them (i.e. husband & wife), appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their conciliation: for Allah hath full knowledge, and is acquainted with all things.*⁵⁰

*Verily! Allah commands that you should render back the trusts to those, to whom they are due, and that when you judge between men, you judge with justice.*⁵¹

Prophet Muhammad (SAW) in his lifetime experienced *tahkim* and on several occasions had advised his followers to engage the neutral persons to resolve their disputes where necessary. History illustrates further that Prophet Muhammad (SAW) had on different times performed the role of *hakam* (arbitrator) and he had likewise appointed *hakam* (arbitrator) in some cases which he was willing to abide by their decisions. This is an indication that *tahkim* is not strange to Islamic law. Though disputants have a liberty to withdraw from arbitration proceedings before the final award is given, disputants may agree on a specific time limit for the duration of *tahkim* proceeding, where this is the case it must be complied with.⁵²

One unique feature of *tahkim* that distinguishes it from other ADR mechanisms is the binding nature of the outcome of

⁴⁹ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 148; Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, 2nd ed. (The Hague: Kluwer Law International, 1999), 17.

⁵⁰ Qur'an 4: 35.

⁵¹ Qur'an 4: 58.

⁵² The Ottoman Code of Legal Provisions (Medjella Code) 1869, art. 1946.

arbitration proceeding hence, arbitral awards are final. However, two theoretical views surround the binding nature of *tahkim*.⁵³ Some scholars are of the view that *tahkim* is conciliatory with no binding force. Other scholars opine that since *tahkim* is a voluntary process with the parties authorising the *hakam* to act, it is impliedly agreed that the outcome should be of binding character. The opinions of the Sunni Schools (Hanafi, Hanbali, Shafi'i and Maliki) split between these two theoretical views hence,⁵⁴ the debates are open ended. However, the view on the binding character of the award is prevalent.⁵⁵

On the other hand, there are limitations on the use of *Tahkim* in the family law disputes. Disputes which are of a *hudud* nature,⁵⁶ *talaq*,⁵⁷ *nasab*,⁵⁸ *fasakh nikah*,⁵⁹ *safih*,⁶⁰ *rushd*,⁶¹ *waqf*,⁶² cannot be settled through the use of *tahkim*.⁶³

⁵³ El-Ahdab, *Arbitration with the Arab*, 17.

⁵⁴ Abdul Hamid El-Ahdab, "General Introduction on Arbitration in Arab Countries," in *International Handbook on Commercial Arbitration*, Suppl. 27, 2nd ed. (Hague: Kluwer Law International, 1998), 382.

⁵⁵ Abdullah Saeed, "Sharia and Finance," in *The Ashgate Research Companion to Islamic Law*, ed. Rudolph Peters and Peri Bearman (Farnham: Ashgate Publishing Ltd, 2014), 249.

⁵⁶ Matters that relates to the rights of Allah.

⁵⁷ It means 'divorce'.

⁵⁸ Issue of paternity of a child.

⁵⁹ Judicial abrogation of marriage.

⁶⁰ It means spendthrift.

⁶¹ It means adolescence.

⁶² Endorsements.

⁶³ Aishath Muneeza, "Is Conventional Alternative Dispute Resolution to Islamic Law," (2010) 4 MLJ xcvi, 75; Syed Khalid Rashid, "Alternative Disputes Resolution," 112.

Application of Med-Arb in Family Law Disputes

The origin of Med-Arb can be traced to Qur'an where it provides:

*If ye fear a breach between then twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation.*⁶⁴

From the above, one glance of the verse easily infers that arbitrator is expected to firstly attempt reconciliation (*sulh*) and if it does not yield any positive results then, arbitration is the second possible stage to resolve such a dispute. Hence, in these modern days, combination of mediation and arbitration is an idea which is now being universally accepted. In Malaysia,⁶⁵ China, Korea⁶⁶ and Japan,⁶⁷ med-arb is now being introduced in their Rules. If conciliation flops, arbitration starts; if conciliation succeeds, the decision reached is incorporated into the arbitral award.

Alternative Dispute Resolution and Justice for Women in Nigeria

The use of ADR in family disputes certainly comes with numerous benefits as discussed above; one of the benefits among other is the fact that ADR can be personalized to suit peculiar needs of individual dispute and parties involved. Regrettably, litigation remains the only option to access justice in a family dispute particularly in a divorce case and other supplementary claims ancillary thereof.

Unlike other ADR mechanisms, Nigerian Courts' decisions and Arbitral Awards come with binding force. The decision/agreement reached through Conciliation Mediation or Negotiation can only be

⁶⁴ Qur'an, 4: 35.

⁶⁵ Kuala Lumpur Regional Centre for Arbitration Rules 2018, art. 34.

⁶⁶ Arbitration Rules of the Korean Commercial Arbitration Board 2011, sec. 18.

⁶⁷ Rules of Maritime Arbitration off the Japan Shipping Exchange 2014, art. 8.

binding and enforceable at the will of the party and a party can negate at any time.⁶⁸ One obvious reason responsible for this challenge is the failure to implement ADR policy and law. Thus, section 19 of Constitution of the Federal Republic of Nigeria 1999⁶⁹ faintly make reference to ADR, hence, it is in respect to foreign policy. This omission has caused ADR to be at the mercy of every individual who is so much desire for it.

The enactment of Arbitration and Conciliation Act 1988⁷⁰ (1988 Act) was specifically to regulates and govern arbitration in Nigeria; it is explicitly stated in its preamble. The Act is to provide a unified legal framework for the settlement of commercial arbitration and conciliation. Emphasis is placed on the 'commercial' arbitration, hence, it is not applicable to family disputes. Section 57 of the 1988 Act defines commercial; consequently, enforcement of rights such as financial support, property rights do not come within the meaning of commercial arbitration.

In 1970, Matrimonial Causes Act (MCA)⁷¹ was enacted to regulate marriages, marital breakdown and welfare of the children in Nigeria. The primary aim of the MCA is to regulate family disputes in Nigeria through its viable provisions. Thirteen years after, Matrimonial Causes Rules (MCR) were regulated in accordance with the Matrimonial Causes Act that contains procedure for initiating dissolution of marriage, custody and maintenance matters following the dissolution of marriage. In 2003, Child Right Act was domesticated in line with United Nations Convention on the Rights of the Child. The law aims to

⁶⁸ David Tarh-Akong Eyongndi, "The Imperative for the Settlement of Matrimonial Disputes in Nigeria through Alternative Disputes Resolution: Problems and Prospects," Academia, 9, accessed on 20th September, 2020, https://www.academia.edu/34100242/SETTLEMENT_OF_MATRIMONIAL_DISPUTES_IN_NIGERIA_THROUGH_ALTERNATIVE_DISPUTES_RESOLUTION_docx

⁶⁹ No. 24 of 1999.

⁷⁰ Laws of the Federation of Nigeria 2004 Cap A18.

⁷¹ Laws of the Federation of Nigeria 2004 Cap M7.

simplify procedures on adoption, custody, guardianship and welfare of children. However, neither MCA nor MCR or Child Rights make reference to ADR. In fact, Married Women's Property Act⁷² (MWPR) specifically states: "*Nothing in this law shall affect the capacity, property, or liabilities of any persons married solely in accordance with the requirements of customary law.*"⁷³ Hence, Islamic marriages may fall within this requirement.

Regrettably, the ordinary rules of property law which are in most cases applied by Nigerian Common Law Courts, still do not produce the desired justice as they are based on the establishment of legal ownership.⁷⁴ Under Common Law, to succeed in a property right claim there must be a tangible evidence of a financial contribution towards the property in question. This position was established in judicial cases such as *Essien v Essien*;⁷⁵ *Amadi v. Amadi*;⁷⁶ *Sodipe v. Sodipe*;⁷⁷ *Egunjobi v. Egunjobi*.⁷⁸ Hence, sections 72 and 73 of the MCA grant power to the relevant court in respect of financial provisions for maintenance, custody and property settlement. Section 73(1)(j) of the MCA further indicates that the settlement of property as contemplated in section 72 of the same Act deduces only the right to use and enjoy the property, it does not intend a total transfer of the ownership except where the court make an order for sale to discharge a maintenance order.⁷⁹ The current position of the Nigerian law as well as the strict

⁷² Law of Western Region of Nigeria, Cap 76.

⁷³ Married Women's Property Law 1959, sec. 1(2).

⁷⁴ Chinedu Justin Efe and Oghenerioborue Esther Eberechi, "Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order," *Pioneer of Peer-reviewed* 23, (2020): 21.

⁷⁵ [2009] 9 NWLR (Pt. 1146) 306, 331-332.

⁷⁶ [1992] SC UJBT 1.

⁷⁷ [1990] 5 WRN 98

⁷⁸ [1976] 2 FNLR 78.

⁷⁹ *Sodipe v Sodipe* [1990] 5 WRN 98.

property rights approach of the courts clearly cannot offer justice to women, hence, there is a need for alternative route to access justice.

Another challenge is that, Nigeria does not have separate family courts like other country such as Malaysia. In Nigeria, family disputes are determined by various State High Courts and *Shari'ah* Courts across the country. MCA awards jurisdiction on family issues related to the State High Courts and High Court of the Federal Territory. Of recent, Lagos State established its own family court but only to settle issues relating to custody, adoption and guardianship. Hence, issues arising from matrimonial causes and Child Rights Law⁸⁰ are excluded from the jurisdiction of the court.

CONCLUSION AND RECOMMENDATIONS

It is an undeniable fact that Islam has accorded Women unequivocal financial and property rights in the Glorious Qur'an and this is attested to by the *Sunnah*. This is clearly different from the way the women are being treated periods before Islam and specifically by African cultural norms for which Nigeria is not an exception. It thus becomes an issue when she tries to exercise some of these God-Given rights in a system where it is believed that men should hold the upper arm simply because of their gender. *Shari'ah* and State High Courts may not be appropriate for the settlement of such disputes because resolution of family dispute comes with emotional attachment and court litigation are not compatible. Considering the emotions involved, it is important that the disputants experience a stress-free dispute resolution process that is easier, faster with utmost privacy. In family disputes, the advantages of ADR outweigh that of litigation. These are; time saving, less expensive, confidentiality, smooth future relationship, encourage respect, aid open communication between disputants, protection of mental health of the disputants and their children. Thus, the followings recommendations are hereby made:

- i. Establishment of *Shari'ah* Courts in every State of Nigeria with exclusive jurisdiction on all Muslim related matters.

⁸⁰ Laws of the Federation of Nigeria, No. 23 of 2003.

- ii. The Marriage Act, Matrimonial Cause Act and Matrimonial Causes Rule should be amended to capture ADR mechanisms and enforcement of its outcome;
- iii. The need to initiate open awareness to the public on the importance of the use of ADR in family dispute settlements.

