COMPARISON OF OTTOMAN LAW OF FAMILY RIGHTS (OLFR) AND ISLAMIC FAMILY LAW IN NIGERIA IN THE FRAMEWORK OF DIVORCE*

BOŞANMA ÇERÇEVESİNDE OSMANLI AİLE HUKUKU (HUKUK-İ AİLE KARARNAMESİ) İLE NİJERYA'DAKİ İSLAM AİLE HUKUKU'NUN MUKAYESESİ

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Abstract: Islamic Family Law is the most applied aspect of Islamic Law. The glorious Qur'an which the first source of Islam underscores this space of law. During the reign of Ottoman empire, the promulgation of Law of Family Rights was the final step in the codification processes of Islamic Law. In Northern Nigeria, where Muslims make up the majority of the population, Islamic family law is implemented through various levels of sharia courts, with divorce being one of the most frequent cases. This work aims to analyze the provisions on divorce to divulge the points of differences and similarities between OLFR and Islamic Family Law in Nigeria. Various resources, including relevant books, journal articles, and online sources, were utilized to conduct a qualitative comparative analysis of the legal provisions. The adoption of views of other schools of fiqh along with Hanafi views in OLFR created links and similarities with Maliki school that is embraced in Islamic divorce law in Nigeria. Additionally, the current social and legal situations in Nigeria exhibit similarities to the conditions that prompted the creation of the OLFR. While the allowance of arbitration is a common ground, the OLFR goes further by granting arbitrators the power to definitively dissolve a marriage if necessary. While codification is not free from some unfavourable aspects, the absence of a codified Islamic Family Law in Nigeria is a worrisome issue that needs to be addressed by utilizing the blueprint of the OLFR.

Keywords: Ottoman Law of Family Rights, Sharia Courts, Divorce, Arbitration, Nigeria.

Öz: İslam Aile Hukuku, İslam Hukuku'nun en çok uygulanan sahasıdır. İslam'ın ilk kaynağı olan Kur'an-ı Kerim bu hukuk alanını vurgulamaktadır. Osmanlı İmparatorluğu döneminde Hukuk-i Aile Kararnamesi'nin yayınlanması, İslam Hukuku'ndaki kanunlaştırma hareketinin son adımı olmuştur. Ayrıca, Nijerya'nın Kuzey bölgesi, çeşitli düzeylerde şeriat mahkemeleri aracılığıyla İslami aile hukukunu uygulamaktadır. En sık karşılaşılan davalardan biri boşanma ile ilgili olanlardır. Bu çalışma, Hukuk-i Aile Kararnamesi ile Nijerya'da İslami Aile Hukuku arasındaki farklılıklar ve benzerlikleri ortaya koymak için boşanmaya ilişkin hükümleri incelemeyi amaçlamaktadır. Yasal hükümlerin niteliksel karşılaştırmalı bir analizini oluşturmak için farklı kaynaklara erişildi. Hukuk-i Aile Kararnamesinde Hanefi mezhebinin yanı sıra diğer fıkıh mezheplerinin görüşlerinin de benimsenmesi, Nijerya'da İslami boşanma hukukunda benimsenen Maliki ekolü ile bağlantılar ve benzerlikler yaratmıştır. Tahkime izin verilmesi ortak bir zemin olmakla birlikte, Hukuk-i Aile Kararnamesi hakemlere gerekli gördüğü takdirde evliliği kesin olarak sona erdirme yetkisi vermiştir. Ayrıca, Nijerya'da kanunlaştırılmış İslami Aile Hukukunun bulunmaması, Hukuk-i Aile Kararnamesi

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Anahtar Kelimeler: Hukuk-i Aile Kararnamesi, Şeriat Mahkemeleri, Boşanma, Tahkim, Nijerya.

Introduction

The close union of husband and wife is an indispensable condition for a blissful family life. For this reason, Islam puts rules and regulations in place to maintain the sustainability of marriage contract and avoid its breach. Accordingly, any marriage contracted with the aim of dissolution is invalid (Musa et al., 2011: 47). However, in unfortunate cases, divorce is one the ways in which the marriage contract is terminated.

Islamic divorce law is a logical consequence of the status of marriage. Marriage is seen as a civil contract that gives the parties to the contract the power to terminate their relationship under certain conditions (Ahmad, 2018: 486). The basis of divorce in Islamic Law is the fact that the spouses can no longer live together, not a specific reason (or fault of a party) on account of which the couple breakup. Thus, acts of both husband and wife can bring about divorce (Islamabad, n.d.). Although, the Islamic law did not withdraw the predominant customary right of the husband to divorce his wife unilaterally. This right is understood in the in the context of the qiwama issue, which mandates the man to be the breadwinner of the family. Thereby, the husband shoulders financial responsibilities as a consequence of divorce (Mashhour, 2017: 572). Also, this right is guided by numerous guidelines and regulations. Thus, a Muslim husband cannot put his wife at his mercy by divorcing her and bringing her back as he pleases. Similarly, Islamic law prescribes a strict procedure and appropriate time for divorce and also obliges the husband to pay maintenance to the wife in case of divorce. In practice, these are adequate and reasonable checks on the husband's unilateral power to divorce his wife (Ahmad, 2018: 486).

Moreover, the classical schools of jurisprudence are of the consensus that the wife can also divorce her husband through, Talaq Tafwid (i.e delegated divorce), khul` (i.e divorce initiated by the wife), Faskh: (i.e divorce by judicial authority) and breach of conditions in the marriage contract (Mashhour, 2017: 574–576).

However, despite the provision of many guidelines which aim to check the frequent occurrence of divorce, it is unfortunately recorded that between 2019-2020 over 2000 divorce cases were filed at the High Court of the Federal Capital Territory Abuja, Nigeria (Adeniyi, 2021: 3). Additional investigations revealed that the number of divorce cases reported at the Customary Courts, including the Alkali and the Sharia Courts within the FCT, is even higher (Adeniyi, 2021: 3). Similarly, in Türkiye, in 2021, the divorce rate in Türkiye was 2.07 per thousand people. This represents an increase in the number of divorced couples from 136,570 in 2020 to 174,085 in 2021(Türkiye İstatistik Kurumu, 2022).

Furthermore, the restricted recognition of women's right to divorce served as a primary catalyst for the promulgation of OLFR, which provided a degree of flexibility by allowing for the incorporation of views from alternative schools of jurisprudence (Aydın, 1985). Due to the high prevalence of divorce cases, even though OLFR had a short lifespan, it is probable that many divorce cases were initiated and resolved under this law while it was in effect. Therefore, like Syria, Jordan, Lebanon, Palestine, and many Muslim countries whose family laws were influenced by OLFR, the author deems it essential to assess the possible influence of OLFR on Muslim Family Law in Nigeria by comparing and contrasting the provisions related to divorce.

Nature and Origin of Ottoman Law of Family Rights (OLFR)

In the Ottoman Empire, the sharia provisions regarding family law were carried out within the framework of the accumulated ijtihad (Ijtihad jamai) conducted by Islamic jurists within the basis of the provisions of Islamic jurisprudence (i.e Fiqh). Courts of Islamic law in Muslim countries were mandated to adjudicate according to this jurisprudence. In a more explicit term, conflicts in family law were mostly settled with the provisions in the fiqh books and the fatwas in some fatwa sources (Sarıtepe - Aydemir, 2020: 31). Provisions on family law were enacted for the first time in the history of Islam in the modern sense with the 1917 Law of Family Rights (Durmuş - Yargı, 2019: 314). Although there were various attempts to codify Islamic family law in some countries, however these works could not be enacted. For example, the work called "al-Ahkâmu Sh-shar'iyyah fil-akhwâli sh-shahsiyyah" by Muhammed Kadri Pasha (d. 1306/1888) in Egypt could not be enacted. Also in 1916, various legal circulars were issued in the field of family law in Sudan, although they were not eventually enacted (Aydın, 1985: 150, 2014: 248).

Similarly, codifications in the field of civil law in the Ottoman Empire started with Land Law and Mecelle. However, the political, social and legal conditions of the period did not permit the enactment in the field of family law until half of a century later (Sarıtepe - Aydemir, 2020: 30). As such, the last link of the codification movements that started after the Tanzimat in the Ottoman Empire is the " Ottoman Law of Family Rights" (OLFR). The promulgation of the decree coincided with the years that preceded the collapse of the Ottoman Empire. The decree was adopted on 8 Muharram 1336 Hijri, 25 October 1917 A.D (Sarıtepe - Aydemir, 2020: 30).

Moreover, some intellectuals of the period published articles in various newspapers and magazines advocating the necessity of promulgation of family law to improve the legal status of women. Ziya Gökalp, one of those intellectuals, propounded the argument in his communique presented to the congress of the Committee of Union and Progress in 1917 that a fundamental reform should be made in the field of family law (Yurtseven, 2003: 207). In view of that, the promulgation of OLFR was projected to close the last major space of legal plurality (Dannies - Hock, 2020: 246) and to bring the empire's diverse religious groups under a centralized system of family law

for the first time (Küçüktiryaki, 2014: 184). Nevertheless, the Decree did not introduce a single integrated law for every Ottoman citizen. On the contrary, the OLFR included separate sections for Muslims, Christians, and Jews, each based on their respective religious practice. Thus for example, while the rules for Muslims and Jews allowed polygamy, it was sternly forbidden for Christians (Martykánová, 2009: 168).

Furthermore, there were many explanations to the relative passivity of the state on the family law issues before 1917. First of all, the Ottoman state was a multinational state. Due to the judicial autonomy granted to non-Muslim communities within the framework of the Ottoman national system, non-Muslims were subject to the provisions of their religion in the field of family law. Therefore, the multiplicity of family law made it difficult to enact a single law that would be applicable to each individual of these diverse religions and sects (Yurtseven, 2003: 204). Another explanation suggested that this area of law was excluded in order to avoid possible objections from the society (Yurtseven, 2003: 205). The third explanation put forward that there was no urgent need for enactment in the field of family law at that time, due to the fact the effects of Westernization movement, which gained momentum with the Tanzimat were more evident in the economic field (Yurtseven, 2003: 206). Irrefutably, the family was perceived as a space where the "authentic" values that shaped the identity of the people were kept alive. Therefore, this space needed to be protected more than any other from pollution that could emanate from foreign influences (Martykánová, 2009: 167).

On the other hand, the Decree faced criticisms from both Muslim scholars -such as Sadreddin Efendi- and non-Muslims intellectuals. The points of the criticisms in question could be summarized under five headings: criticisms of the preparation and enactment process of the Decree, the violation of the Sharia, the preparation of the Decree without considering the interests of the people, inappropriate power given to the courts and the deficiencies of the rules and contents of the Decree (Durmuş - Yargı, 2019: 318).

It is necessary to point out that until the 20th century, there were three courts in the Ottoman Empire namely; Sharia courts, Cemaat (community) courts and Consular courts. The consular courts were closed with the unilateral abolition of the capitulations. The second step towards the unity of the judiciary was the Family Law Decree. The decree abolished the jurisdiction of the Cemaat (community) courts in the field of personal matters. Thereby, the Sharia Courts were made the sole competent authority in these matters (Küçüktiryaki, 2014: 190). In the same context, the Nizamiye courts, were in charge of adjudicating all criminal and civil cases concerning Ottoman citizens, without regard to their religion or social status. These courts were separate from Sharia and community courts, as well as consular courts, and served as both courts of first instance and appellate courts (Öztürk, 2018: 156).

Generally speaking, the decree played a larger role in the history of Islamic law

than it played in the history of Ottoman law (Küçüktiryaki, 2014: 181). Although it remained in effect for a short time like one and a half years in the Ottoman state, it had an effect that dates back to the 1950s and still continues in some of the Middle East countries such as Syria, Jordan, Lebanon and Palestine. Also, by making use of the opinions of the other schools of thoughts (Madhhab) for the first time, the decree paved the way for many developments needed in the legal sphere without leaving the framework of Islamic law. Later, other Islamic countries adopted this method and accepted almost all of the developments brought by the decree with partial changes (Küçüktiryaki, 2014: 181).

The Decree consists of two kitabs (books), one of which is munâkehât (marriage) and the other is mufârakât (divorce). The first book that discusses marriage consists of 6 chapters, 15 sections and 101 articles; The second book, which talks about divorce, consists of 3 chapters, 5 sections and 56 articles. The entire Decree consists of 157 articles (Sarıtepe - Aydemir, 2020: 34).

The Decree was abrogated by the Ottoman parliament on 19 June 1919 in response to pressure from the Allied countries that was prompted by the dissatisfaction of non-Muslims as well as conservative Muslims who objected the abridged role of the Sharia courts (Dannies - Hock, 2020: 247).

Nature and Origin of Islamic Family Law in Nigeria

Islamic law is accepted as one of the three systems of law operating in Nigeria. The other systems are English law and Native/Customary law. Although, before the British colonization and their seizure of the territory, the lands that eventually became the Northern States of Nigeria recognized Islamic Sharia law as a binding legal system (Kumo, 1988: 43). It was widespread and applied in various aspects of life, including civil, criminal, and personal matters. However, with the arrival of the British colonizers, this arrangement was abolished, and Islamic law was limited to family law matters exclusively (Salman, 2022: 90). As such, its application was constitutionally restricted to personal law of marriage, divorce, child custody, pre-emption (waqf) gift, will, and any other matter to which the parties consent (Wigwe, 2009: 116–117).

Expressively, Islamic law has never been as influential in the southern parts of Nigeria as it was in the North. Islam entered the South, particularly in what became the Western Region, where there are some records of Muslim communities as early as the seventeenth century (Ostien - Dekker, 2010: 561). More explicitly, Islam was well-known and entrenched in many Yoruba metropolises including Lagos as at the time when the British extended their control to the region in the latter part of the 19th century. However, the people of this region restricted their devotion to mainly the Ibadat aspect of sharia, and paid little cognizance to the Mu`amalat aspect which governs the conduct of Muslims in social life. (Ostien - Dekker, 2010: 561).

Furthermore, the strongest contest between custom and law in many parts of Nigeria especially, northern Nigeria is in the space of family law. It is correct to say that in northern Nigeria, "a combination of 'ädа and Sharia" oversees family laws (An-Na'im, 2002: 284). Moreover, from the last part of the 19th century, British colonial laws influenced Islamic law in general and Islamic family law in particular in the region. Colonial authorities saw Islamic law as an alternative to customary law and amended its application. However, Islamic law has shown strong resilience in northern Nigeria, which has always been famous for its application of Islamic law (Oba, 2013: 273).

Only Maliki Fiqh (law) is enforced and applied by Islamic (Sharia) courts in Nigeria, and this law is also susceptible to customary interpretation (Sodiq, 1992: 100). The dominant and exclusive application of Maliki law in northern Nigeria was upheld by the Supreme Court in the case of Alkamawa vs Bello. The details of the case are as follows: Upon the demise of the appellant's adjacent neighbour, the deceased's inheritors, proposed to sell the deceased's house to the appellant for the sum of thirty thousand Naira (N 30,000.00) only. The appellant declined the offer claiming that the price was on the high side. Eventually, the house was later sold to the second respondent for the sum of twenty-six thousand Naira (N 26,000.00) only. The appellant filed a lawsuit with the Area Court, requesting that the transaction should be stopped and that he should be allowed to use his Shufa (neighbourly pre-emption) rights. The trial court ruled in favour of the appellant and mandated that the house should be given over to the appellant after the appellant reimbursed the second respondent's purchase price. The respondents filed an appeal with the High Court, which overturned the Area Court's decision and mandated a new trial on the grounds that the identity of the property at issue had not been established. Subsequently, the Court of Appeal heard appeals from each party, and both appeals were upheld. The appellant possessed a right of shufa in the property under Islamic law, but the court determined that by refusing to pay the asking price, he had wilfully renounced or abandoned this right. The Court of Appeal effectively rejected the appellant's claim. The appellant therefore appealed to the Supreme Court (Oba, 2002: 838). At the Supreme Court, Justice Wali delivered the final judgment on the case drawing extensively from classical Islamic law literature to show that a neighbour does not have a right of Shufa under Maliki Law (Oba, 2002: 839). The Supreme Court declared that courts can take judicial notice that the Maliki doctrine applies "before and after the colonial era in Nigeria" (Kwara Law Review, 1999: 152). It is also known that since the creation of the Sharia Court of Appeal in the northern region of Nigeria in 1960, the applicable Islamic law in the region has been "Maliki law as customarily interpreted at the place where the trial at first instance took place"(Oba, 2013: 276). The courts interpret this to mean that if there are differing views within the Maliki School, the courts usually follow the mashhür or well-known view. Nevertheless, if there is no mashhür opinion, the court may adopt any opinion that heightens justice in the case at hand. So ,a

minority opinion is favoured by the courts if it is consistent with a statutory rule or advances the cause of justice (Oba, 2013: 272). Meanwhile, the 1999 Constitution makes no specific mention of the adoption of any madhhab, only mentioning 'Islamic personal law' and 'Islamic law, '(Constitution of the Federal Republic of Nigeria 1999, 1999) As a result, limiting Islamic law to the Maliki school, whether by state legislation or judicial practise, would appear to be in conflict with the Constitution. In the Abdulsalam vs Salawu case, however, the Supreme Court ruled that the "Islamic personal law" (which includes Islamic family law) listed in the Constitution "must be that of the Maliki school" (Oba, 2013: 275–276). As such the judges frequently make reference to resources from the Maliki school, such as; Al-Fiqh Al-Maliki fi Thawbihi Al-Jadid, Kifayat At-Talib Ar-Rabbaniy in Hashiyat Al-Adawiy, Jawahir Al-Iklik, Muhtasaar Khalil, Tuhfatul-Hukkam, Thamarul dani commentary on Risalat by abu Zaid Al-qairawany, Al-Bahjat etc while giving judgements in courts (Ahman, 2006: 173; Kwara State Shariah Court of Appeal, 2012).

In the same context, some attempts were made to codify Islamic family law in Nigeria. For example, an NGO named the Women's Rights Advancement and Protection Alternative, (WRAPA), initiated the introduction of a model state code for the northern Muslim states. The aim was to give women more equal rights in marriage and divorce under Islamic law (Sharia), and thus conform with national and international human rights law (Struensee, 2005). Furthermore, codification of Islamic family law would provide more equal rights to Muslim women and articulate in written form Islamic marriage and divorce laws that address Nigeria's modern social reality. Thereby, many provisions of the code are modelled on the Islamic laws of other Muslim countries (Struensee, 2005) The NGO (WRAPA) collaborated with MacArthur Foundation and the Governments of the seven Northwest States namely Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Zamfara to implement the Islamic Family Law project to enhance the application and improve practice around Islamic Family Law matters (Gbulie, 2017). Consequently, some states have adopted some of the outcomes of the project. For example, the practise and procedure of Sulh/ Hakamain which is utilised as a sort of dispute settlement in which a third party intervenes to enable opposing parties reach a mutually suitable agreement, has been applauded and adopted by Katsina state. Thereafter, deployment of necessary structure and mechanism for manifestation of its application have since begun. Also, Kaduna, Kebbi, Zamfara and Kano expressed their interest in the concept (Gbulie, 2017).

In the same context, Nigeria is signatory to many international treaties such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Optional Protocol to African Charter on Women's Rights (Maputo Protocol). Among the aims of these treaties is to advocate for equal rights of men and women in marriage and divorce. Consequently, the Gender and Equal Opportunity Bill, 2016 which seeks to give effect to the CEDAW and Maputo Protocol, was rejected after passing the second reading at the National Assembly. A basis for the rejection of the Bill is that the content of the Bill was inconsistent with the religious

and cultural beliefs and practices of the Nigerian citizens and thus unworthy of being passed as a law in Nigeria (Adelakun - Shaeeb, 2018: 199).

Divorce in OLFR

The (OLFR) decree introduced provisions that can be considered as improvements on the classical Ottoman family law on divorce. In addition to the jurisprudence of the Hanafi School, which has been the official school of jurisprudence since the middle of the 16th century, the provisions of other schools on divorce were also applied. It can be said that the new atmosphere that encouraged more participation of women in social life had a direct effect on making the amendment in their favour in the decree (Cin, 1988: 126).

The second book of the OLFR includes the provisions of divorce under the title of "Müfarakat". In this book, the authorisation of talaq, the place of talaq and the words of talaq are included. According to the Decree, the person who has the talaq right is the husband. The husband can divorce his wife without any court order. According to this provision, which is also in accordance with the principles of Islamic law, there is no state intervention in the divorce of the husband. If the woman divorces her husband, then the state intervenes in the divorce and the divorce takes place only after the judge's decision (Cin, 1988: 126). However, despite accepting the husband's right to divorce his wife whenever he wishes, in the Article 110, the Decree imposes on the husband who divorces his wife, to inform the judge about the situation so that the marriage and divorce proceedings can proceed in a certain order. This application has the purpose of processing the divorce in the registry kept by the judge (Cin, 1988: 127).

In the same vein, one of the important developments brought by the decree is that, in some cases, women are given the right of judicial (Kazaî) divorce (tefrik). By drawing on the stands and judgements of various Hanafi jurists as well as other schools of thought, OLFR has provided women the right to request separation (tefrik) in specific circumstances and necessities. One of these circumstances and necessities is the right to tefrik owing to "absence". Absence of the husband can be in two forms namely: Mafkood (someone who has gone missing and it is unknown whether or not he is alive) and Gâib (someone known to be alive but whose whereabouts are unknown and who hasn't been heard from in a long time). According OLFR, "if the husband goes missing by hiding, travelling far away or close, and caring for the woman becomes impossible, the judge will separate them after performing appropriate investigations at the woman's request" (Sarıtepe - Aydemir, 2020: 53). More forthrightly, in article 127 of the OLFR, there are two situations regarding the absent husband. The first situation is when the whereabouts of the absent husband are unknown, and no news about his life or death can be obtained, and hope has been lost upon receiving news, the judge postpones the time of separation for four years from the moment that hope is lost. If no news is received during the four-year period

and the woman insists on divorce, the judge grants the divorce. The second situation is that if the husband is missing in a war, the judge postpones the waiting period for one year from the return of the combatants and prisoners of war on both sides. If no news is received after one year, the judge grants the separation (Aydın, 1985: 203). "In either case, the woman waits for the waiting period for death (iddatul-wafat) starting from the judge's decision" (Sarıtepe - Aydemir, 2020: 55). This is in line with Maliki`s view as it is applied in Muslim family law in Nigeria. Also, the presence of the marriage thwarting impairment in the husband, like the manifestation of diseases such as leprosy, venereal and mental diseases, were accepted as grounds for divorce (Sarıtepe - Aydemir, 2020: 38).

Divorce in Muslim Family Law in Nigeria

The divorce process in Nigeria is overseen by unique laws. It is established that the kind of law in which the marriage is consummated determines the kind of law that governs the dissolution of the such marriage. In Nigeria, marriages are typically conducted within the framework of three legal systems: civil law, Islamic law, and customary law (Canada: Immigration and Refugee Board of Canada, 2006) The legal marriage that occurs within the scope of civil law is regulated by the 2004 Nigeria Federal Marriage Act (Adelakun - Shaeeb, 2018). Moreover, the legal marriage, under the Nigerian Marriage Act of 2004, is strictly monogamous and any form of separation without judicial separation or death of one of the parties constitutes a criminal offense punishable with a five-year prison sentence (Adelakun - Shaeeb, 2018: 195). Hence, a legal marriage is characterized as a consensual lifelong partnership between a man and a woman, and can only be terminated by death or divorce. The validity of a marriage under the law depends on compliance with specific regulations and formalities, and if they are not followed, the marriage would be considered defective and akin to a customary marriage (Adelakun - Shaeeb, 2018: 196).

Also, a customary marriage is a lifelong union between one man and one or more women (Nwogugu, 2014). Customary marriage is conducted according to local laws and traditions. Therefore, the requirements for a valid traditional law marriage differ in Nigeria, depending on the local customs. This is because Nigeria is a multi-ethnic society with various cultures, and people's traditions are as diverse as the number of ethnic groups (Adelakun - Shaeeb, 2018: 196).

In Nigeria, most Muslims opt to solemnize their marriages in accordance with Islamic law, leading to the conclusion that only Islamic Sharia courts have the authority to terminate such marriages (Canada: Immigration and Refugee Board of Canada, 2006). The reason for this is that the law that applies to a marriage is determined by the law under which the marriage is conducted. For instance, if a Muslim man marries a Christian woman under Islamic law, their marriage will be subject to Islamic law (Oba, 2013: 284). On the other hand, statutes such as Matrimonial Causes Act (MCA) LFN 1990 (Kwara State Shariah Court of Appeal, 2016: 117–118) and Matrimonial

Causes Rule (Jegede, 2020) govern the divorce process of a statutory marriage.

Like other aspects of Islamic Family Law, divorce processes are based upon the Maliki fiqh. Muslim personal laws of divorce apply where both husband and wife are Muslims, and where both husband and wife (even if they are not Muslims) agree that Muslim personal law should apply to them. Additionally, it also applies where both parties contract the marriage in accordance with Muslim law as stated in Section 242 (2) (a) of the 1979 Constitution of the Federal Republic of Nigeria (Faki et al., n.d.: 4).

Components and Conditions of Divorce in OLFR

Article 102 of the Decree specifies that divorce can only occur between spouses who are legally obligated. Article 103 provides further clarification that at the time of divorce, a woman may either be in a proper marriage or observing a waiting period (Iddah). However, divorce cannot take place for a wife who is already in her waiting period due to the termination of her marriage (Çeker, 1985: 41). The Decree elaborates the conditions for a valid divorce. For instance, the article 104 states that: The talaq of a drunkard is not valid (Sarıtepe - Aydemir, 2020: 47). The Decree takes an important step in this regard by invalidating the divorce of a drunkard without making any differentiation between the roots of intoxication whether it is as a result of taking permissible or unlawful substances. Whereas some scholars consider the causes of intoxication while others consider the state of drunk whether he is alert and admits what he has said after he becomes sober (Awdat, 2008: 249). In a nutshell, there is a consensus among Islamic jurists that the divorce of the person who takes the intoxicating substance for a permissible purpose, such as a medicine, is not valid. Whereas, the bone of contention lies in the divorce of a person who is intoxicated in an unlawful way. Most of the jurists, especially Hanafis, Malikis, and Shafiis, hold that the divorce of a drunk is valid and binding (Sarıtepe - Aydemir, 2020: 48). Perhaps, there was high rate of drunkenness and alcoholism at the time of preparing the Decree. This measure was taken to prevent the disintegration of families due to drunkenness, because when this kind of divorce is accepted as valid, not only the drunk husband is punished, as claimed, but also his innocent wife and children, if any, are harmed (Sarıtepe - Aydemir, 2020: 49).

Similarly, article 105 of the OLFR emphasizes the significance of intention in the process of divorce. It states that the divorce pronunciation made under duress is not valid (Sarıtepe - Aydemir, 2020: 50). With this provision, the Decree ditched the opinion of the Hanafi school and adopted the views of the other three popular Sunni schools of fiqh (Al-Hujjaj, 2000: 337). In this context, the Article 109 of the OLFR holds that a valid divorce occurs with unambiguous (i.e sarih) statements. However, recognizable allegorical (kinayah) are categorized as sarih. Moreover, the occurrence of divorce with allegorical (kinayah) statements that are not recognized as the pronunciations of divorce, are subject the husband`s intention (Sarıtepe - Aydemir, 2020: 50).

Components and Conditions of Divorce in Muslim Family in Nigeria

Since the principle of Muslim divorce in Nigeria is based upon Maliki school of fiqh, therefore, it is needless to say, it shares some theories with other Sunni schools of fiqh. In this part the components of divorce -as it is applied in Nigeria- is discussed.

The couple in a valid marriage form the first two of the four components of divorce. To talk of divorce there should be a man recognized by the law as husband. In addition to the recognition, he should have attained puberty, be a Muslim and person in control of his faculties. In other words, the divorce pronounced by a non-Muslim, an immature person and a mad man is neither valid nor recognized by Islamic Law. However, a man delegated by the recognized husband or the judge in a circumstance where the law is to impose divorce can make or order valid divorce (Ambali, 2014: 270).

"Wife" too constitutes the second ruknu, i.e., an essential component of divorce. The law does not entertain the claim of a man to divorce a woman unless he shows that enjoys the right of marriage over the woman. Therefore, the subject of divorce is wife. A wife becomes eligible to talaq where she is either married in fact or married in law (de jure). She is regarded as married in law where she is serving iddah of a revocable talaq or of a dissolution considered as a divorce due to certain reasons, like lack of maintenance, apostasy by the wife, vow of abstinence (ila) by the husband or zihar (Gurin, 2014: 151).

"Seegah" or the formula is the third component of divorce. This denotes the legal form of statement by which divorce is invoked. It is sarih, i.e., categorical in whatever form is used once the word talaq is used to convey divorce to the woman. Be it "I divorce you" or "you are divorced" etc. It may also be kinayah i.e., non-categorical or indirect. Both categorical and indirect statements that do not leave the woman in doubt are taken as binding and regarded as one pronouncement of divorce. The statement of talaq can be written and it is binding as soon as it delivered (Ambali, 2014: 271).

The fourth essential ruknu of talaq is qasd i.e., "intention". There can be no divorce without the intention. For example, it is not binding if a man makes the statement of divorce in a language he does not understand. The divorce that a man makes under the agony of pain is not binding on him. But of a man who is drunk needs clarification. Is not binding if the intoxication is due to taking lawful food or drink. But understandable, a statement of divorce under the influence of alcoholic drinks or any forbidden food or drink shall be binding. Similarly, the divorce pronounced under duress is not binding. However, in a state of anger, it is binding except when the anger is at peak whereby it has overpowered the reasoning and made his behaviour similar to that of a mad man, who is not conscious of the implications of his utterances and actions (Ambali, 2014: 272).

Verbal and written talaq are commonly practiced in Nigeria with the most accepted practice being the written form of talaq invocation (Adelakun, 2018: 201). Also, the triple talaq is common in Muslim communities in Nigeria, with husbands expressing the talaq statement three times in a sitting and usually in a state of resentment. On whether the triple talaq pronounced in a state of anger is considered as one talaq or three, the courts have constantly held that such invocation is considered as three talaqs, as such it brings the divorce to a final state. Additionally, in some parts of the North East, the widely practiced formula of talaq is the verbal triple talaq and talaq by conduct (Adelakun - Shaeeb, 2018: 202). In this region, it is rather rampant to invoke talaq by saying 'I divorce you, I divorce you, I divorce you', or by relying on the words 'go back to your house and never come back.' A petition by a wife that the husband required her to go back to her house and a denial of the statement by the wife followed by his claim to have divorced her was held to be a valid divorce in the case of Bara'atu Suleman Fagge v. Ibrahim Musa Zuma at Fagge Sharia Court, Kano state (Adelakun - Shaeeb, 2018: 202).

Arbitration in OLFR

Another measure designed to strengthen the position of the wife was divorce negotiated in a family council. The authors of OLFR defended it as a measure that protected women from the misbehaviour of their husbands (Martykánová, 2009: 198). Except for the Maliki school of fiqh, all other notable schools of fiqh hold that the duty of the arbitral tribunal, which will be composed of families, is limited to facilitating the reconciliation between the husband and wife, unless a separate authority is given. However, according to Malikis, the arbitrators can separate the parties if they deem it necessary. The decree favoured this view (Küçüktiryaki, 2014: 191). The view is contained in the article 130 of the decree as follows:

If there appears a conflict and incompatibility between the spouses and one of them appeals to the judge, the judge appoints one arbitrator from each family. If an arbitrator cannot be found in one or both families, or if the person does not have the required qualities, then the judge designates suitable people from outside of the family. The family council created in this way examines the explanations and defence of both sides, trying to reconcile them. If it is not possible and the fault is the husband's, the couple separates. If it is the wife's fault, they are divorced and the wife returns a part or all of the mehr [dower]. If the arbitrators do not agree, the judge either appoints another family council of suitable people or a third arbitrator who has no relation to either side. The decision of the arbitrators is irrevocable and no protest is accepted (Martykánová, 2009: 168).

Arbitration in Muslim Family Law in Nigeria

Arbitration is highly regarded as an upending tool in divorce processes in Nigeria. Sharia courts give room for arbitration before the final decision is made.

A good example of this, is Ndache Baba (appellant) vs. Hassana Ndache Baba (respondent) case. Both the appellant and the respondent were husband and wife until 26th November, 2014 when the respondent filed for divorce at Area Court 1 Shonga. Nevertheless, after an appeal was filed, and the parties had successfully reconciled themselves, the appellant made a request to withdraw the case. Thus, the Sharia Court of Appeal held that the appellant should be allowed to withdraw his appeal in line with Islamic Law principle, which states that, if an appellant wants to be silent with his appeal he should be allowed to do so (Adeboye, n.d.).

The Hisbah Guards operating under the jurisdiction of the Kano State Sharia Commission, are renowned for their active involvement in promoting reconciliation. According to the Commander General of the Guards, Malam Aminu Daurawa, they have successfully resolved 20,000 disputes between spouses over the past decade (Abdul Hamid - Sanusi, 2016: 18)

OLFR as a Blueprint for 'a Progressive Muslim Family Law' in Nigeria

Moreover, the promulgation of OLFR in the early 20th century, during a time of significant social and political changes, can be seen as a necessary framework for a modern and standardized Muslim Family Law in Nigeria. The legal and societal circumstances that led to the establishment of OLFR bear similarities to the present-day social and legal realities in Nigeria. To provide an illustration, the initial legal impetus for the formation of the OLFR was the necessity to ensure the coherence of the legal system. At the time, lawmakers deemed it crucial to implement a uniform law that would apply to all individuals under the Ottoman rule, and to establish a centralized authority to settle conflicts (Kılınç, 2019: 627–628). In a contrary, legal pluralism in the Nigerian legal system makes achieving such uniformity in law seemingly impossible (Ostien, 2006: 4). Nonetheless, uniformity and standardization in the adjudication with Muslim Family Law is the contentious issue in Nigeria. Due to the lack of codification of this law in any Nigerian state, the application of Islamic family law by judges is not consistently uniform. Consequently, a significant number of women, as well as numerous lawyers and judges at the local community level, remain unaware of the specific rights afforded to women under Islamic law (Struensee, 2005).

The OLFR has demonstrated the significant impact of social events on the law by adopting opinions that deviate from the Hanafi school of thought, as long as these opinions promote the social stability required. An example of this can be seen in the adoption of a minority opinion on the invalidity of divorce statement issued by a drunkard. This was implemented to prevent the dissolution of families due to drunkenness. Allowing such a divorce to be valid not only punishes the drunk husband, but also harms his innocent wife and children (Sarıtepe - Aydemir, 2020: 49). The divorce rates in Nigeria have been steadily increasing, and implementiny the OLFR framework for codifying Islamic family law may assist in mitigating

the adverse consequences of the lenient form of irrevocable divorce, including the pronouncement of triple divorce concurrently. Like other prominent schools of fiqh, the Maliki fiqh, which is the only recognized school of jurisprudence for Islamic court rulings in Nigeria, views the utterance of the triple divorce pronouncement as three distinct divorces. However, a dissenting view held by Ibn Taymiyyah and Ibn al-Qayyim considers the triple divorce declaration as a single divorce (Kutty, 2023). Although the latter view is held by a minority, it aims to reduce the frequency of irrevocable divorce. Unfortunately, this perspective can only be taken into account if there is a codified Islamic Family Law.

Conclusion

It can be argued that the basis of divorce in Islamic Law is the inability of the partners to live together rather than any specific reason (or fault of a party) which impedes and prevents their peaceful living together. In this regard, OLFR introduced provisions from other schools of jurisprudence. And this makes OLFR an improvement on the classical Ottoman family law on divorce, and establishes points for its striking similarity with the existing Muslim Law of divorce in Nigeria.

Although, Islamic divorce law is strictly based upon Maliki school in Nigeria, however if there are divergent views within the Maliki school, Sharia courts are mandated to follow the most popular opinion. Additionally, if there is no prevalent opinion, the court is free to adopt even a minority opinion as long as it enhances the cause of justice. This is similar to the adoption of views of other schools of fiqih by the authors of OLFR for the cause of justice. Also, the authorization of arbitration in divorce processes was a Maliki view which was well captured in OLFR and regularly implemented in Sharia courts in Nigeria. Except that in OLFR, the arbitration processes were well explicated and the arbitrators were empowered to irrevocably dissolve the marriage.

After a thorough analysis of the regulations concerning divorce in the Ottoman Ottoman Law of Family Rights and Muslim Family law in Nigeria, certain resemblances and variations can be discerned between the two sets of laws.

From the hhistorical and cultural context, it is seen that throughout the history of Islamic civilizations, family matters were being adjudicated in accordance with provisions of fiqih which are the products of ijtihad of different scholars and jurists. The promulgation of Ottoman Family Law Decree (OLFR) in 1917 endorsed the combination of diverse opinions of multiple schools of fiqih and gave new impetus to the codification of Islamic Law in general. OLFR was enacted to significantly shutter the space of the legal pluralism by bringing the various religious groups of the empire under a central family law system, and to improve the legal status of women. Therefore, OLFR was shaped by the historical and cultural context of the Ottoman Empire, which was a multi-ethnic and multi-religious empire that spanned across diverse regions.

Even though, the Decree was in effect in the Ottoman state for less than two years, its long-lasting influence was incontestably felt in standardisation of the latitude of Islamic Family Law in many Muslim countries. As at the time when the Ottoman Law of Family Rights (OLFR) was being promulgated in 1917, there was a gradual restriction of the application of Islamic law in Nigeria, with an emphasis mainly on family law. Northern Nigeria as a predominantly Muslim region, was implementing a full-fledged Islamic Law before colonization. English colonization later confined the jurisdiction of Islamic Law to only Islamic personal law. The subsequent constitutions of Nigeria uphold that.

Moreover, from the legal framework perspective; the Ottoman Family Law decree was a codified legal code that incorporated various opinions from different schools of Islamic jurisprudence. In contrast, Muslim Family law in Nigeria is a non-codified part of the broader legal system in Nigeria, which strictly adjudicates based on the Maliki school of fiqh.

Furthermore, although both laws are rooted in Islamic principles, the Ottoman Family Law decree applies to individuals of other faiths, such as Christians and Jews, through their respective religious practices, while the application of Islamic family law in Nigeria is limited to Muslims and non-Muslims who voluntarily submit to its jurisdiction.

The introduction of OLFR was intended to eliminate the last significant area of legal diversity, whereas the implementation of Muslim family law in Nigeria is considered an essential aspect of legal pluralism.

Significantly, the social and legal circumstances surrounding family law, particularly divorce, among Muslims in Nigeria are similar to those that occurred prior to and prompted the promulgation of OLFR. Therefore, introduction of the OLFR as a prototypical can be viewed as a crucial system for establishing a contemporary and uniform Muslim Family Law in Nigeria. This is because, although OLFR was short-lived as it was abruptly abrogated just after a year and half, its long-lasting impact in codification and unification of law in a heterogeneous society cannot be overemphasized. It is therefore high time the contemporary scholars and jurists in Nigeria codified Islamic Family Law for a more effective application.

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