

INFLUENCE OF CUSTOMARY COURTS ON ISLAMIC FAMILY LAW: A CASE STUDY OF IJEBU LAND IN NIGERIA

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Abstract

Marriage (An-nikāh) is the pillar upon which the Muslim family system rests. It is a sacred contract among Muslim couples based on mutual consent and justice. When these objectives are not met, and peaceful coexistence among the partners becomes impossible, Islam allows the marriage to be repudiated following the Sharī'ah legal principle of marriage repudiation (Talāq). In Ijebuland, Nigeria, Mālikī madhhab (school of Islamic jurisprudence) is the most preferred school of thought, and it reflects well-defined principles concerning ṭalāq (divorce), nafaqah (maintenance), 'iddah (waiting period), and hadānah (child custody). The study employs doctrinal and comparative research methods in analyzing the intersection of customary and Islamic legal systems. Findings reveal that the customary legal practices in Ijebu land override Sharī'ah principles, resulting in misapplication of Islamic principles on marital rights, child welfare, and post-divorce responsibilities. The paper therefore recommends setting jurisdictional boundaries between Customary and Sharī'ah Courts. It also calls for legal reform, judicial training, and sensitization of Muslims on their rights to proper adjudication of marital disputes in relation to Sharī'ah principle in Nigeria's pluralistic legal system.

Keywords: Influence, Customary Courts, Yoruba Muslims, Ijebu Land, Islamic Family Law

INTRODUCTION

Marriage (*nikāh*) in Islam is not merely a civil contract but a sacred covenant (*mīthāq ghalīz*), founded upon mutual consent, love, and mercy. The Qur'ān states: "And, among His signs is that He created for you spouses from yourselves that you may find tranquility in them, and He placed between you affection and mercy" (Qur'ān 30:21). In Islamic jurisprudence, the validity of marriage is contingent upon the satisfaction of certain legal elements, offer and acceptance (*ījāb wa-qubūl*), presence of witnesses (*shāhidān*), and payment of *mahr* (dower). All of which are grounded in Qur'ānic injunctions (Qur'ān 4:4). The Prophet

Muhammad (S.A.W) emphasized the contractual nature of marriage by stating: "Marriage is part of my Sunnah, and whoever turns away from my Sunnah is not of me." (Khan, 1997: Hadith 5063).

Divorce (*talāq*) in Islam, while permissible, is viewed with strong disapproval when done without just cause. The Prophet (SAW) stated: "Of all lawful things, divorce is the most detested by Allah." (Nasiruddin, 2008; Hadith 2178). The Qur'ān delineates the process of divorce and reconciliation with profound clarity: "Divorce is twice; then, either retain them in kindness or release them with good treatment." (Qur'ān 2:229). Islamic family law,

therefore, establishes due process in divorce, including opportunities for reconciliation, arbitration, and waiting periods (*'iddah*). This system contrasts with the approaches of some Customary Courts, which may apply traditional Yoruba norms or statutory procedures that do not align with *Sharī'ah* principles (Oloso, 2018: 143). The result is often confusion and inconsistency in legal outcomes, leading to spiritual and social dissonance among Muslim litigants who expect decisions grounded in Islamic law.

The Nigerian Constitution recognizes the establishment of Sharia Courts of Appeal for the adjudication of Islamic personal law matters in states that so provide (Constitution, 1999, s.277(1)). Specifically, Section 277(2) defines the jurisdiction of the Sharia Court of Appeal over “questions of Islamic personal law,” including matters relating to marriage, divorce, guardianship, and inheritance. However, in Southwestern Nigeria, including Ijebu Land, Islamic matters are often heard in Customary Courts due to the absence of *Sharia* Courts of Appeal in the region. This overlap has led to the application of non-Islamic procedures to Islamic marital issues such as *nikāh* (marriage), *ṭalāq* (divorce), and *nafaqah* (maintenance), thereby raising questions about the integrity and authenticity of Islamic legal rulings in these contexts (Abikan, 2003:215; Abdulraheem, 2019:102).

The study, therefore, seeks to critically assess how these Customary Courts influence Islamic family law, particularly regarding marriage and divorce, and the role of Imām Mālik’s madhhab (the dominant school of thought) among Yoruba Muslims in shaping judicial outcomes.

The Maliki School, dominant in North and West Africa, places greater emphasis on custom (*'urf*) and public interest (*maslahah*). According to Imām Mālik, divorce is valid only when deliberately pronounced by a sane, adult

husband, and must not occur during a woman’s menstrual period, in accordance with Qur’ānic guidance (Qur’ān 65:1). He held that a divorce (*ṭalāq*) pronounced in anger or jest, though discouraged, remains effective if the words of divorce are explicit, for the intent is presumed from utterance.” (Ibn Rushd, 1992: vol. 2:58). However, Mālik also maintained that divorce under coercion (*ikrah*) or extreme mental distress is invalid, as consent and rational intent are prerequisites for the act’s legal effect (Ibn Rushd, 1992: vol. 2:59). Moreover, the Mālikī school distinguishes between *ṭalāq al-sunnah* (divorce in accordance with prophetic procedure) and *ṭalāq al-bid'ah* (divorce contrary to Sunnah), condemning the latter as sinful though legally binding (al-Jazīrī, 2003: vol. 4:371).

In addition, Imām Mālik’s position is described as one prioritizing justice and moral accountability. He disapproved of multiple pronouncements of divorce in one sitting (triple *ṭalāq*), viewing it as innovation (*bid'ah*) and contrary to the Prophet’s practice (al-Jazīrī, 2003:373). This stands in contrast to the Ḥanafī view, which treats triple *ṭalāq* in one utterance as immediately effective and aligns more closely with the Shāfi’ī stance of discouragement but legal validity.

Imām Mālik’s jurisprudential principle rests upon *maqāṣid al-sharī'ah* (the objectives of Islamic law), especially the preservation of the family unit (*ḥifẓ al-nasl*) and the prevention of harm (*raf' al-darar*). Accordingly, a judge (*qāḍī*) is encouraged to facilitate reconciliation before confirming dissolution, a practice that aligns with Qur’ān 4:35: “And if you fear dissension between them, appoint an arbitrator from his people and an arbitrator from hers; if they both desire reconciliation, Allah will cause it between them.”

The Mālikī *madhhab* adoption among the Yoruba Muslims places strong emphasis on *'urf*

(custom) and *maṣlahah* (public interest), allowing for limited flexibility in accommodating local practices, provided they do not contradict the Qur'ān and *Sunnah*. In judicial practice, Mālikī jurisprudence informs rulings on marriage contracts, divorce pronouncements, and reconciliation processes. For instance, the Mālikī position allows judicial annulment (*faskh*) of a marriage in cases of harm or prolonged neglect, a provision often relevant in marital disputes before Customary Courts. However, the improper application of customary norms in such cases, without reference to Mālikī fiqh, risks misrepresenting Islamic principles and eroding public confidence in the judicial process (Abikan, 2003: 228).

THE CONCEPT OF MARRIAGE UNDER ISLAMIC LAW

Marriage (*nikāḥ*) under Islamic law is both a religious duty and a legal contract that establishes a moral, emotional, and economic bond between a man and a woman. It is one of the most significant institutions in Islam, intended to preserve chastity, ensure mutual support, and promote the continuation of humankind through lawful means. Unlike the Western notion of marriage as purely a civil contract or social arrangement, Islamic marriage embodies a spiritual covenant (*mīthāq ghalīz*), combining divine injunctions with contractual rights and obligations (Ali, 2014:67). The Qur'ān describes marriage as one of the signs of Allah's mercy:

And among His signs is that He created for you spouses from yourselves that you may find tranquility in them, and He placed between you affection and mercy. (Qur'ān 30: 21).

This verse highlights that the objectives of marriage include tranquility (*sukūn*), love (*mawaddah*), and mercy (*rahmah*), three key emotional and social pillars that distinguish

Islamic marriage from mere cohabitation or convenience. In Islamic jurisprudence, marriage (*nikāḥ*) is considered a contract (*'aqd*) that legalizes sexual relations and creates rights and duties between spouses. Jurists differ slightly on its classification: while some view it as a purely civil contract, others, particularly Mālikī and Shāfi'ī scholars, see it as both a contract and an act of worship (*'ibādah*) (Ibn Rushd, 1992: 3).

The essential elements (*arkān*) of a valid Islamic marriage include:

- i. Proposal and acceptance (*ījāb wa-qubūl*) - an offer by one party and acceptance by the other in clear terms.
- ii. Competent parties (*al-'āqidān*) - both the bride and groom must be legally capable (sane, adult, and consenting).
- iii. Guardian (*walī*) - for a woman, the consent of a legal guardian is required, especially in the case of a virgin.
- iv. Dower (*mahr*) - a lawful gift given by the husband to the wife as a mark of respect and commitment.
- v. Witnesses (*shāhidān*) - the presence of at least two just witnesses during the contract

The Qur'ān commands: “And give the women their dowries graciously.” (Qur'ān 4:4). This establishes *mahr* as an obligatory right and not a bride price, contrary to pre-Islamic customs or some African cultural interpretations (Oloso, 2018:142). The Prophet Muhammad (S.A.W) recommended marriage as part of his *Sunnah*, stating: “Marriage is part of my Sunnah, and whoever turns away from my Sunnah is not of me.” (Khan, 1997: Hadith 5063). He further said: “O young men, whoever among you can afford marriage, let him marry, for it lowers the gaze and protects chastity.” (Khan, 1997: Hadith 5066).

According to Imām Mālik, marriage is recommended (*mandūb*) for those capable of

fulfilling its obligations, but may become obligatory (*wājib*) for one who fears falling into sin if unmarried (al-Jazīrī, 2003, vol. 4:45). Ibn Rushd (1992) recorded that Mālik considered marriage an act through which both religious piety and social welfare are achieved. He emphasized equity and fairness in marital rights, requiring husbands to maintain their wives materially and emotionally, based on Qur’ān 4:19: “And live with them honourably.” (Qur’ān 4:19).

The rights of the wife include maintenance (*nafaqah*), protection, kindness, and fair treatment. The husband is obligated to provide for his wife’s food, shelter, and clothing according to his means (Qur’ān 65:7). The wife, on the other hand, owes her husband obedience in lawful matters, fidelity, and cooperation in managing household affairs (al-Zuhaylī, 2007, Vol.9:44). The Prophet said “Fear Allah regarding women, for you have taken them in trust of Allah.” (Nasiruddin, 2007, Vol.3:347). Hence, marriage under Islamic law is not merely a contractual exchange but a divine trust (*amānah*) involving moral accountability before Allah.

Modes of Divorce in Islamic Law

Islamic law provides a structured and ethical framework for the dissolution of marriage, known as *ṭalāq* (repudiation), which must adhere to moral, procedural, and spiritual guidelines. The Qur’ān commands: “When you divorce women, divorce them for their prescribed period, and count accurately their prescribed period...” (Qur’ān 65:1). It further encourages reconciliation through arbitration: “If you fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation” (Qur’ān 4:35). Although Islam permits divorce, it remains the most detested of lawful acts. The Prophet Muhammad (S.A.W) declared: “Of all lawful things, divorce is the most hateful to

Allah” (*abghad al-ḥalāl ilā Allāh aṭ-ṭalāq*) (Al-Khaṭṭāb, 2007, Hadith 2018:154). This hadith underscores the discouragement of arbitrary divorce, promoting patience and reconciliation.

Types of Divorce in Islamic Law

Islamic jurisprudence (*fiqh*) classifies divorce into several categories, reflecting varying causes and procedures:

1. *Ṭalāq* (Repudiation by the Husband): The most prevalent form, initiated by the husband through explicit verbal or written pronouncement. The Qur’ān (2:229) allows two revocable divorces, after which the third becomes irrevocable (*bā’in*).
2. *Khul’* (Divorce Initiated by the Wife): This occurs when a wife seeks separation and offers compensation, often the return of her dower (*mahr*). Qur’ān 2:229 permits this form, stating, “If you fear that they cannot keep the limits of Allah, there is no blame upon either of them if she gives back (part of her dowry).”
3. *Tafrīq* (Judicial Dissolution): A judicial decree by a *qāḍī* (judge) due to harm (*ḍarar*), desertion, or other valid causes. Mālikī jurists emphasize *tafrīq bi-l-ḍarar* (dissolution due to harm), granting judges broad discretion to end oppressive marriages (Ibn Rushd, 1992, Vol. 2: 66).
4. *Mubāra’ah* (Mutual Separation): A mutual agreement between spouses to part ways without blame or compensation imbalance.

According to Ibn Rushd (1992), a leading Mālikī jurist, Mālik considered a divorce contrary (*ṭalāq al-bid’ah*) to Qur’ānic procedure (e.g., pronouncing three divorces at once) - as sinful but effective. He explains: “Imām Mālik and al-Shāfi’ī held that such a divorce is valid though blameworthy, because it conflicts with the command of observing the waiting period and proper sequence” (Ibn Rushd 1992, Vol. 2:62). Mālik also allows judicial intervention in cases of harm, impotence, or neglect, granting the woman the

right to *tafriq*. This humanitarian element reflects the Qur'ānic principle of justice and mercy within family relations (Qur'ān 4:128).

The Waiting Period (*Iddah*)

After divorce, a woman must observe *'iddah*-a prescribed waiting period of three menstrual cycles (Qur'ān 2:228) or until delivery if pregnant (Qur'ān 65:4). This serves to:

- i. Verify non-pregnancy, safeguarding lineage (*nasab*).
- ii. Allow reflection and possible reconciliation.
- iii. Preserve dignity and order.

During *'iddah*, maintenance (*nafaqah*) remains obligatory upon the husband (Al-Munajjid, 2011)

Reconciliation and Documentation

The Mālikī *madhhab* emphasizes reconciliation through arbitration, as the Qur'ān instructs (4:35). Mālik viewed the involvement of *ḥakamayn* (arbiters) as a moral and quasi-judicial process intended to preserve family harmony (Ibn 'Abd al-Barr, 1999, vol. 2:455). While classical jurisprudence accepted oral *talāq*, modern Mālikī jurists, in line with Qur'ān 65:2, promote documentation and witnesses for legal certainty: "And take for yourselves two just witnesses from among you and establish the testimony for Allah." This requirement is now reflected in contemporary Muslim family laws across North and West Africa (Ali, 2016:117).

In addition, Islamic law mandates that men provide financial support to divorced women during *'iddah* and, where applicable, for children's welfare. The Mālikī school prioritizes maternal custody (*ḥaḍānah*) during early childhood, while paternal responsibility remains financial and moral (Ibn Qudāmah, n.d, vol. 7:340). This dual framework safeguards both compassion and responsibility in post-divorce relations.

CASE REVIEWS OF YORUBA MUSLIM DIVORCE PROCEEDINGS

Case I

Citation: *Abdul-Lateef v. Rasheedat* (Suit No: JGII/10CL/2023)

Nature of the case: *Nafaqah* (maintenance) and *Hadanah* (custody)

Summary of fact of the case:

The plaintiff, (Rasheedat), appeared before the Ijebu-Igbo Grade II Customary Court seeking the dissolution of her 13-year-old marriage to the defendant, (Abdul-Lateef), on the grounds of the husband's persistent neglect in maintaining the children and lack of affection toward the wife. The defendant was absent but represented by his mother, who stated that her son consented to the dissolution. During the hearing, the defendant's mother communicated with him by phone, and he reportedly agreed to provide ₦30,000 monthly as a feeding allowance for the children and to assume responsibility for their general upkeep. (Yinusa, 2023)

Decision of the Court

The Ijebu-Igbo Grade II Customary Court dissolved the marital relationship between the parties based on mutual consent and evidence of the breakdown of love and care. The court ordered the defendant to pay ₦30,000 monthly for the children's feeding and to provide for their general welfare. Custody was awarded to the mother, and both parties retained visitation rights. The court concluded the matter with advice for mutual understanding and peaceful coexistence for the benefit of their children.

Analysis of the Decision (Based on Mālikī Jurisprudence)

From the standpoint of Islamic jurisprudence, particularly under the Mālikī school, the court's decision reflects administrative fairness but fails to adhere to procedural due process as required under Sharī'ah. Mālikī law places great emphasis on reconciliation (*ṣulḥ*) and arbitration (*tahkīm*) before a marriage can be

validly dissolved. The Qur'ān provides explicit instruction on this principle: "And if you fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation." (Qur'ān 4:35). In *Abdul-Lateef v. Rasheedat*, there is no evidence of any formal reconciliation effort or arbitral procedure being conducted before the dissolution. According to Mālikī jurisprudence, the omission of reconciliation invalidates the divorce process because the essence of arbitration lies in fulfilling the Qur'ānic command. *Ibn Rushd* (1992) affirms that reconciliation must precede divorce to safeguard the sanctity of marriage and to ensure that separation occurs only after all remedial efforts fail.

Furthermore, Mālikī jurists such as *al-Dardīr* (n.d) (in *al-Sharḥ al-Kabīr* 2/467) stress that marital discord (*nushūz*) or loss of affection (*bughḍ*) does not justify dissolution except where it results in harm (*ḍarar*) or hardship. The wife's claim of "lack of love" and "failure to care for children" could have been investigated under *nushūz*, but does not independently suffice for *ṭalāq* unless the harm is proven and irreconcilable. The Mālikī position requires verification through *ḥakamayn* (two arbiters), as highlighted by *al-Qarāfī* (1998 Vol. 3:112), who notes that hasty dissolution without reconciliation contradicts Qur'ānic procedure and undermines the *maqāṣid al-sharī'ah* (objectives of Islamic law), particularly preservation of family (*ḥifẓ al-nasl*).

In addition, the requirement of observing *'iddah* was overlooked in this case. The *'iddah* period "O Prophet! When you divorce women, divorce them for their prescribed period, and count the period carefully." (Qur'ān 65:1) The Mālikī school holds that the *'iddah* serves dual purposes: ensuring that the woman is not pregnant and providing an opportunity for

reconciliation before final separation. The absence of any reference to the *'iddah* period in the court's decision suggests a deviation from Qur'ānic injunctions and renders the dissolution incomplete under Islamic procedure. (Yinua, 2023).

Moreover, since the wife was the initiating party, this case may fall under *khul'* (divorce initiated by the wife). Mālikī jurisprudence requires that in *khul'*, the wife returns the dowry (*ṣadāq*) to the husband as compensation for dissolution, as stated: "If you fear that they cannot keep the limits of Allah, there is no blame upon either of them if she gives back (part of her dowry) to obtain her release." (Qur'ān 2:229). There is no indication that this requirement was considered or enforced by the court, which further demonstrates deviation from Islamic procedural justice.

Hence, from a Mālikī jurisprudential standpoint, the dissolution in this case lacks procedural and spiritual completeness. While the court's concern for the welfare of the children and financial provision aligns with Islamic objectives of justice and mercy (*maṣlahah*), the process itself failed to uphold the structured safeguards mandated by Islamic law. Therefore, under a Mālikī court, such a marriage would not be validly dissolved until these procedures are duly observed.

Case II

Citation: *Adewale v. Fatimah* (Suit No: JCCGII/145CL/2023)

Nature of the case: *Divorce (Talaq)*

Summary of fact of the case:

The petitioner, Adewale (husband), sought the dissolution of his three-year-old customary marriage to Fatimah (wife), which had produced a 32-month-old female child. The grounds cited for the petition included allegations of adultery, constant quarrelling, lack of mutual understanding, disrespect

towards the husband's family, and absence of affection (*mawaddah*).

Decision of the Court

The Ijebu-Ode Grade II Customary Court granted the divorce on the grounds of marital breakdown, citing irreconcilable differences and mutual hostility. During the trial, the respondent (wife) denied the allegations of adultery and rudeness. The court, after hearing both sides, proceeded to dissolve the marriage. Custody of the 32-month-old child was awarded to the respondent (mother), while the petitioner (father) was granted rights of access to the child. The court additionally ordered that the respondent should not interfere with or disturb the petitioner in his private or public life. (Yinusa, 2023).

Analysis of the Decision (Based on Mālikī Jurisprudence)

The ruling of the Ijebu-Ode Grade II Customary Court, though intended to resolve evident marital discord, fails to conform to Shari'ah procedural standards as articulated within Mālikī jurisprudence. Under Islamic law, allegations such as adultery (*zinā*), persistent quarrelling, and lack of understanding do not automatically warrant dissolution without first exhausting the Qur'ānically mandated process of reconciliation (*ṣulḥ*) and arbitration (*taḥkīm*). "If you fear a breach between them twain, appoint (two) arbiters-one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation." (Qur'ān 4:35) In this case, the Customary Court did not indicate that any arbiters or mediators were appointed before pronouncing dissolution. According to *Ibn Rushd*, the appointment of *ḥakamayn* is an essential procedural step designed to preserve the marriage where reconciliation remains possible. The Mālikī jurist *al-Qarāfi* (in *al-Furūq*, Vol. 3:114) emphasizes that neglecting this process contradicts Qur'ānic injunctions and

undermines the *maqāṣid al-shari'ah* (objectives of Islamic law), which include preservation of family (*ḥifẓ al-nasl*) and moral stability (*ḥifẓ al-'ird*).

Furthermore, a crucial aspect of this case is the husband's accusation of adultery, which under Shari'ah carries stringent evidentiary requirements. The Qur'ān stipulates: "The woman and the man guilty of fornication-flog each one of them with a hundred stripes." (Qur'ān 24:2) However, proof of *zinā* requires the testimony of four upright male witnesses who personally witnessed the act, or an open confession by the accused. In this case, no such witnesses were presented, and the respondent categorically denied the charge. The Qur'ān sternly warns against false accusations: "Those who launch a charge against chaste women and do not bring four witnesses, flog them with eighty stripes and never again accept their testimony. Such are indeed transgressors." (Qur'ān 24:4).

Accordingly, under Islamic law, the husband's accusation of adultery without four credible witnesses constitutes the *ḥadd* offence of *qadf* (false accusation of unchastity). *Al-Dardīr* in *al-Sharḥ al-Kabīr* and *al-Mudawwanah al-Kubrā* both affirm that any husband making such an accusation must either substantiate it through the testimony of four eyewitnesses or undergo the process of *li'ān* (mutual imprecation) with his wife. Failure to do so exposes him to punishment for *qadf*. Thus, in *Adewale v. Fatmah*, if adjudicated under a Shari'ah framework, the husband's uncorroborated claim of *zinā* would not justify dissolution; rather, he himself could face prosecution for *qadf* unless *li'ān* is properly conducted.

The Court's decision also overlooked the requirement of *'iddah* (waiting period) following divorce. The Qur'ān commands: O Prophet! When you divorce women, divorce

them for their prescribed waiting period, and count the period carefully.” (Qur’ān 65:1) According to Mālikī scholars such as *Ibn al-Qāsim* in *al-Mudawwanah*, observance of *‘iddah* is indispensable because it allows the possibility of reconciliation and ensures that lineage is not confused. By immediately dissolving the marriage without such a provision, the court ignored an essential Qur’ānic safeguard designed to preserve family harmony. From the Mālikī standpoint, the *Adewale v. Fatimahah* decision lacks procedural and evidentiary integrity under Sharī‘ah. The decision reflects an attempt to address marital discord and protect child welfare; it departs from the procedural and moral rigour of Islamic jurisprudence as espoused by Imām Mālik and later Mālikī authorities.

Case III:

Citation: *Azeez v Zainab* (Suit No. ODCCGII/132CL/2020)

Nature of the case: *Validity of Marriage and Maintenance (Nafaqah)*

Summary of fact of the case:

In this case, the petitioner, Azeez (the husband), accused the respondent, Zainab (the wife), of stealing a sum of ₦40,000 and absconding to her parents’ home. Consequently, he sought the dissolution of their marital union before the Odogbolu Grade II Customary Court. The respondent failed to appear for the hearing despite being duly served with a summons. After reviewing the petitioner’s claim, the court held that there was no valid marriage between the parties and ordered the respondent to refund the sum of ₦40,000 to the petitioner within three months.

Decision of the Court

The Odogbolu Grade II Customary Court concluded that there was no subsisting or legally recognized marriage between the petitioner and respondent. It therefore declined

to pronounce a formal dissolution and instead ordered the refund of the allegedly stolen money. The court also recorded the respondent’s absence as a failure to defend the accusation. No reference was made to any proof of a customary or religious marriage ceremony between the parties.

Analysis of the Decision in Light of Mālikī Jurisprudence

From the perspective of Islamic law, particularly under the Mālikī school of jurisprudence, the court’s declaration that “*no valid marriage existed*” demands deeper scrutiny. According to Sharī‘ah, the validity of a marriage (*nikāḥ ṣaḥīḥ*) rests on the fulfilment of certain essential elements (*arkān*) and conditions (*shurūṭ*), namely: Offer and acceptance (*ijāb wa qubūl*); Consent of a legal guardian (*walī*) for the bride; Presence of two trustworthy witnesses (*shāhidayn*); Payment of dowry (*mahr*); and Publicity (*i’lān* or *walimah*). If these elements are satisfied, the marriage is recognized as valid in Sharī‘ah, even if not registered under civil or customary law. In this case, the petitioner himself acknowledged the respondent as his wife. Therefore, the presumption of a marital relationship exists under Islamic law, unless clear proof to the contrary is provided. The court’s outright denial of marital validity without probing these essential elements reflects a procedural gap and a lack of alignment with Islamic jurisprudence.

The husband’s allegation of theft also raises critical Sharī‘ah considerations. The Qur’ān prescribes a *ḥadd* punishment for theft, stating: “As for the thief, male or female, cut off their hands in recompense for what they committed, as a deterrent from Allah.” (*Qur’ān* 5:38) However, Mālikī jurists emphasize that this *ḥadd* punishment applies only when strict evidentiary and contextual conditions are met such as the stolen property reaches the legal threshold (*niṣāb*); it is taken from secure custody (*hirz*); the act is committed deliberately

and without necessity; and the offender is legally competent (*'āqil bāligh*). If any of these conditions are not met, then the act does not qualify for the *ḥadd* punishment but rather falls under *ta'zīr* (discretionary punishment), determined by the judge based on circumstances. (Doi, 1984:255-257).

The respondent's alleged act of taking ₦40,000 must be examined in light of *Sharī'ah*'s broader principles of justice (*'adl*) and necessity (*ḍarūrah*). In an authentic narration, Hind bint 'Utbah, the wife of Abū Sufyān, complained to the Prophet (SAW) that her husband was miserly and failed to provide sufficient maintenance for her and her children. The Prophet (SAW) responded: "Take what is sufficient for you and your child, according to what is customary (*bil ma'rūf*)." (Khan, 1997: Hadith 5364). This ḥadīth establishes a legal precedent within Islamic law: when a husband fails to fulfil his duty of maintenance (*nafaqah*), a wife may lawfully take from his wealth an amount sufficient to meet her basic needs without this being classified as theft. If the respondent's action was motivated by the petitioner's neglect of maintenance, her act could be legally justified under *Sharī'ah* as recovery of her due rights, rather than a criminal offence.

Thus, before a finding of theft, the court should have investigated whether the petitioner was fulfilling his financial obligations (*wājibāt al-nafaqah*). If not, the act might have been an expression of necessity (*ḥājah*) rather than criminal intent. The wife's action of leaving the matrimonial home (*khurūj min al-bayt*) must also be contextualized. Mālikī jurists state that a woman is not guilty of *nushūz* (disobedience) if she leaves her husband's home due to mistreatment, denial of maintenance, or fear for her safety. The Qur'ān instructs reconciliation through arbitration: "And if you fear dissension between the two, send an arbitrator from his family and an arbitrator from hers." (Qur'ān

4:35) This verse underscores the *Sharī'ah* requirement of reconciliation and arbitration before resorting to dissolution. The Customary Court's decision to terminate the union without any such reconciliation process diverges from the Islamic procedure that prioritizes settlement and fairness.

Under Mālikī jurisprudence, the court's declaration of "no valid marriage" overlooks the religious presumption of marital existence where both parties had cohabited as husband and wife. If the essential pillars of *nikāh* were present, the marriage remains valid in *Sharī'ah* even if civil registration is absent. The allegation of theft should have been treated separately, and reconciliation (*ṣulḥ*) attempted before any dissolution. Moreover, the respondent's failure to appear in court does not automatically nullify her rights. Islamic courts must ensure fair hearing (*samā' al-ḥujjah*) and investigate the circumstances of both parties before issuing a judgment (Qur'ān 5:8).

Case IV: *Razak v Azeezat* (Suit No. ODCCGII/50CL/2021)

Nature of the Case: *Nafaqah (Maintenance) and Paternity Determination*

Summary of fact of the case:

The petitioner, Azeezat, initiated proceedings before the Odogbolu Grade II Customary Court, alleging that the respondent, Razak, denied responsibility for her four-month-old pregnancy. She sought the court's intervention to compel the respondent to assume paternal and financial responsibility after the child's birth. The petitioner also expressed her disinterest in continuing the marital relationship, citing emotional distress resulting from neglect and repudiation. Despite being duly served with a summons, the respondent failed to appear before the court. Consequently, the court deferred determination of paternity until after the birth of the child, pending a DNA test result to confirm biological fatherhood.

Decision of the Court

The Customary Court held that paternity could not be conclusively determined before the birth of the child and directed that a DNA test be conducted thereafter. The court, therefore, deferred its final decision on paternity and maintenance obligations pending the outcome of the scientific verification. The absence of the respondent was recorded, and the court expressed its disapproval of his non-appearance, while protecting the petitioner's interests until the birth. (Yinusa, 2023)

Analysis of the Decision in Light of Mālikī Jurisprudence

From the standpoint of Mālikī jurisprudence, as grounded in Islamic family law, the issue of *nasab* (paternity) and *nafaqah* (maintenance) is deeply intertwined and governed by divine injunctions and prophetic guidance. Under Sharī'ah, a child conceived within the subsistence of a valid marriage is automatically presumed legitimate and attributed to the husband, provided the couple had lawful marital relations (*dukhūl*), and there exists the possibility of intercourse. This principle of presumption of paternity (*ḥaqq al-firāsh*) is firmly established in the well-known ḥadīth of the Prophet (SAW): "The child belongs to the (marital) bed, and the adulterer gets nothing." (Khan, 1997: Hadīth 1457) Imām Mālik and classical jurists affirm that once a valid marriage exists, paternity is legally presumed unless the husband contests it through the procedure of *li'ān* (mutual imprecation). *Li'ān* is an exceptional Sharī'ah mechanism prescribed in (Qur'ān 24:6–9), which allows a husband to deny paternity only through solemn oaths before a judge. In the absence of *li'ān* or explicit evidence of non-access, the law upholds the child's legitimacy.

Accordingly, the respondent's refusal to appear before the court or initiate *li'ān* renders his denial of paternity legally and religiously invalid under Islamic law. His failure to honour judicial summons constitutes a violation of the

Qur'ānic command: "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people, judge with justice." (Qur'ān 4:58). His non-compliance undermines due process (*iḥtirām al-qaḍā'*), which is obligatory in Sharī'ah, as justice cannot be achieved without full participation of the parties. Moreover, the wife's petition is justified on the grounds of *ḍarar* (harm) and *nushūz* (spousal misconduct). Mālikī scholars permit *faskh* (judicial annulment) of marriage when the husband's behaviour constitutes neglect or causes injury to the wife's emotional and material welfare (al-Dardīr, *Sharḥ al-Kabīr*, vol. 2:457).

While the Customary Court deferred paternity pending DNA testing, the Mālikī legal position considers scientific evidence such as DNA, a form of *qarīnah* (supporting circumstantial proof), not a substitute for the Sharī'ah standard of *ḥaqq al-firāsh*. Thus, under Sharī'ah, the presumption of legitimacy stands unless successfully rebutted through lawful *li'ān*. The Prophet (SAW) also forbade denial of lineage without due process, stating: "Whoever claims lineage from other than his (real) father while knowing it is false, Paradise is forbidden to him."

(Khan, 1997: Hadīth 6768). Therefore, in an Islamic court, the husband's denial without *li'ān* would attract both moral and legal sanction, and the child would remain attributed to him. The court would further order the husband to provide *nafaqah* (maintenance) for the wife during pregnancy and after childbirth, in line with Qur'ānic injunction: "And upon the father is the mother's provision and clothing according to what is acceptable." (Qur'ān 2:233)

In essence, the Mālikī interpretation emphasizes protection of lineage (*ḥifẓ al-nasab*), preservation of family dignity, and avoidance of public scandal (*sadd al-dharā'i'*). While the Customary Court's reliance on DNA aligns with modern evidentiary procedures, an Islamic court would uphold *ḥaqq al-firāsh* as

the overriding presumption unless *li'ān* is formally undertaken.

A CRITIQUE OF CUSTOMARY LAW AS COMPARED TO ISLAMIC LAW

While the Customary Courts serve as accessible local fora for dispute resolution, their decisions often neglect essential Sharī'ah requirements, particularly those concerning reconciliation (*sulh*), maintenance (*nafaqah*), evidentiary procedures, and the sacred nature of the marital bond (*'aqd al-nikāh*). The critique highlights these deficiencies and situates them within the framework of Mālikī jurisprudence. A recurring shortcoming across all four cases is the absence of reconciliation or arbitration before pronouncing divorce. Under Islamic law, this omission is a significant procedural irregularity. The Qur'ān explicitly commands: "If you fear a breach between them, appoint (two) arbiters, one from his family and the other from hers; if they both desire reconciliation, Allah will cause it between them." (Qur'ān 4:35). In *Abdul-Lateef v. Rasheedat* and *Adewale v. Fatmah*, the courts dissolved marriages based purely on mutual consent or allegations of misconduct without initiating the Qur'ānic process of reconciliation (*iṣlāh*). Mālikī jurists insist that reconciliation is not optional but a mandatory precondition to any lawful dissolution. Customary Courts, however, treat reconciliation as an informal option rather than a juridical requirement, thereby undermining the Qur'ānic spirit of preserving marital harmony.

Furthermore, Customary Courts also exhibit serious lapses in evidentiary standards, especially in handling sensitive accusations such as adultery or theft. In *Adewale v. Fatimah*, the petitioner's unsubstantiated claim of adultery led to a divorce decree without the four witnesses required by Sharī'ah. The Qur'ān mandates: "Those who accuse chaste women and do not bring four witnesses—flog

them with eighty stripes." (Qur'ān 24:4). In Mālikī jurisprudence, uncorroborated accusations of adultery (*zinā*) not only fail to justify divorce but also render the accuser liable for *qadhf* (false accusation). The absence of such procedural rigour in Customary Court rulings compromises both justice and the sanctity of the marriage institution.

Similarly, in *Azeez v. Zainab*, the court hastily labelled the union invalid and ordered the woman to refund ₦40,000 for alleged theft, neglecting to investigate the possibility of *nafaqah*-related necessity or the validity of the marriage under Islamic law. Mālikī jurists such as al-Dardīr (in *al-Sharh al-Kabīr*) affirm that if a husband withholds maintenance, a wife may lawfully take what suffices for her sustenance, as established by the ḥadīth of *Hind bint 'Utbah*. These cases therefore, illustrate evidentiary superficiality and a lack of awareness of Sharī'ah principles governing evidence (*bayyinah*), intention (*niyyah*), and equitable judgment (*'adl*).

Another major divergence lies in the disregard of the waiting period (*'iddah*) and the presumption of paternity (*ḥaqq al-firāsh*), as seen in *Razak v. Azeezat*. The court deferred paternity determination to a postnatal DNA test, ignoring the prophetic rule: "The child belongs to the (marital) bed, and the adulterer gets nothing." (Khan, 1997, Ḥadīth 2053). In Mālikī law, a child conceived during lawful access (*dukhūl ṣaḥīḥ*) is presumed legitimate unless the husband initiates *li'ān* (mutual cursing). DNA testing may serve as *qarīnah* (circumstantial evidence) but cannot override the presumption of legitimacy established by Sharī'ah.

Additionally, all four cases show courts dissolving marriages instantly, without enforcing the Qur'ānic *'iddah*: "O Prophet! When you divorce women, divorce them for their prescribed period, and count the period

carefully.” (Qur’ān 65:1). The *‘iddah* is designed to ensure emotional stability, ascertain non-pregnancy, and provide room for reconciliation. Customary Courts’ neglect of this obligation reflects an administrative rather than a spiritual approach to marriage, undermining Islamic principles of *ḥifẓ al-nasl* (preservation of lineage).

Islamic law regards *nafaqah* as a sacred and continuous duty upon the husband, enforceable even after separation if minor children are involved. The Prophet (SAW) said: “It is enough sin for a man to neglect those he is responsible for.” (Yaser Qadhi & Abu Khaliyl, 2008:316). In *Abdul-Lateef v. Rasheedat*, although the court ordered ₦30,000 monthly child maintenance, it treated this as a mutual financial arrangement rather than a religious obligation. Mālikī jurisprudence classifies *nafaqah* as a binding right (*ḥaqq wājib*) derived from the Qur’ān (2:233). Likewise, *ḥadānah* (custody) in *Adewale v. Fatimah* was granted to the mother without evaluating moral fitness (*ahliyyah*), a core Islamic condition for guardianship. Customary Courts, therefore, prioritise practical settlement over compliance with the moral and spiritual structure of Sharī‘ah, which integrates justice (*‘adl*), compassion (*rahmah*), and accountability (*mas’ūliyyah*).

The comparative examination of these four cases exposes Customary Law’s conceptual incompatibility with Islamic matrimonial jurisprudence. While both systems seek social order and justice, Customary Courts tend to treat marriage as a civil contract rather than a sacred covenant (*mīthāq ghalīz*), as described in Qur’ān (4:21). In contrast, Mālikī jurisprudence upholds marriage as an act of worship (*‘ibādah*) governed by divine limits (*ḥudūd Allāh*). Islamic law insists on structured reconciliation, verifiable evidence, protection of lineage, and due process grounded in revelation. The failure of Customary Courts to observe these principles

not only weakens justice but also alienates Muslim litigants from Sharī‘ah-compliant remedies.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

This study analyzed the impact of Customary Courts on the application of Islamic family law in Ijebu Land. It uncovers notable discrepancies between customary judicial practices and the procedural mandates of the Sharī‘ah legal system. A review of selected divorce cases revealed that Customary Courts often depended on indigenous Yoruba norms or statutory customs instead of the Sharī‘ah principles for reconciliation, evidence assessment, and dissolution. These findings highlight ongoing challenges within Nigeria’s heterogeneous legal system, especially in areas lacking operational Sharī‘ah Courts of Appeal.

The study revealed that in divorce-related issues, including allegations of adultery, maintenance, paternity, and custody, numerous Customary Court rulings diverged from fundamental Islamic legal norms, particularly those defined by the Mālikī madhhab. The divergence encompassed a failure to designate arbiters (*ḥakamayn*), inadequate compliance with evidence criteria for grave accusations, non-compliance with the mandated waiting period (*‘iddah*), and recurrent disdain for the presumption of legitimacy safeguarded by the doctrine of *ḥaqq al-firāsh*. The resultant rulings, although administratively expedient, frequently contradicted Islamic legal principles that underscore equity, justice, and the safeguarding of familial honour.

The research emphasized the Islamic view of marriage as a sacred covenant (*mīthāq ghalīz*) based on reciprocal rights, ethical obligations, and divine accountability. The disregard for this spiritual aspect in Customary Court adjudication compromises both legal

uniformity and the religious expectations of Muslim litigants. The study recommended the necessity for a cohesive legal framework that honours constitutional protections while ensuring that Muslim marriage issues are resolved in conformity with Islamic law.

Recommendations

In light of the findings from this research, this study recommends that:

Shari'ah-compliant family courts should be established in Muslim-majority areas of Ijebu Land. This can be achieved through strategic collaboration between the Muslim *Ummah* of South West Nigeria (MUSWEN), the Ogun State Muslim Council (OGMC), and the Ogun State House of Assembly. Such courts will provide an institutional platform for resolving marital disputes in accordance with Islamic principles, thereby preserving the integrity of the Islamic family system. Legislative advocacy, stakeholder engagement, and community sensitization will be vital to securing the political and social support necessary for their establishment.

Furthermore, customary court judges should receive structured training in the basics of Islamic family law to enable them to adjudicate Muslim marital disputes with fairness and accuracy. Training programmes can be organized in partnership with recognized Islamic legal institutions and universities, with regular refresher courses to ensure continued competence. By improving the legal capacity of judges in Islamic matters, this measure will reduce instances of misapplication of Shari'ah principles and strengthen the credibility of court decisions among the Muslim populace.

In addition, there is a need for comprehensive community sensitization campaigns aimed at educating Muslims on their rights to Shari'ah-based adjudication. Such campaigns should be coordinated through Mosques, Islamic organizations, and media platforms, using

sermons, public lectures, and printed materials in both English and Yoruba. The involvement of respected scholars and community leaders will further enhance the credibility and reach of the sensitization efforts, empowering Muslims to make informed decisions regarding marital dispute resolution.

It is equally important to pursue legislative reforms that formally recognize Islamic personal law in matters relating to marriage, divorce, and inheritance for Muslims. This will require coordinated advocacy from Muslim lawyers, scholars, and civil society organizations who can draft proposals, submit memoranda to legislative bodies, and engage in public awareness efforts to counter misconceptions about Shari'ah. Such legal recognition will provide a clear framework for adjudicating personal status issues, reducing jurisdictional conflicts between customary and Islamic laws.

Finally, compulsory pre-marital and crisis counselling should be introduced for Muslim couples as a proactive measure to prevent unnecessary divorces. These counselling sessions, facilitated by Islamic centers, trained marriage counsellors, and community mediation committees, should address the rights, obligations, and conflict resolution mechanisms within marriage. By institutionalizing such counselling, the Muslim community in Ijebu Land can promote stronger marital relationships, minimize avoidable disputes, and uphold the values of the Islamic family system.

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