

LACK OF MAINTENANCE (*ADAM NAFAQAH*) AS A JUDICIAL GROUND FOR DISSOLUTION OF MARRIAGE UNDER ISLAMIC LAW

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Abstract

This paper delves into the Islamic principle of *nafaqah*, or maintenance, and its implications for divorce proceedings. Specifically, it examines the circumstances under which a lack of *nafaqah* (*adam al-nafaqah*) may be considered a valid reason for a wife to seek legal dissolution of her marriage. The paper also delves into the legal justifications and requirements necessary to support such a claim. Moreover, it explores the broader concept of *nafaqah*, encompassing the necessities a husband must provide for his wife, as well as financial and material support for her overall well-being. The analysis is rooted in Islamic jurisprudence and various Islamic legal sources. The study adopted a doctrinal method of research. The paper found that the Muslim Jurists are divided as to whether the wife should be allowed to claim dissolution of the marriage solely on grounds of lack of maintenance, although they both allude to the fact that the wife does encounter hardship in such circumstances. Therefore, it is recommended that the judicial authorities should thoroughly investigate complaints made by wives of lack of maintenance, and where such a plea is found to be true, relief must be accorded to the woman as per the Maliki jurists' reasoning against what the Hanafi and Zahiri jurists have opined on the issue.

Keywords: maintenance, marriage, dissolution, Islamic Law, Judicial Ground

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1.1 Introduction

A valid marriage contract under Islamic law has the effect of creating mutual rights and obligations between spouses, one of which is that of maintenance (*nafaqah*). And, by its nature, the rights and obligations arising out of marriage are reciprocal in the sense that if either spouse fails to perform his/her part of the express or implied conditions of the marriage contract, he/she cannot be entitled to the enjoyment of the rights vested in him/her and the other spouse is at liberty to seek redress from there.¹

Hence, one of the pivotal rights of the wife against her husband upon marriage is that the husband must financially take the responsibility of supporting her while she is under an obligation to make herself available to him and to look after his domestic comfort. The wife is thereby obliged to leave her parents or relations to live with the husband in the matrimonial home in which event, her daily needs are at the hand of the husband. Therefore, if the husband fails to provide an adequate means of livelihood or subsistence to the wife while she remains under his custody, then she can lawfully refuse to live with the husband. Likewise, if the wife fails or refuses to live with the husband without just cause, the husband is no longer under an obligation to support her.²

Accordingly, it is a general principle that one of the most essential rights and obligations between spouses is maintenance (*nafaqah*). This entails a husband's duty to provide his wife with necessities such as food, clothing, and lodging. This obligation is of strict liability, meaning it is absolute and cannot be abandoned by the husband. The wife's right to maintenance is so fundamental that a husband's failure to fulfill this duty can entitle the wife to seek a divorce through judicial separation.³

¹ Ahmed, K. N. *The Muslim Law of Divorce* (Kitab Bhavan, New Delhi, India, 1978). 710

² Ibn Abdil Barr, *Al-Kaafil fi Fiqh ahl al-Madinah al-Maalikii*, (Maktabah al-Riyadh al-Hadithiyyah, Riyadh, Saudi Arabia, 1980) Vol. 2, 559; See also Abd al-Ati, H. 'Islam in Focus' (n.d.) *The World Assembly of Muslim Youth [WAMY]*, Riyadh, Saudi Arabia, 117

³ Al-Adawi, Mustapha, *Jami'i Ahkam al-Nisaa* (Dar Ibn.Affan, Cairo, 1999) Vol.4, 14; Muhammad, I. T. *Maintenance of Wife under Islamic Law: Its Application in the Northern States of Nigeria*. (Unpublished LL.M Thesis, A.B, U.Zaria, 1984) 91

However, the objective of this paper is to examine and analyze the concept of maintenance (*nafaqah*) of a wife and the extent to which its lack thereof (*adam nafaqah*) can constitute a ground for divorce under Islamic law. Given this, the paper aims to consider the legal justifications that would entitle a wife to a judicial decree of divorce upon the husband's failure to discharge his obligation of maintenance. Hence, particular emphasis is placed on the legal requirements that must be established to sustain a claim for dissolution of marriage on this ground.

1.2 The Concept of Maintenance

In its general terms, maintenance connotes the preservation or up-keeping of a certain object in a particular state or condition and to maintain means to preserve; support to furnish sustenance for a particular object.⁴

Thus, the general conception of the word is that for one to maintain a particular object, one has to by all means provide for all necessities which conductively allow for a smooth existence of that object.⁵ However, in the context of family life, maintenance refers to those necessities incumbent upon a husband to his wife which will render her marital life easy, happy, and successful.⁶

The term *maintenance* (*nafaqah*) refers to the financial or material support a husband is obligated to provide for his wife. It encompasses all expenses necessary for her sustenance and well-being. As described in *Al-Hidayah*, *nafaqah* includes essential provisions required to sustain her life, such as food, clothing, and lodging.⁷ It also includes such articles as are necessary according to the custom of a community and particular class of people such as cosmetics, cleansing soap, hair oil, and articles of domestic use such as cooking utensils, mats, carpets, blankets, furniture, etc.⁸

But it may be observed that in most books on Islamic jurisprudence, emphasis is laid on food, clothing, and residence as what

⁴ Gurin, A. M. *An Introduction to Islamic Family Law*. (Al-Rauf Press Ltd, Zaria, 2010) 145.

⁵ Ibid, 145

⁶ Ibid, 145

⁷ Al-Marghinani, *al-Hidayah*, (Karachi, n.d.), Vol. 2. 437.

⁸ Ibn Abidin, *Radd al-Muhtar*, (Cairo, 1324 AH) Vol. 2. 888.

constitutes the maintenance of a wife.⁹ This gives the impression that maintenance is restricted only to these three items. However, as K. N. Aluned argued while relying on the statement of Ibn Rushd,¹⁰ it would be wrong to hold that maintenance consists only of food, clothing, and residence because the items considered to constitute necessities of life must naturally differ from one place to another given social status, the cultural background of different people, and changes that may result due to time-lapse.¹¹

Maintenance is one of the economic or financial rights of a wife towards her husband during the subsistence of their marriage which is a fundamental obligation on the husband to forward to the wife. Failure to discharge the obligation of maintenance by a husband may amount to a ground of divorce.¹² The level of maintenance as it was stated in the Maliki book *Al-Kaafil fi Fiqh ahl al-Madinah* is that it should be according to the husband's ability from what has been customarily feasible to be supported by a person of his status to a woman of the wife's status.¹³

Maintenance of a wife becomes due from the very moment she fulfills the conditions antecedent to the right of maintenance and the mode of paying it depends upon the convenience of the husband in settling it in cash or kind and whether daily, weekly, monthly, quarterly, half-yearly or on yearly basis as per the husbands means of income.¹⁴

1.3 Legal Nature of Wife's Right to Maintenance

The wife's right and the husband's obligation towards maintenance during the subsistence of the marriage is a matter governed by the Holy Qur'an and the Sunnah. Thus, the authority for the legal obligation of maintenance is laid down in the primary sources of the sharia. The Holy Qur'an provides:

The mothers shall give such to their offspring for two whole years if the father desires to complete the term. But

⁹ Abd al-Ati, H. *Islam in Focus*, (n2) 117-119

¹⁰ Ibn Rushd, *Bidayat al-Mujtahd*, Vol.2, p.54

¹¹ Ahmied, (n1) 711

¹² Gurin, (n4) 216

¹³ Ibn Abdil Barr, (n2) Vol. 2, 561

¹⁴ Gurin, (n4) 152

he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden left, on it greater than it can bear...¹⁵

Similarly, the holy Qur'an further provides:

Let the women live [in 'iddat] in the same style as ye live, according to your means: Annoy them not, to restrict them. And if they carry [life in their wombs], then spend [your substances on them until they deliver their burden: and if they suckle your [offspring], give them their recompense: and take mutual counsel together, according to what is/uxt and reasonable. And if ye find yourselves in difficulties, let another woman suckle [the child] on the [father's] behalf. Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him. After a difficulty, Allah will soon grant relief.¹⁶

From the provisions of the above Qur'anic verses, Muslim jurists opined that it is an obligation upon a husband to maintain his wife during the subsistence of the marriage. Maintenance of wives under the sharia is therefore a strict liability rule to the extent that she is entitled to maintenance even if the husband is ill, imprisoned, or in a state of poverty whereas the wife is rich. Maintenance of a wife is still due even when intimacy with the wife is not possible due to her old age or some physical defects and the same rule applies where the husband is a minor, impotent, or too ill to be intimate with her.¹⁷ But as an exception to the general rule of absolute liability of a husband towards the maintenance of his wife, it is premised upon the fundamental condition that the wife must not be *nashizah* (refractory or un-submissive) to the husband, i.e., she must faithfully perform her marital obligations towards the husband, failing which, she cannot capitalize her claim on that as a ground to secure divorce before the courts against the husband.¹⁸ A wife is considered to be *nashizah* when she leaves her

¹⁵ Qur'an 2:233

¹⁶ Qur'an 65:6-7

¹⁷ Ibn Abidin, (n8) Vol.2, 87; Ahmed, K.N. (n1) 715

¹⁸ Ibn Abdil Barr, (n2) Vol. 2, 559. Ibn Abidin, (n8) Vol. 2, 87; Fatawa al-Hindiyyah, Vol. 11, 142-143

husband's matrimonial home without his permission and when she refuses the husband access to herself.¹⁹

Thus, there are certain circumstances when maintenance is due and when it is not due to a wife, i.e., when a wife is entitled to and when she would not be entitled to receive maintenance from her husband. A wife shall be entitled to maintenance when she is lawfully married to the husband. However, if the marriage is void (*batil*) or irregular (*fasid*), she would not be entitled to receive maintenance from him. Also, a divorced woman is entitled to receive maintenance during *iddah* (waiting period) irrespective of whether the divorce is revocable or irrevocable according to Hanafi School. However, the majority of jurist, Maliki, Shafi'i and Hanbali, are the view that, in the case irrevocable divorce, the woman only have a right to housing and nothing more.²⁰ Also, when the wife is pregnant, she is entitled to maintenance till the delivery of her child.²¹ Furthermore, a wife would still be entitled to maintenance even during such periods of sickness, menstruation (*haydh*), postnatal bleeding (*nifas*), fasting, hajj, or when she is on travel with the husband's permission.²²

1.4 Conditions for Wife's Entitlement to Maintenance

Generally, a wife would be entitled to maintenance either during the subsistence (coverture) of the marriage or after its dissolution (i.e., in the case of *iddah*). This obligation of maintenance which goes on throughout the continuity of the marriage contract is an entitlement of the wife as of right and it is hinged upon the following principles and conditions:

a) Existence of a valid (*sahih*) and subsisting marriage between the spouses: An invalid marriage would therefore confer no right of maintenance to the wife nor an obligation on the husband. Muslim jurists are unanimous in accepting the legitimacy of a valid marriage contract in creating corresponding rights and obligations between spouses; hence the right of the wife and the duty of the husband over

¹⁹ Ibid

²⁰ Ulaysh, M. b.. *Manah al-Jalil* (Dar al-Fikr, 1983) Vol. 4, p. 400; Al-Hattab, B. A. *Mawahib al-Jalil*. (Dar al-Fikr, 1992) Vol. 5, p. 553; Al-Rafi'i, A. K. b. M. b. A.. *Al-Aziz Sharh al-Wajiz*. (Dar al-Kutub al-'Ilmiyyah, 1997) Vol. 10, p. 40.

²¹ Ibn Abidin, (n8) Vol. 2, 888; Gurin, (n4) 145

²² Ibn Abdil Barr, (n2) Vol.2, 559

maintenance.²³ To the Maliki School, a void whereby a Wali (marriage guardian) is lacking cannot confer any right and obligation between the spouses inclusive of the right and obligation of maintenance' but to the Hanafi School, such right and obligation exists.²⁴

Also, when the wife becomes a widow because of the husband's death unless she is pregnant. A widow is not entitled to any maintenance from the time of her husband's death. This is because, maintenance is paid out of the husband's property during his lifetime but upon the death of the husband, his ownership ceases and becomes immediately vested in his heirs including the widow herself and the heirs are in no way responsible for the maintenance of the widow. But where she is pregnant and is expecting a child, she shall be entitled to maintenance in such a case.²⁵

b) Consummation of the marriage: for a wife to be entitled to the right of maintenance, her marriage must have been consummated by the husband. Consummation as a precondition to the right of maintenance refers to actual sexual intercourse between the spouses. But where the wife has rendered herself accessible while the husband suffers from certain sort of defects or minorities as to render consummation infeasible, the obligation of maintenance is still incumbent upon the husband.²⁶

c) The wife must be able to tolerate and/or discharge conjugal relations: to be entitled to maintenance, the wife must not be of such tender age as not to be able to engage in sexual intercourse with the husband because given it, such incidences of conjugal relations which provides for safeguard against immorality, domestic comfort, harmonious relationship and procreation of children as the main objectives of marriage would be defeated in such circumstances. If sexual intercourse becomes impossible solely on her account, then she acquires no right of maintenance against her husband.²⁷

Also, when sexual intimacy with her is not possible on account of serious illness or tender age. A husband is only liable for the wife's

²³ Muhammad, I. T (n3) 92; Gurin, (n4) 154-146

²⁴ Muhammad, I. T. (n3) 92-93

²⁵ Ibn Abidin, (n8) Vol.2, 922.

²⁶ Muhammad, I. T. (n3) 93-94; Gurin, (n4) 146-147

²⁷ Muhammad, I. T. (n3) 92-93;

maintenance if she becomes capable of affording sexual intimacy or enjoyment irrespective of the fact as to whether the marriage has or has not been consummated.²⁸ If the wife is in a state of illness before the marriage while living in her father's house to such an extent as not to be able to come to her husband's house, she shall not be entitled to receive maintenance from her husband even when she has not refused to come to his house. But where a wife is ill while living with her husband at his house and she later returns to her parent's house to live there with her husband's permission, she shall be entitled to get maintenance from him.²⁹

d) The wife must be accessible for conjugal relations: upon marriage, a wife is supposed to be under the custody of her husband within the matrimonial home and where this is not the case, she has no right of maintenance against her husband if she is imprisoned, abducted or leaves the matrimonial home without the husband's permission (e.g., if she goes on Hajj without his permission).³⁰

e) The wife must respond to the invitation to cohabit by her adult husband: to be entitled to maintenance, the wife should readily accede to the husband's invitation to the conjugal roof and if she refuses to comply, she loses her right of maintenance.³¹

f) The wife must obey the husband's reasonable orders: the wife is obliged to obey commands and instructions issued to her by the husband which are within the bounds of the sharia.³² However, where the wife becomes *nashizah* (disobedient) to the husband. A husband is not duty bound to maintain his wife if she is *nashizah* (disobedient or not submissive) to him and a wife is deemed to be *nashizah* when she leaves her husband's house without his permission and when she refuses him access to herself in terms of intimacy.³³

Moreover, when the wife apostates and is remanded in prison custody, she loses her right of maintenance unless and until she reverts to Islam. Apostasy here implies that she is a Muslimah before adopting

²⁸ Sayyid Sabiq, *Fiqh al-Sunnah*, (Dar Kutub Misriyaah, Cairo, 2003) Vol.2, 309. Ibn Abidin, (n8) Vol.2, 888.

²⁹ Ibn Abidin, (n8) Vol. 2, 888.

³⁰ Gurin, (n4) 147

³¹ Ibid, 147

³² Ibid, 147

³³ Ibn Abidin (n8) Vol. 2, 890.

another religion and before renouncing Islam otherwise, she cannot be considered an apostate. Hence, if a Muslim man marries a Christian woman, she shall be entitled to maintenance unless she becomes *nashizah* (disobedient) or where she becomes an atheist in which case her marriage becomes unlawful and her entitlement to maintenance is no longer tenable. When a wife is *nashizah* (disobedient), the husband's obligation to support her does not 'come to an end but is merely suspended for the time being, and upon return to her husband's house, she will become entitled to be maintained by her husband because the cause for the loss of the right to maintenance has been removed.³⁴

1.5 Lack of Maintenance (*Adam Nafaqa*) as a Ground of Divorce

Lack of maintenance as a ground of divorce is contemplated in such periods of difficulty or hardship (*I'sar*) wherein the husband fails to remit his obligation of maintaining the wife. *I'sar* (hardship) connotes that type of hardship or difficulty that renders one's livelihood miserable because of extreme poverty, sickness, etc. Where such an unpromising situation occurs during the subsistence of the marriage, the matrimonial life may become turbulent resulting in inadequacy or the lack of food, clothing, or even ejection of the family for failure to settle rents.³⁵ In such difficult circumstances, is the wife obliged to bear the situation with patience or to seek divorce as an alternative relief? The Muslim jurists have expressed different views on the issue. There are two dominant juristic positions on whether lack of maintenance constitutes a ground for divorce. The first view is the one held in the affirmative by Maliki, Shafi'i, and Hanbali while the second view is held in the negative by Hanafi and the Zahiri schools respectively.³⁶

The Maliki,³⁷ Shafi'i,³⁸ and Hanbali³⁹ schools permit divorce on the grounds of lack of maintenance. Their position is based on specific

³⁴ Ibn Abdil Barr (n2) Vol. 2, 559; Ibn Abidin (n8) Vol. 2, 889.

³⁵ Muhammad, I.T. (n3) 96-97

³⁶ Gurin, A. M. (n4) 217

³⁷ Al-Dasuqi, M. S. (n.d.). *Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir*. Dar al-Fikr; Al-Kharshi, M. (n.d.). *Sharh Mukhtasar Khalil*. Dar al-Fikr.

³⁸ Al-Nawawi, Y. (n.d.). *Rawdat al-Talibin*. Dar al-Minhaj; Al-Rafi'i, A. K. (n.d.). *Al-Aziz Sharh al-Wajiz*. Dar al-Kutub al-'Ilmiyyah.

³⁹ Ibn Qudamah, A. (n.d.). *Al-Mughni*. Dar 'Alam al-Kutub; Ibn Taymiyyah, A. (n.d.). *Majmu' al-Fatawa*. Dar al-Wafa.

provisions of the Holy Qur'an and the Sunnah. These jurists argue that Qur'an 4:19 obliges spouses to live together with kindness and equity:

O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allah makes therein much good.

The scholars argued that this verse obligates spouses to live together with kindness and equity. Failure to provide maintenance violates this principle, as withholding financial support creates hardship and contradicts the Qur'anic directive for harmonious coexistence.⁴⁰ They further rely on Qur'an 2:231, which prohibits retaining one's wife with the intent to harm or take undue advantage of her:

And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms. And do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself.

This verse prohibits retaining a wife with the intent to harm her. If a husband fails to provide maintenance, he is effectively retaining her in a state of harm and injustice, justifying her right to seek separation. Additionally, Qur'an 2:229 underscores the duty to either live together on equitable terms or separate amicably:

Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment.

The scholars interpret this verse as requiring spouses to either live together on equitable terms, which includes the provision of maintenance, or to part ways amicably. A lack of maintenance breaches the condition of equity, making separation a valid option. These Qur'anic principles are further supported by the hadith:

⁴⁰ Al-Nawawi, Y. (n.d.). *Rawdat al-Talibin*. Dar al-Minhaj, Vol. 7, p. 119

There should be neither harming (*darar*) nor reciprocating harm (*dirar*).

On the above Hadith, the scholars opined that failure to provide maintenance causes harm to the wife, which is prohibited by this hadith. Scholars emphasize that financial neglect constitutes harm that justifies divorce. Another hadith supports the wife's right to demand maintenance or separation, stating:

A woman has the right to say, 'Feed me or release me.'⁴¹

This hadith explicitly supports the wife's right to demand maintenance or divorce. It highlights that the provision of financial support is a basic marital obligation, and its absence legitimizes her request for separation.

Thus, based on the aforementioned provisions of the Holy Qur'an and the Sunnah, the Maliki, Shafi'i, and Hanbali jurists assert that both spouses owe one another mutual rights and obligations. This principle is rooted in the Qur'anic verse:

And they (women) have rights similar to those (of men) over them in kindness...⁴²

This establishes the principle of reciprocity and equity in marital responsibilities. Among these obligations, maintenance by the husband is deemed so essential and fundamental that its neglect constitutes a violation of the marital contract.

On the strength of these authorities, the jurists reasoned that great harm or injustice would befall a wife if the husband notwithstanding lack of maintenance continues to keep her within the matrimonial bond and it is desirable in such circumstances to get her separated to remove the hardship that she is undergoing. Moreover, it is only when she complains, i.e., fails to bear the situation that the marriage would be dissolved, otherwise she may elect to continue with the marriage despite the financial constraints of the husband.⁴³

⁴¹ Reported by Daraqudni

⁴² Qur'an 2:228

⁴³ Muhammad, I. T. (n3) 96-97

The Maliki School further specifies that, if the wife had prior knowledge of the financial status of the husband at the time of the marriage contract, later on, she cannot sue on this ground.⁴⁴ The Shafii and Hanbali on the other hand held the view that notwithstanding that the wife had prior knowledge of the husband's financial status, she could still complain for divorce on lack of maintenance.⁴⁵

Equally, some jurists like the Maliki and the Shafii, allow claims on accumulated maintenance where owing to certain reasons, the husband was unable to discharge the duty of maintaining his wife and its arrears would therefore be settled later on as a debt. But Imam Abu Hanifa, allows it only to accumulate where there has been mutual agreement on the quantum of maintenance or where its payment has been decreed by the court.⁴⁶

It may be understood that the rationale behind this ground is to save the wife who has been under the custody of the husband from becoming destitute and prone to begging. Such a ground is further justified by the very fact that as the wife is obliged to remain at home in the name of the marriage to preserve her chastity to the husband's comfort; she would thereby not be able to earn a living. Thus, given her confinement in her husband's matrimonial home, she is guaranteed means of sustenance through her husband failing which, the option remained open to her to either bear the situation with patience or rightly demand her exit from the marriage bond through the assistance of the Khadi in this regard.⁴⁷

Likewise, in holding a contrary view that lack of maintenance alone cannot qualify as a ground for divorce, the Hanafi School relies on the provisions of certain verses of the Holy Qur'an. The Hanafi jurists argue that the Qur'an 24:32 provides:

Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things.

⁴⁴ Muhammad, I. T. (n3) 96-97; Gurin, (n4) 217

⁴⁵ Gurin, (n4) 216-217

⁴⁶ Gurin, (n4) 53;

⁴⁷ Ibn Abidin, (n8) 915

Similarly, the Qur'an 65:7 provides:

Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.

Likewise, the provision of Qur'an 2:280 is that

If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.

Based upon the provisions of these verses of the Holy Qur'an, the Hanafi jurists were of the view that a wife cannot be granted a divorce on grounds of lack of maintenance but she should be patient and share the husband's richness and poverty. These jurists further base their argument on the point that none of such ground of divorce for lack of maintenance was obtainable during the time of the Prophetic Companions, is that most of them were not all rich but included poor people among them.⁴⁸ These jurists consider that the way out is for the wife to be given a judgment for maintenance and that she be permitted to take on credit what she needs for her maintenance which is to be settled by the husband later upon regaining financial strength.⁴⁹ Likewise, it is also the view of the Zahiri School that a wife should not be granted a divorce on grounds of lack of maintenance but if the wife is wealthy enough, she has to maintain herself as well as her husband unless the husband has a rich son or father.⁵⁰

Where a marital conflict revolves around lack of maintenance (*adamul nafaqah*), three causes of action are open to the spouses to resolve such a conflict. Providing a solution when a husband faces difficulties in maintaining his wife involves three key steps; The first step is to grant the husband a respite period to resolve the issue and provide the necessary maintenance. This period can range from three days, seven days, thirty days, or even up to two months, depending on the specific circumstances. The determination of this period lies at the

⁴⁸ Gurin, (n4) 217

⁴⁹ Ibid, 217

⁵⁰ Ibn Hazm, *al-Muhalla*, (Darul Fikr, 2006) Vol.10, 92

discretion of the Qadi (judge), who takes into account factors such as the husband's situation and the wife's condition, particularly her capacity for patience and endurance.⁵¹ The second step involves the appointment of two arbitrators (*al-Hakamaini*) to evaluate the marital situation and attempt to mediate and rectify the issues between the spouses.

The third and final step allows for the dissolution of the marriage at the instance of the wife. However, this option is not automatic or granted solely on the wife's claim or a frivolous demand. Instead, it requires proper inquiry and evidence presented before the court. The wife must substantiate her claim with sufficient proof to demonstrate the husband's inability or failure to provide maintenance. A baseless or unsubstantiated complaint is not acceptable.⁵²

If the wife wishes to pursue her right to dissolve the marriage due to the lack of maintenance, she must formally petition for divorce before the Qadi. The Qadi will assess the evidence, and if satisfied that the grounds are legitimate, the marriage can be dissolved even if the husband opposes the decision.⁵³

In the Maliki School, a wife's complaint about a lack of maintenance necessitates two distinct procedures, depending on whether the husband is present or absent from the court proceedings.

1. **If the Husband is Present:** When the husband appears in court regarding the wife's complaint, he is questioned about the claim. If he admits to the claim but pleads poverty as the reason for his failure to provide maintenance, he is granted a period—typically one to two months—to fulfill his obligation. If he remains unable to provide maintenance after this period and the situation shows no signs of improvement, the Qadi will request that he divorce his wife. Should the husband refuse, the Qadi has the authority to pronounce the divorce on his behalf.⁵⁴
2. **If the Husband is Absent:** If the husband absents himself from the court proceedings, the Qadi will send him a notice requiring him to either send maintenance to his wife or face divorce on a

⁵¹ Ibn Abdil Barr, (n2) Vol.2, 561

⁵² Muhammad, I.T (n3) 112

⁵³ Muhammad, I.T (n3) 112-113

⁵⁴ Gurin, (n4) 169

specified date. If the husband fails to comply with the directive within the given timeframe, the Qadi will proceed to divorce the wife. However, this is contingent upon the wife providing evidence to establish the following prerequisites:

- a) That she is a wife by a valid marriage contract;
- b) That no divorce took place between them at the moment of complaint;
- c) That she was under his control and disposition;
- d) That she is entitled to be maintained by him;
- e) That she did not relinquish her right of maintenance;
- f) That she is deprived or is not receiving maintenance from him; and
- g) She will take a judicial oath.⁵⁵

Divorce for lack of maintenance is considered by Muslim jurists to be a revocable divorce, in that, if the husband's financial capability improves later and the wife has not yet completed her iddah, he may recall her back by *raja'a*.⁵⁶

1.6 Analysis of Some Nigerian Case Laws

It is pertinent to examine some relevant cases that illustrate the application of the concept of maintenance (*nafaqah*) to see whether and how its absence constitutes a ground for divorce among Muslims in Nigeria. In *Taibat Adunni v. Banni Jimoh*,⁵⁷ the wife who was the plaintiff before the lower court (Upper Area Court II Oloje Illorin) instituted an action for dissolution of their marriage by way of *Khul'u* but the husband counter claimed reimbursement for the gifts and the medical expenses he spent on the wife. It was therefore held by the Kwara State Sharia Court of Appeal while relying on the authority of the famous Maliki book *al-Fawakih ad-Daani*⁵⁸ that it is not binding on the husband to pay for the cosmetics as well as medical expenses of his wife when she falls sick but that it is the opinion of the court that

⁵⁵ Ibn Farhun, *Tabsirat al-Hukkam*, (Darul Kutub Ilmiyyah, 2007) Vol. 1, 189.

⁵⁶ Ibn Abdil Barr, (n2) Vol.2, 561.

⁵⁷ (2013)1 Sharia Quarterly Law Report [SQLR](PART III) at 78

⁵⁸ An-Nafrawi, Ahmad bin Qanim bin Salim, *al-Fawakih ad-Dawani ala Risalat ibn Abi Zayd al-Qiragani*, (Maktabah al-thaqafah al-Diniyyah, 2009) Vol.2,104

payment for such items is out of generosity and in case of separation, they are not refundable even if admitted by the wife.⁵⁹

By way of analysis, it may be observed that as the parties in the above case desire to end their marriage through *Khul'i*, it is the principle of the law that if the matrimonial life becomes unbearable to the wife, she is free to seek her release upon returning the dower she received from the husband or its value. It is the *ijma* (consensus) of Muslim jurists that a wife can only be obliged to return the dower to the husband provided there is no manifest harm, maltreatment, or blameworthiness arising from the husband.⁶⁰ Instead of returning the dower, she may negotiate with the husband to relinquish some of her rights towards him such as arrears of maintenance, her deferred dower, maintenance during iddah or pregnancy, etc.⁶¹

It may be observed that this case has depicted the application of the classical Maliki view that medical expenses do not form part of the expenses of maintaining a wife, therefore a husband is not obliged to pay for the medical expenses of the wife if she falls sick. Moreover, the court's opinion that its remittance should be out of generosity is a welcome decision as it strikes a balance between outright rejections of it while favoring its payment generously. But medical expenses or the health status of a wife is as good a corollary to her existence as food, clothing, and lodging, and in our view, the traditional view of not classifying medical expenses as part of the components of maintenance ought to be modified to encompass all those things which are necessary for the support of a wife including medical expenses.

Similarly, in the case of *Mama Ahmadu v. Ahmadu Maiyaki Yunusa*,⁶² Mama Ahmadu being the Plaintiff before the trial Area Court Grade I, Lafiagi sued her husband Ahmadu Maiyaki Yunusa in a divorce action predicated upon the grounds of lack of feeding and maltreatment. The husband denied the claim and the wife being the plaintiff was requested by the court to prove her claim which she failed.

⁵⁹ *Taibat Adunni v. Banni Jimoh* (supra) pp. 84-85, paras. F-A

⁶⁰ Sahnun, *Al-Mudawwanah al-Kubrah*, (Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, nd). Vol.5, 22

⁶¹ Muhammad ibn Yusuf al-Dafii, *Ihkamul Ahkam ala Tuhfah al-Hukkkam*, (Dar al-Fikr, Beirut, Lebanon, nd), 102-103

⁶² (1998) Unreported Appeal No.KWS/SCA/CV/AP/LF/01/98, Kwara State Sharia Court of Appeal Annual Report, 72-79

The trial court sought to know the amount of dowry involved in the marriage and the husband submitted a list containing head of claims to the tune of N40,830.00 while the wife denied liability and admitted only N2,000.00 as dowry and N2,200.00 being medical expenses. Eventually, the trial court ordered the dissolution of their marriage with the refund by the wife to the husband of N27, 630.00 being expenses and dowry. On appeal, the wife's counsel contended that the award of N27, 630.00 made in favor of the husband is unfair and unreasonable as most of the head of claims on the list tendered by the husband were not refundable as dowry under the sharia. It was further contended by the wife's counsel that only the N2,000.00 paid as dowry is refundable and that even N2,200.00 admitted by the wife as being medical expenses is not claimable or refundable to the husband arguing that the husband had the duty to take care of the wife during the pendency of the marriage. On the other hand, the husband's counsel contended that the medical expenses were incurred while the divorce action was already pending before the trial court and in anticipation of amicable resolution of the marital conflict and that as all efforts towards reconciliation proved futile; it is fair that such expenses should be refunded.

It was finally held by the Kwara State Sharia Court of Appeal that medical expenses are not the responsibility of the husband for his wife and the court therefore refused to uphold the submission of the wife's counsel to the effect that the wife is not liable to refund the admitted sum of N2, 200.00 being medical expenses. In passing this judgment, the court relied on a passage from the famous Maliki book *Jawahirul-Ikhlil* which states to the effect that the husband doesn't need to provide his wife with either medication or expenses for cupping or scarification and medical fees of doctors.

Again, this case relates to the application of the Islamic concept of maintenance (*nafaqah*) as it concerns the issue of whether medical expenses fall within the constituents of *nafaqah* or not. As it has been earlier stated, in the most considered the classical view of the Maliki jurists, the medical expenses of a wife do not constitute one of the components of the right to maintenance. Thus, following the analysis offered in the above-cited case of *Taibat Adunni v. Banni Jimoh*,⁶³

⁶³ (2013) 1 Sharia Quarterly Law Report [SQLR] (PART III) at 78

It is our firm view that as Nigerian Muslims are customarily inclined to accept responsibility for the medical expenses of their wives, it ought to be seen and interpreted as such by the courts in Nigeria. Medical expenses should therefore be regarded as a collorally component of the wife's right to maintenance which goes to the welfare of the wife as do other components such as food, clothing, and lodging.

In *Ndana Mohammed v. Mariam Ndana*,⁶⁴ part of the principal issues in contention is who takes the responsibility for the maintenance of a wife and whether a wife loses her right of maintenance for refusing of conjugal relationship. The fact of the case is that Mariam Ndana sued her former husband Ndana Mohammed before the trial Upper Area Court for lack of maintenance of herself and five children of the marriage claiming the sum of N160, 000 as feeding allowance for herself and their children for eleven years and school fees for four children. The husband Ndana Mohammed denied the allegation and responded that it has been three years since he had sexual intercourse with her.⁶⁵

The trial Upper Area Court decided that from the evidence, the wife had lost her right to claim feeding and maintenance for six years on the grounds of refusing sexual intercourse with the husband. On appeal to the Kwara State Sharia Court of Appeal, it was held that the maintenance of wife and children of Islamic marriage is the responsibility of the husband and that this position is strengthened by the provisions of Qur'an 2:233 and Qur'an 65:7 respectively.⁶⁶ The court further held that if the wife refused a conjugal relationship, the consensus opinion of Muslim jurists is that she loses the right to receive maintenance from the husband. In its judgment, the Sharia Court of Appeal relied on the opinion of the Maliki jurist Ibn Rushd on the issue which is that a recalcitrant wife loses the right of maintenance.⁶⁷

The above case typically reflects the position of the law that under the sharia whenever a wife proves recalcitrant thereby becoming *nashizah* (disobedient), she loses her right for the time being to receive maintenance from her husband. Thus, the decision of both the trial

⁶⁴ (2013) 1 Sharia Quarterly Law Report [SQLR](PART II) at 140

⁶⁵ Ibid, pp.141-143

⁶⁶ Ibid,pp.152-153,paras.F-E

⁶⁷ See Jbn Rushd,Bidayat al-Mujtahid,Vol.2,p.55

Upper Area Court and that of the Sharia Court of Appeal in this case of *Ndana Mohammed v. Mariam Ndana*⁶⁸ is laudable as it unanimously upheld the basic principle that the responsibility for maintenance rests with the husband but correspondingly, the wife forfeits such a right in circumstances of disobedience or gross neglect by the wife to observe her marital duties towards the husband. This is bas it could because, it would be untenable to oblige a husband in such a difficult circumstance to shoulder the responsibilities of maintenance, housing, and clothing of the wife when the relationship between them is very bad and engulfed with a serious conflict which the wife has- even disobediently deserted him.

1.7 Conclusion

From the above discussions, it is observed that Islamic law has provided an effective legal framework for the protection of women's economic rights through the allocation of maintenance (*nafaqah*) as a right that a wife can even get enforced against her husband in case of default. The right to claim maintenance has therefore been conferred on the wife to free her from financial constraints and dependence upon anybody aside from her husband who is the closest companion to her. It is also observed that the wife is in no case obliged under the Sharia to maintain neither herself nor her husband. Her wealth or property is indispensably preserved to her personally and in addition to what she possesses, she is further supported financially to protect her womanhood and make the matrimonial home a haven to her amidst the difficulties of pregnancy, menstruation, child-birth, rearing of children and many more family constraints that befalls on her.

The Muslim Jurists are divided as to whether the wife should be allowed to claim dissolution of the marriage solely on grounds of lack of maintenance, although they both allude to the fact that the wife does encounter hardship in such circumstances they differ as to its legal outcome. Therefore, it is recommended that the judicial authorities should thoroughly investigate complaints made by wives of lack of maintenance, and where such a plea is found to be true, relief must be accorded to the woman as per the Maliki jurists' reasoning against what the Hanafi and Zahiri jurists have opined on the issue. This is because to deny the wife relief by way of separation in such circumstances of

⁶⁸ (2013)1 Sharia Quarterly Law Report [SQLR] (PART II) at 140

difficulty when the husband can no longer be able to provide maintenance to the wife would entail great hardship to the wife in such an unbearable situation. This is because, in the present time, it is much more difficult if not impossible for her to get a loan or credit facility in the husband's name as in the present generation, loan or credit facility would only be given upon security or guarantee as to means of repayment

Moreover, it is further recommended that a wife should be afforded relief by having the marriage dissolved if the husband happens to deceive her at the time of the marriage regarding the true position of his financial capabilities. If she was made to believe that the husband is a well-to-do person and after the marriage, it turns out not to be so, then upon her complaint, she deserves an order of separation from the courts. In the same vein, the dissenting view of the Hanafi and Zahiri jurists that a wife need not be granted divorce merely on grounds of lack of maintenance is also not out of place, if reviewed to take into cognizance the realities of contemporary life where even if the husband is on fixed earning or income like a salary, in circumstances of prolonged delay in the payment of salary, period of the no-work-no-pay policy during labour strike or when one's bank account become frozen for a reason or the other, the husband gets plunged into financial difficulties but the truth of the matter is that he did fail nor refused to discharge his obligation of maintenance only that he is overcome by unavoidable circumstances. Thus, in such situations of relative poverty, it is recommended that the complaint by the wife for lack of maintenance is not supposed to yield an order of separation by the courts but that the wife should be persuaded to bear the situation with patience as the Hanafi jurists have opined.