

**PROOF UNDER THE SHARI'A WITH PARTICULAR REFERENCE
TO *DHARAR* IN MATRIMONIAL CAUSES**

A PAPER PREPARED AND PRESENTED BY:

Hon. Kadi Ahmad Muhammad Gidado
Kadi Shari'a Court of Appeal, Kano State

DISCUSSANTS

A.A. Mu'allimu, Esq.

&

Abdulkarim Muhammad Mustapha, Esq, ACarb.

Saturday 12/Rabi'ul Awwal, 1444H (8/10/2022)

بسم الله الرحمن الرحيم

I sincerely express my appreciation to the Chairperson, Hajiya Bilkisu Ibrahim Suleiman, of the Mentorship Committee of the International Federation of Women Lawyers (FIDA) and the members of this august Association for granting me the opportunity to present this paper entitled: “Proof Under the Shari’a with particular Reference to *Dharar* in Matrimonial Causes” for a One Day Workshop on the Training of Female Legal Practitioners. I am very grateful, please.

1.1. INTRODUCTION

The paper consists of seven parts excluding the introduction, recommendation and conclusion. It explained The nature of Shari’a Justice System and two main classes of temporal justice under the Shari’a. Likewise the presentation also exposed the nature of *muraafa’at* and its application in Shari’a Legal System. The principles governing Matrimonial Causes and the Guidelines Regulating Matrimonial Dispute are discussed. Again Nushuz, which is sometimes, the source for domestic violence is explained and related to *dharar* being a dispute in Matrimonial Causes. Consequently, the application *muraafa’at* in Matrimonial Causes with particular reference to domestic violence is exposed finally the preference of As-sulh mechanism over litigation is specifically given special attention.

2.1. SHARI’A JUSTICE SYSTEM

Justice system under Islamic law is based on the protection of five fundamental rights known as *addharuriatul khams* (five fundamentals) followed by *Hajiyyat* (demands) and *tahsiniyat* (compliments). The five fundamentals are the protection of religion, life, lineage, property and intellect, while the two other generation of rights are complimentary to the fundamental rights. Upon that background the Shari’a checked balanced these rights in its legislation, *mura’aft* (Islamic law of evidence) inclusive. Allah (SWT) is absolutely a fair and just judge. However, in contemporary period ignorantly or arrogantly Islamic legislation is commonly challenged, in that the Shari’a oppresses women. Muslims are convinced that the Immutable attributes of Allah keep such claim out of place; therefore, such claim does not in any way affects our firm conviction on Shari’a justice and that cotemporary attitude cannot shake our hearts. But these insinuating statements would rather trigger for an in-depth research in Islamic law jurisprudence.

Upon this premise, Allah the Al-Mighty, made various declarations in His sacred scripture on justice. For example, Allah says: **“And your Lord wrongs no-one”**¹, He also declared as follows: **“Indeed Allah wrongs none, not even as much as an atom’s weight...”**² **“Allah is no oppressor of His servants”**³. He also stated that: **“...It was not for Allah to wrong them”**⁴. Accordingly, the Prophet himself reported a Hadith Al-Qudsi on oppression, that has forbidden injustice for Himself and He have made if forbidden among His servants⁵.

Consequently, judges in particular are required to absolutely observe justice in all their judicial functions. Abdullah Ibn Amr reported that: The Messenger of Allah, peace and blessing of Allah be upon him, said, **“Verily those who were just will be in the presence of Allah upon pulpits of light, near the right hand of the Merciful, the Exalted, and both of His sides are honorable. They are those who practiced justice in their judgments, with their families, and in all that they did”**.⁶

2.2. Formal Justice

Formal Justice *“adl”*, otherwise known as judicial justice, it is specifically expressed by authorities as *“qist”*.⁷.

“Indeed, we sent our messengers with clear signs, and sent down with them the book and the balance that people may uphold justice. And we sent down iron, wherein there is awesome power and many benefits for people so that Allah may know who, without even having seen Him, helps Him and His messengers, sure Allah is most strong, most – Mighty”⁸.

¹ Suratul Kahaf: 18:49

² Suratun Nisa’ 4:40

³ Suratul Ankabut 29:40

⁴ Suratul Hajj: 22:10

⁵ Reported by Muslim, H. o. 2577

⁶ Sahih Muslim, Hadith No. 1827.

⁷ Suratul Hadid: 57:25, see also Suratun Nisai 4:135

⁸ Suratul Hadid: 57:25, Abul A’ala Mawdudi, S. (2006): Toward Understanding the Qur’an: Abridged version of Tafhim Al- Qur’an, Translated and edited by Zafar Ishaq Ansari, p. 1132.

This verse indicated two things that cure every evil. First is the book, the Qur'an and then the *mizan* (balance) which means consciousness of being just. Second, the iron was also sent down, which indicated power of authorities to remove evils. That is to say, where admonition and moral discipline failed to cure evil of any kind then authorities must use power to remove same. That is why, it was reported that the third, Caliph, Usman Ibn Affan, said: "*Verily Allah removes by the power of established authority that He would not remove with Qur'an*"⁹.

Ibnu Taymiyya while exposing this position stated that, whoever violated and disregarded the provisions of the Qur'an and committed evil, he would be corrected by authority and power¹⁰. The word "*qist*" specifically mentioned here indicates that people would uphold justice, if they obeyed the book, the Shari'a, and the balance (justice) which is implemented by the judiciary. And followed by "*hadid*" which implies force of authorities that must enforce the judgement of the courts¹¹.

The Prophet (SAW) said, the most loved creatures of Allah, is the ruler who established justice and the most hateful one is the one who is *fasiq*. He is also reported to have said one day with a just ruler is better than the worship of seventy years¹².

Consequently, proper justice delivery could not be achieved, unless justice is established between the contending parties, rich and poor must be equal before the law. that is why, corruption and bribery go contrary to justice, therefore, bribery, in form *Rishwa*, *hadiyya*, or anything that may create conflict of interest with judicial function is regarded as judicial corruption¹³.

That is why, a judge is only permitted to adjudicate on the strength of evidence, that is to say a judge is disallowed to based his decision on the facts within knowledge.

⁹ Ibn Taymiyya A. Ahkamul Murtaddin, vol. 1 p. 365.

¹⁰ Ibn Taymiyyah A. (1951): Assiyasat Ashar'iyya Fi Islahirra'I Warra'iyya: (2nd ed.) Maktabatu Arriyad Alhaditha p.24.

¹¹ Suratul Nisa'i 4:58, 135. Suratul Baqarah 2: 188, Abul A'ala Mawdudi, S. (2006): Toward Understanding the Qur'an: Abridged vesion of Tafhim Al- Qur'an, Translated and edited by Zafar Ishaq Ansari, p. 170.

¹² Ibn Taymiyyah A.H. (1951): Assiyasat Ashar'iyya Fi Islahirra'I Warra'iyya: (2nd ed.) Maktabatu Arriyad Alhaditha p. 22.

¹³ Suratul Baqarah 2: 188, Abul A'ala Mawdudi, S. (2006): Toward Understanding the Qur'an: Abridged vesion of Tafhim Al- Qur'an, Translated and edited by Zafar Ishaq Ansari p. 55.

2.3. Informal Justice.

As-sulh mechanism is an informal justice system which has its root, in *jahiliyya* period. The mechanism was however adopted and reformulated and reformed by the Shari'a. The basis of As-sulh mechanism is available in the very divine sources of Islamic Law, the Qur'an and Sunnah. There clearly provided for As-sulh affecting both criminal (*jinayat* offences) and civil matters. Family matters in particular, were given priority¹⁴.

Scholars commenting on this verse have stated that to protect the right of the women's economic interest, various rules were prescribed in respect of dower in marriage which cannot be taken from her unless under special circumstances permitted by the Shari'a. However, the sanctity of marriage itself is greater than any economic interest. That is why, it is better to sacrifice any economic interest than to divorce. Divorce, which is unpleasant in the sight of Allah, should be avoided by the application of *As- Sulh* mechanism. This is because it always jeopardizes the future of the family.

Thus, some scholars opined that the statement “... **the settlement is best...**” this is strong interpretation in this verse which relates to conciliation between spouses. As a matter of fact, generally women and children are socially vulnerable. It is therefore imperative for a specific provision for handling conflict between spouses. Hence, classical jurists such as Ibn Kathir are of the view that the statement is *I'tirad* (an interruption) in the verse to emphasize amicable settlement in relation to kinsmen. However, some commentators, although conceding that this statement serves this purpose, are of the strong view that the statement was deliberately drafted and inserted in the middle of this verse to encourage *As-As-Sulh* as a crucial means of dispute management mechanism generally. These scholars therefore said the word “As-Sulh” in employed in the context under review as a general term accommodating all kinds of peaceful resolution of dispute.

3.1. *Murafa'at* (Law of Evidence)

The Islamic Administration of Justice System which entails the correct application of the law basically postulated six components in accomplishing judicial justice. Scholars identified these components to consist of the court, the applicable law, the parties, the

¹⁴ Suratun-Nisa'i 4:128.

subject matter and the procedural law¹⁵. The last component is technically described as “*bayyina*”¹⁶ which is anything that may disclose the truth in a given situation as explained below.

3.2. *Bayyina* (Evidence)

The Islamic procedural law is both rationalized and formalistic¹⁷. The latter, particularly, that involved the pure public rights, such as sexual offences, is only proved by voluntary retractable confession or producing, the qualified, four eyewitnesses¹⁸. However, the rationalization of evidence, in the former, is highly recognized, particularly in civil matters, including the infringed individual rights in hudud offences such *sariqa*¹⁹ and *hiraba*²⁰. Likewise, in homicide and injury cases anything that may expose the truth in the offence committed is allowed under Islamic procedural law, including all debatable and scientific evidence²¹. Thus, whenever the truth is exposed by any means and justice of the case is clearly attained through a given surrounding circumstance, then there is the spirit of Shari’a²².

Accordingly, *Ibnu Farhun*, a *Maliki jurist*, and before him *Ibnul Qayyim Al-Jauziyya*, while analyzing the legal implication of the word “*bayyina*”²³ maintained that *bayyana* is accomplished by a reasonable ground that discloses the true position of a given situation²⁴.

¹⁵ Alkafi M. B. (2000) *Ihkamul Ahkam Sharhu Tuhfatul Hkkum*, Darul Fikir, Publication and Distribution, p.12, Addasuqi M.A. (n.d.), *Hashiya alas Sharhir Kabir*, Darul Fikir, publications, vol. 4 p. 237.

¹⁶ The Prophet (SAW) used this generic term “*al-bayyina*” that encompassed all classes of evidence. That is why, the word *bayyina* is part of declaratory laws which are not necessarily confined to textual authorities. *Bayyina* entails everything that would uncover the true position of a given situation, thus, circumstantial evidence is widely allowed in establishing individual rights, including homicide, through all other scientific proofs such DNA, fingerprint, genetic fingerprint and all other forensic evidence are allowed.

¹⁷ *Ibnul Qayyim Jauziyya* M.A. (n.d.) *AtTurukul Hukumiyya fis Siyasatis Shar’yya*, Darul Kutubil Ilmiyya, p.19, *Ibnu Farhun* A. (2001) *Tabsiratul Hukkam fi Usulil Aqdhiyati wa Minhail Ahkam*, Darul Kutubil Ilmiyya, part I p. 172.

¹⁸ Al-Adawi A.S. (2009) *Kifayatul Talibir Rabbani Ala Risalati Ibni Abi Zaidul Qairawni*, vol. 4 p. 78.

¹⁹ *ibid* p.101.

²⁰ Alkawardi A.A. (2006) *Al-Ahkmu Al-Sultaniyah wal-wilayat al-diniyah*, Dar Al-Kotob Al- Ilmiyah Beyrouth-Liban, pp. 80-81, see also AbdusSami’ S. (n.d.) *Atthamaruddani fi Taqribil Ma’ani*, Sharhu Risalati Ibni Abi Zaidinil Qairawani, Al-Maktabatul Islmaiyya, p.590.

²¹ Khojali Q.A. (2016) *Al-Basit fil Murafa’atis Shar’yya*, Reprographics Communication, Ltd. Pp. 86- 100.

²² *Ibnu Farhun* A. (2001) *Tabsiratul Hukkam fi Usulil Aqdhiyati wa Minhail Ahkam*, Darul Kutubil Ilmiyya, part I p. 172.

²³ Hadith No. 1341 *At-Tirmizi* (n.d.) *Al-Jami’s Sahih*, Sunanut Tirmizi, Darul Iya’ut Turathul Arabi, Bairut vol. 3, p.626.

²⁴ *Ibnul Qayyim Jauziyya* M.A. (n.d.) *AtTurukul Hukumiyya fis Siyasatis Shar’yya*, Darul Kutubil Ilmiyya, p. 19.

The Prophet (SAW) himself administer justice based on normal adjectival law²⁵. That means the court cannot rely and adjudicate on its own knowledge²⁶. Accordingly, the court's decision cannot convert legal illegal or vice versa. The court's decision only ends the dispute between the contending parties²⁷. Hence, the basic means of proof under Islamic law are, *Iqrar* (confession)²⁸ *Shahada* (testimony) *Yamin* (oath) and *Qar'ain* (circumstantial evidence)²⁹.

The general rule is that the claimant must prove his case on sufficient evidence,³⁰ and he can only do so by the confessional statement of the defendant or by the testimony of two responsible and impeachable (*adl*) male eyewitnesses³¹. *Yamin* (oath-taking) and *nukul* (refusal of the defendant to take an oath). Commercial matters, however, decision are based on the preponderance of evidence.³² . thus, the testimony of two males or one male and two females who are Muslim and responsible (*adl*) is admitted³³. However, it is argued that in case of unintentional homicide and all other cases falling short of *hadd* or *qisas*, the evidence of one and two women is admissible, since the essence is to prove *diya* which is a financial liability and not of punitive nature³⁴. However, if the plaintiffs demanded *qisas* (retribution) the standards of proof are stricter, for example, the testimony of one witness corroborated by the plaintiff's oath, or the defendant's refusal to take an oath (*nukul*) or by the corroboration of two females witnesses are not admitted³⁵. Nonetheless, circumstantial

²⁵ Hadith No. 2458 Ibnu Isma'il A.M. (2004) Sahihul Bukhari, Darul Al-Koton Al-Ilmiyyah, Beirut-Lebanon, p. see also Mallah H.Y. (2011) The Governmental System of the Prophet Muhammad (SAW), A Comparative Study in Constitutional Law, Dar Al-Kotob Al- Ilmiyyah, p.163.

²⁶ Khojali Q.A. (2016) Al-Basit fil Murafa'atis Shar'yya, Reprographics Communication, Ltd. P. 66.

²⁷ Ibnu Abid M.A. (2000) Hashiyatu Raddul Mukhtar Ala Sharhi Tanwiril Absar, Fiqhi Abi Hanifa, Darul Fikir, Publication and Distribution, Beirut vol. 8 p.203

²⁸ Al-Adawi A.S. (2009) Kifayatul Talibir Rabbani Ala Risalati Ibni Abi Zaidul Qairawni, vol. 4 pp.6-7.

²⁹ Al-Garyani S.A. (2015) Mudawwanatul Fiqhil Maliki Wa Addillatu, Daru Ibnu Hazam, vol 5. Pp. 103-226., see also Ibnu Farhun A. (2001) Tabsiratul Hukkam fi Usulil Aqdhayati wa Minhail Ahkam, Darul Kutubil Ilmiyya, part I p. 172 -310.

³⁰ Mayyara A.M. (2000) Sharhu Mayyaratul Fasi Ala Tuhfatul Hukkam fi Nuktatil Uqdi wal Ahkam, DAR al-KOTOB al – ILMIYYAH, Beirut – Lebanon vol 2 pp.449-453.

³¹ Pervin M. (2016) Law of Murder under Islamic Criminal Law: An Alalysis, in Journal Law, Policy and Globalization, vol. 53, p. 144.

³² Ibnu Farhun A. (2001) Tabsiratul Hukkam fi Usulil Aqdhayati wa Minhail Ahkam, Darul Kutubil Ilmiyya, part I p. 256-257.

³³ Al-Garyani S.A. (2015) Mudawwanatul Fiqhil Maliki Wa Addillatu, Daru Ibnu Hazam, vol 5. Pp. 145-152.

³⁴ Al-Adawi A.S. (2009) Kifayatul Talibir Rabbani Ala Risalati Ibni Abi Zaidul Qairawni, vol. 4 p.6.

³⁵ Ibnu Farhun A. (2001) Tabsiratul Hukkam fi Usulil Aqdhayati wa Minhail Ahkam, Darul Kutubil Ilmiyya, part I pp. 232 and 270, see also Assidiq A.M. (n.d.) Masalikuddilala fi Sharhi Matnir Risala, Darul Fikir, Publication and Distribution, p. 274

evidence which is direct, cogent and compelling is also admissible³⁶. For example, where a person was seen with a stained knife, coming out an uncompleted building running, and when the site was inspected a deceased's throat was found cut with a knife³⁷. The accused may be convicted for homicide³⁸.

4.1. Principles Guiding Matrimonial Causes

Marriage Contract under Islamic law is based on love, compassion, kindness, understanding and companionship. Thus, the spouses entering into this solemn covenant must passion themselves toward this end for the marital home to be fruitful and beneficial.

That is why, the families of the spouses were involved in making the contract right the stage of the marriage proposal up to the conclusion of the marriage. That is to say the basis of marriage contract is made upon the payment of dowry, guardianship and before sufficient witnesses.

Marriage contract (*nikah*) is a shared life between spouses on an honorable agreement established by Allah Himself³⁹. Marriage was the tradition (*sunna*) of all Prophets with exception of Jesus (Isa) (AS)⁴⁰. The Qur'an describes marriage as a solemn covenant this secret contract must not be entered into hastily or unadvisedly, but rather, honorably, reverently and soberly with trust in Allah (SWT). The causes for marriage must be contemplated upon before embarking the quest of intimacy. These causes include (1) that the natural instincts of love and intimacy that Allah implanted can be legally accomplished. (2) that marriage is a source reproduction that would the remembrance of Allah (SWT). (3) that the family is the primary component of the society marriage therefore should be the source of benefit to the society at large where love, commitment, sacrifice and dutiful and caring society is created. Thus the function of good marriage ensures social reproduction, socialization of progeny and siblings that would pass on the social capital.

³⁶ AbdusSami' S.A. (n.d.) Athamaruddani fi taqribil Ma'ani sharhu Risaltu ibnu Abi Zaidil Qairawani, Almaktabul Islamiyya, p. 568-569.

³⁷ Ibnul Qayyim Jauziyya M.A. (n.d.) AtTurukul Hukumiyya fis Siyasatis Shar'yya, Darul Kutubil Ilmiyya, p. 6, see also AbdusSami' S.A. (n.d.) Athamaruddani fi taqribil Ma'ani sharhu Risaltu ibnu Abi Zaidil Qairawani, Almaktabul Islamiyya, p. 568-569.

³⁸ Ibnul Qayyim Jauziyya M.A. (n.d.) AtTurukul Hukumiyya fis Siyasatis Shar'yya, Darul Kutubil Ilmiyya, p. 6

³⁹ Suratun Nisa'i 4:1

⁴⁰ 13:38

Again the actual goal of marriage is succinctly stated by the Qur'an⁴¹; where the Shari 'a established mutual kindness and companionship between spouses⁴². Consequently, the sustenance of marriage or otherwise must be on the basis of kindness. As regards the wife, she is responsible for nurturing marital harmony in the matrimonial home⁴³. The Shari 'a also clearly defines how spouses should treat each other by using a beautiful and intimate imagery⁴⁴.

5.1. Guidelines Regulating the friction of Matrimonial Home

The Shari 'a while envisaging the possibility of having differences between spouses made specific provisions in handling the situation, the Qur'an stated, thus:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves, and such settlement is the best; even though men's soul are swayed by greed, but if ye do good and practice self – acquainted with all that ye do⁴⁵.

Scholars therefore said the word *As- sulh* is employed in the context under review as a general term accommodating all kinds of peaceful conflict resolution⁴⁶. Az-Zamakhshari supporting this view argued that, in this verse there are two interfering statements, deliberately drafted to play two different important roles distinct from the main mission of the verse⁴⁷. The former is drafted to imply that *As- sulh* is the best option in all kinds of disputes, including family disputes; whilst the latter statement, which is the immediate one after the statement in question, indicates the most dangerous impediment of conflict management to wit, self-interest and greediness⁴⁸. Be that as it may, bringing this important statement in the middle of marital solution verse indicates how imperative is the amicable settlement in a matrimonial home.

⁴¹Suratu Rum30:21

⁴²Suratun Nisa'i, 4:25, Suratul Baqara, 2:229, Suratut Talik 65:6

⁴³ Suratun Nisa'i, 4:34

⁴⁴ Suratul Baqara 2:187

⁴⁵ *Suratun-Nisa'i* 4 : 128,

⁴⁶ Ibn Ashur M.D. Op. Cit. *Suratun-Nisa'i*, 4: 128, PP. 266 -268, see also Akinci K. Op. Cit

⁴⁷ Al-KhasShaf, AzZamakhshry, Q.U, (1407 H) *Al KasShaf An GawamitTanzil Wa'Uyunul Aqawil fi WujuhutTa'awilm, Daar Kutubil Arabi*, Bairut, Commentary on Suratun-Nisa'i, 128, pp. 571-572.

⁴⁸ Ibn Nasir Assa'adi A. (1996) *Tafsirul Karimr-Rahman Fi Tafsiril Kalamul Mannan, Mu'assatur Risalah* 571

That is why, the Qur'an also categorically provided for a suitable mechanism, known as *tahkim* (arbitration) in handling dispute in family life.

If you fear a breach between the two, appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things⁴⁹

Allah, the Al-mighty, however, said if both of them want to reconcile, *Islahan*, then, Allah (SWT) will make the reconciliation easy. The important point here is that word *As-Sulh* was repeated to subsume *tahkim* which in this verse declared to be employed in making peace between spouses. That is why, the Prophet, peace be upon him, normally used the word *As -Sulh* even in relation to *tahkim* cases.

It is in line with this submission that Allah, the Omniscient, precisely and succinctly, declared *As- sulh* (peaceful dispute resolution) in just one word as an umbrella for dispute management, which is today known as ADR. ADR was however imprecisely coined in three words namely: **Alternative Dispute Resolution**. The Qur'an thus, reads "...*As-sulh is best...*"⁵⁰.

Accordingly, the Divine Sources (*Qur'an/Sunna*) as against the terminology of *Fuqaha*, *As-sulh* has not been completely separated from *tahkim*; because most authorities in the *Qur'an* and *Sunna*, supporting *tahkim* may also be relevant authorities in favor of *As-Sulh*. The *Qur'an*, however, qualified *tahkim*, in that a third person is chosen to resolve a given dispute, thereby rendering it under the concept of *As-Sulh*. However, practically speaking, and by the definition of scholars *Sulh/ Musalaha* differs from *As-Sulh* in that *As- Sulh* is the concept of peacemaking itself, while *tahkim* and *sulh/musalaha* refer to classes under *As-Sulh* Mechanism. *Tahkim* therefore differs from *sulh/musalaha*, described in this paper as, *musalaha* principally in three important respects: first, *musalaha* is an amicable settlement that may be reached between the parties with or without an involvement of a third party, whereas *tahkim* is only achieved through the appointment of a third party. However, the disputing parties in *musalaha* also have the option to use *tahkim* in order to work towards a settlement, namely, combination (*musalaha* and

⁴⁹ Suratur-Nisa'i, 4: 35.

⁵⁰ See generally, Gidado A.M. (2015) Comparative Analysis Between *As-sulh* And Mediation Under Alternative Dispute Resolution (ADR) (Unpublished) pp. 66-80

tahkim); accordingly, *tahkim* can be part of *musalaha*. Secondly, the agreement by *musalaha* is not binding unless it is undertaken before a court of law, whereas *tahkim*, according to the majority of the jurists, is binding without court intervention. Thirdly, *musalaha* can only be resorted to if the dispute has already occurred. *Musalaha*, according to some jurists, cannot address a prospective dispute, whereas *tahkim* can address both existing and prospective disputes⁵¹.

Accordingly, Islamic Law recognizes any procedure not contradicting the established principles of the *Shari' a* as part of dispute resolution mechanism. In fact, *As –sulh* has a wider scope in *Shari' a* than mere conventional ADR⁵².

Similarly, in matrimonial causes the word *afw* was used to denote concession on part of the dower where a woman is divorced before consummation of the marriage. *Afw* here is also regarded as a method for resolving disputes between spouses. Allah the Al-Mighty thus declared:

And if ye divorce them Before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the remission (of the man's half) if the nearest to righteousness ...⁵³

Imamus Sa'di in his commentary on this verse said the verse legislated on two things: the first is the entitlement of the divorced wife of half her dower where the marriage is not consummated. Whereas the other was the concession either from the side of the wife or that of the husband in remitting her/his rights. He further comments that kindness and concession maintain healthy relations between the parties⁵⁴.

Based on the above expositions it is safe to conclude that *As– sulh* had been practiced from time immemorial ever since before the advent of alternative dispute resolution (ADR). This is because Allah has sent His Prophet, peace be upon him, for no other reason than to set up the matter of mercy⁵⁵. It

⁵¹ *Suratun Nisa'i*, 4, 35. in this verse Allah instructed that if spouses fear breach, *hakmaini* may be appointed from both sides.

⁵² Gidado, *Supra*

⁵³ *Suratul Baqara*, 2: 237

⁵⁴ *As – Sa'adi supra* 87 - 88

⁵⁵ *Suratul Anbiya'* 21:107

follows without saying that the *Shari' a* is essentially composed of mercy and concession. Hence, the jurists have coined an important maxim “*Al – Mushaqqatu tajlibu-taysir*”, meaning difficulty brings about mitigation. Thus, the provisions of divine sources are far more concise than the legal structure evolved through *fiqh* literature. Consequently, it is argued that all the deductive rulings of scholars on any particular issue are regarded as part of *Shari' a* though amenable to change due to the change of time and circumstances. That is why, most of the detailed laws and procedure governing *As– sulh*, peacemaking under Islamic Law, are based on the *Ijtihad* of classical and modern jurists and therefore amenable to adjustment or even change if situations and circumstances so warrant.

6.1. *Nushuz* (Violation of Husband’s Right Imposed the Shari’ a)

Linguistically, the word *nushuz* is a derivative of the verb *nashaza* which means “land that is raised up”. Technically, however, according to Maliki jurist *nushuz*⁵⁶ is defined as a hostility that occurs from the side of the wife making her able to discharge marital duties taken up from the lines of obedience. Some scholars defined *nushuz* as the wife’s inequity to her husband and the violations of the conditions of the marriage as imposed by the Shari’ a. It was also defined as a violation committed against the husband on the conditions required of her from the marriage rights

This may be by not observing her religious rites such daily prayers or leaving her matrimonial home without permission. The wife should not deny her husband his conjugal rights without justification; she is expected to obey him except that runs against the will of Allah (SWT). The wife should protect herself from any illicit relation and protect her husband’s property. This is because the spouses formed the family which is the component of the society. Thus, imbalance between the spouses in their marital life would bring about serious social damage affecting all and sundry. The husband, according to the Shari’a, is the leader and protector of his wife because he is stronger and firm.

Breaching these basic principle of marital life usually leads to domestic violence. *Nushuz*, therefore may force the husband to act violently against his wife to change her for the better. Nonetheless, consequent of *nushuz*⁵⁷ does not in any way legalize any form of violence against women.

⁵⁶ Suratun Nisa’i, 4:34

⁵⁷ *Nushuz* can also be attributed to the husband, but scholars do not technically refer husband to commit *nushuz*.

7.1. Application of *Murafa'at* (Law of Evidence) in *Dharar* (Domestic Violence) matters

Matrimonial causes entail lawsuits for divorce by way of judicial separation, the restitution of conjugal rights and custody and welfare of children.

Where a husband is in breach of wife's right known as *dharar* (domestic violence). The wife may get relief on the following grounds:

(1) Maltreatment from the side of the husband which include cruelty or violent treatment. This include coercion, cruelty, injury causing physical damage or property.

(2) Lost of Conjugal Rights

Conjugal rights refer to the mutual rights and privileges between the spouses arising from valid marriage. These include mutual rights of companionship, support, comfort, intimacy and affection, etc.⁵⁸

(3) (*Nafaqa*) maintenance of the wife

The word *nafaqa* is a general one implying the sufficient support of the family with food, clothing and shelter. The husband has the duty to maintain his wife as soon as the marriage contract is concluded and this right continues until the marriage ends or at the event of nushuz (violation of husband's right). She has the right to all other necessary expenditure customarily recognized in the community where the spouses reside⁵⁹.

(4) The protection of wife's dignity

The Shari 'a imposes duty on husband to maintain his wife with kindness or be apart with kindness. Disrespectful words such as abuse or unfounded accusation of *zina*, is not allowed under the Shari 'a. The Prophet (SAW) is reported to have said "Best among you is one who is best to his wife, and I am the best among you in my dealings with my wives". He also said, in his Farewell Pilgrimage, treat your wives with kindness. The prophet specifically declared that: "Those who disobey my practice are not part of me"

⁵⁸ Suratul Naqara, 2:228

⁵⁹ Suratul Baqara, 2:233, Suratul Nisa'i, 4:34, Suratul Talaq 65: 6-7.

7.2. Proof of *Dharar* may be by the Following Means:

(i) Confessional Statement

Confession by the defendant is the most powerful means of proof since confession is better testimony of any witness. This is because confession is the admitted facts within the knowledge of the defendant, therefore no further proof is required.

(ii) Two Qualified Male Witnesses

Two just responsible and just witnesses are required in proving of any matrimonial causes⁶⁰. Under the Shari'a the minimum number of witnesses apart from monetary or money worth claims is two qualified male witnesses. Therefore, *dharar* in the absence of confessional statement may be established by the production of two witnesses.

(iii) Circumstantial evidence

Another means is that circumstantial evidence may be used to prove *dharar* because the shouts, tore of clothes, physical injury and other violence that can be associated with the defendant is admissible.

(iv) Operation of Law

Where the plaintiff can show that the husband was in breach of any her right establishing that the spouses' guardians have being severally trying for amicable settlement between them on the ground of *dharar* from the husband's side. This would be a sufficient proof for judicial separation. Likewise, where the wife established that she has been forced to commit *nushuz* by leaving her matrimonial home because of *dharar* this would also be a sufficient proof. Similarly, in *Khul'i* proceedings the wife may raise the issue of *dharar* any time before judgment. It can also be raised at first time on appeal and where any imposed right on the husband is not fulfilled, then the court may give order for the dissolution of that marriage without compensation.⁶¹

⁶⁰ Suratut Talaq, 65:2, see also Hadith No. 22, Asshafi'i (1951) Musnadusshafi'i vol. 2 p. 12.

⁶¹ See the recent case of Abba Abdullahi v. Safiya Usman (unreported suit No. SCA/KN/CV/57/2022)

8.1. The Preference of *As-sulh* Over litigation mechanism in Matrimonial Causes

From the foregoing expositions it is very clear that matters *As-sulh* mechanism is more preferable resolving any kind of dispute, particularly matrimonial dispute, where the strictly required two male witnesses as sufficient in proving marital conflict. Nonetheless *As-sulh* mechanisms whether in *tahkim*, *wasata* (mediation) *Musalaha* (negotiation) are more comprehensive, more vibrant and more flexible in peaceful disputes resolution. Unlike litigation the regulating factor in *As-sulh* is the principle of fairness and justice based on prevailing *Maslaha* (interest). Thus, *As-sulh* Mechanism is based on *Al- maqasid As-Shari'a* (the intendments of *Shari'a*) aiming at protecting *ad- Dharuriyat al- Khams* (five fundamental) and *Hajiyyat* (demands) as explained above. It is therefore, wider in scope than mere litigation. This is because the *Shari'a* seeks to strike a balance between the protection of lineage which is part of the fundamentals of *Shari'a* and the protection of *hajiyyat* which is the protection of the spouse's right by way of *sulh* or litigation. Another reason is that *sulh* Mechanism, encompassed all forms of peaceful dispute resolution by whatever name called, provided they do not convert *halal* (permissible) to *haram* (prohibited) or vice – versa⁶². That means, any method followed in resolving matrimonial disputes is permissible, provided it is in conformity with the provisions of the *Shari'a*.

It is evidentially clear, therefore that, following the above matrimonial principles would make a given marital dispute a very notorious fact which needs no further proof in *dharar* matters. Because it would very easy to prove by the operation of law which can be raised any time before judgment, for example on *I'izar* stage, and it can also be raised first time on appeal.

9.1. Recommendations

The *Shari'a*, basically being a text-based law, her provision must be complied with to enable a party to a case to succeed in any matter. Hence the following recommendations for the proof of any matrimonial dispute, domestic violence inclusive:

(1) The traditional methods approved by the *Shari'a* must be followed before any litigation take place.

⁶²Reported by Tirmizi he says the hadith is hasan and authenticated by Ahamd Shakir and al-Bani, see also Ibn Yusuful Kafi (2000) *Ihkamul Ahkam Ala Tuhfatul Hukkam*, Daarul Fikr, vol. 1 p. 279

(2) The Court shall order for the compliance of *tahkim* procedure before the commencement of any matrimonial dispute, including *dharar* matters.

(3) The State Council of *Ulama* shall establish a comprehensive and independent department of using all forms of *As-sulh* mechanism to peacefully resolve all matrimonial disputes before taking same to the court law.

(4) The Grand Kadi should make a practice direction that Shari ‘a court must ensure the compliance of the above procedure at the commencement of litigation on matrimonial dispute.

(5) Any Matrimonial dispute taken to court without compliance of the Shari’ a approved procedures of *As-sulh* should be a premature litigation.

10. 1. Conclusion

The paper discussed Islamic Justice System explaining how it relates to application of Shari ‘a in marital dispute with particular reference to the proof of *dharar*. The paper however explained why the Shari’a imposed strict requirements for the proof of *dharar* before a court of law and how *As-sulh* mechanism is preferred in all cases particularly relating to proof of domestic violence. The paper proffered some recommendations for resolving Matrimonial Causes, including the procedure for the proof of *Dharar*.