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Children's Rights after Marital Dissolution: With Particular Reference to Child Maintenance

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Abstract

This study examines the legal and Islamic jurisprudential framework for protecting children's rights after marital dissolution, whether through divorce or khul' (wife-initiated divorce). It draws on comparative family law and relevant international instruments. Particular attention is given to the 1989 United Nations Convention on the Rights of the Child. The central question is whether national laws and procedures adequately protect the best interests of children in custody and shield them from the harmful effects of family disputes. The study adopts a comparative analytical approach. It examines two connected dimensions of child protection. The financial dimension covers maintenance, including food, clothing, housing, healthcare, and education. The non-financial dimension concerns custody, visitation, and educational guardianship.

Keywords: Children's rights; Marital dissolution; Child maintenance; Child custody; Best interests of the child.

Introduction

The family is the fundamental unit and first source of a child's sound upbringing and care. The marital bond provides the natural setting for psychological, social, and material stability. Yet marital difficulties may lead to divorce, khul', or annulment. Dissolution creates a new family situation and changes the roles of both parents. The child is often the person most affected by the consequences of separation.

Research Problem

Marital dissolution may be a justified response to a relationship that can no longer continue. It does not, however, end parental responsibility or extinguish legal and religious duties toward children. Against this background, the study addresses the following question:

To what extent do national laws and international instruments establish a coherent system that protects children's financial and non-financial rights after marital dissolution, while placing the child's best interests above parental conflict?

Significance of the Study

The significance of this study has two main dimensions:

- 1. Theoretical significance:** The study highlights the interconnected rights of children in custody. These include maintenance, custody, visitation, overnight stays, and educational guardianship. It also considers developments in comparative family legislation, judicial practice, and international instruments, especially the 1989 Convention on the Rights of the Child.
- 2. Practical significance:** The study explores more effective judicial and procedural safeguards for the prompt enforcement of these rights. Examples include maintenance funds and arrangements for overnight contact. It also seeks ways to prevent either parent from using the child as a means of pressure or retaliation.

Research Objectives

The study pursues the following objectives:

- Identify the legal and Islamic jurisprudential nature of children's rights after separation, and explain their independence from the rights of the spouses.
- Distinguish financial rights, including maintenance, housing, clothing, healthcare, and education, from non-financial and educational rights, including custody, visitation, overnight stays, and moral guidance.
- Assess whether existing laws and judicial procedures provide prompt and effective protection for children during and after litigation.

- Offer recommendations for improving legislation and family mediation, with the aim of safeguarding children's psychological and social stability.

Methodology

The study uses a comparative analytical method. It examines legislative provisions, Islamic jurisprudential rules, and decisions of higher courts. These sources are then compared with established international principles and standards on children's rights.

Section One: The Legal Concept of the Child

International concern for children emerged relatively late. Their need for protection gained attention only in the early twentieth century. Even then, no general definition was developed to distinguish children clearly from those who did not fall within that category.

Subsection One: The Child in International Law and National Legislation

Although the term 'child' appears in many international documents, most did not expressly define it. Dr Hassanein al-Mohammadi Bawadi regards the Convention on the Rights of the Child as the first international instrument to provide a clear and explicit definition. Professor Mohamed al-Said al-Daqqaq, however, considers the wording of that definition ambiguous and hesitant.

First: The Child under International Human Rights Law

Article 1 of the 1989 Convention on the Rights of the Child defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

Two conditions therefore determine whether a person qualifies as a child under the Convention.

The first concerns age. The person must be under eighteen. The Convention adopts this threshold as an international standard. In the converse case, those above eighteen are treated as adults rather than children.

The second condition concerns the age of majority under applicable national law. A person may reach legal adulthood before turning eighteen if domestic law so provides. Once that age of majority is reached, the person no longer falls within this definition of a child.¹

The United Nations Commission on Human Rights drafted an international convention on children's rights. The Convention was adopted on 20 November 1989. It became part of international law at the World Summit for Children on 2 September 1990.

Article 2 of Part I of the African Charter defines a child as every human being under eighteen years of age. Other international instruments also define the terms 'child' or 'juvenile'. Article 2 of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour applies to all persons under eighteen. Likewise, Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires states parties to take all feasible measures to prevent members of their armed forces under eighteen from taking a direct part in hostilities.²

Second: Definition of the Child in Algerian Legislation

Article 2 of Algerian Law No. 15-12 on child protection provides the following definition: 'For the purposes of this Law, the following terms shall mean: Child: any person who has not reached the full age of eighteen (18) years. The term juvenile has the same meaning.'³

Subsection Two: The Rights of Children in Custody after Marital Dissolution

The family is the basic unit of society. Its stability provides a foundation for children's healthy upbringing. Divorce or khul' creates a new legal and social situation that directly affects the rights of children.

This part of the study examines the legal and Islamic jurisprudential rules governing children's rights after marital dissolution. It focuses specifically on non-financial rights and asks whether the relevant legislation adequately protects the best interests of children in custody.

First: Conceptual Framework and Principles of Child Protection after Separation

Marital dissolution means the termination of the religious and legal marriage contract between the spouses. Islamic jurisprudence and comparative personal status laws recognize a central principle. A child's rights are independent of the financial or personal disputes between the parents.⁴

- **Best interests of the child:** This principle guides all legislative and judicial decisions that concern the child.⁵

¹ Maysoum Bousouar, *Criminalization of Violations of Children's Rights in International Law*, doctoral dissertation in public law, Faculty of Law and Political Science, Abou Bekr Belkaid University, Tlemcen, academic year 2016-2017, p. 11.

² Belkacem Souikat, *Criminal Protection of Children under Algerian Law*, master's dissertation in law (Criminal Law), Department of Law, Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, academic year 2010-2011, pp. 9-10.

³ Law No. 15-12 of 28 Ramadan 1436 (15 July 2015) on Child Protection, Official Gazette No. 39 of 3 Shawwal 1436 (19 July 2015).

⁴ Wahbah al-Zuhayli, *Islamic Jurisprudence and Its Evidence*, 4th ed., Dar al-Fikr, Damascus, vol. 10, p. 7311.

⁵ Article 3 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989.

- **Continuing parental responsibilities:** Dissolution of marriage does not remove the parents' duties of upbringing and emotional care toward their child.¹

Second: The Right to Custody

Custody concerns the child's protection and upbringing. It is among the most important legal consequences of parental separation.

1. **Legal nature:** Under Islamic jurisprudence and statutory law, custody is not an absolute entitlement of either parent. It is a right of the child and must be exercised in the child's best interests.
2. **Entitlement and order of priority:** Custody is initially awarded to the mother on the basis of her presumed natural aptitude for caregiving. It may then pass to other eligible relatives under the applicable legal order. The decision takes account of kinship, capacity to provide care, trustworthiness, and the absence of religious or legal disqualifications.
3. **Psychological and social stability:** The custodial parent must provide a safe environment. The child should be protected from parental conflict and acts of personal retaliation after separation.²

Third: The Right to Visitation, Overnight Stays, and Regulated Family Contact

After separation, the child can no longer live with both parents in the same home. Legal systems therefore recognize rights intended to preserve regular contact with the non-custodial parent.

- **Visitation:** The non-custodial parent, often the father, has a right to see the child and follow the child's well-being. Visits should be arranged without undue strain on the child or disruption to schoolwork.³
- **The move toward overnight contact:** Modern legislation is gradually extending contact beyond brief visits in public places. Arrangements for overnight stays allow the child to spend specified days each week, or public holidays, in the non-custodial parent's home.⁴
- **Sanctions for misuse of rights:** Laws may impose serious penalties, sometimes including the loss of custody, when a parent unjustifiably prevents contact or turns the child against the other parent.⁵

Fourth: Educational Guardianship, Upbringing, and Moral Supervision

Legal and non-financial responsibilities remain divided between parents after marital dissolution. Their purpose is to secure the child's upbringing and preparation for the future.

- **Educational guardianship:** In many legal systems, this responsibility generally rests with the father. Some recent legislative reforms also give the mother a role. It includes choosing suitable educational institutions and monitoring the child's education and medical treatment.⁶
- **Educational and moral duties:** Both parents must raise the child according to sound values and avoid arguing in the child's presence. Disparaging the absent parent in front of the child may cause serious psychological harm and entail legal responsibility.⁷

Fifth: The Child's Right to Maintain Kinship Ties with Grandparents

Family contact after separation is not limited to the parents. Legal and Islamic jurisprudential duties also extend to grandparents on both sides of the family. Judicial protection of these ties helps preserve the psychological and social support offered by the wider family.⁸

A review of legal rules and Islamic jurisprudence shows the importance attached to children's educational and non-financial rights after marital dissolution. The child's best interests guide decisions on custody, visitation, overnight stays, and educational guardianship. Despite the breadth of legislative protections, effective judicial practice and parental awareness remain essential. Both help shield children from the psychological and social effects of separation.

Section Two: The Meaning and Legal Basis of Child Maintenance

Child maintenance is among the most important financial and humanitarian obligations arising from the parent-child relationship. This duty continues during marriage and after divorce or *khul'*. Religious law and statutory legislation give considerable importance to it. Maintenance provides the child with decent living conditions. It also safeguards the child's fundamental right to life and healthy development.

¹ Muhammad al-Kubaysi, *Personal Status Rules in Islamic Sharia and Law*, al-Irshad Press, Baghdad, 1977, p. 215.

² Badran Abu al-Aynayn Badran, *Children's Rights in Islamic Law and Statutory Law*, University Youth Foundation, Alexandria, 1985, p. 104.

³ Supreme Court of Algeria, Personal Status Chamber, Decision No. 512304 of 18 December 2008, Supreme Court Review, no. 2, 2009, p. 231.

⁴ Khaled Mustafa Fahmy, *Legal Protection of Children in Custody in Islamic Jurisprudence and Comparative Law*, Dar al-Fikr al-Jami'i, Alexandria, 2014, p. 178.

⁵ Article 65 of the Algerian Family Code; compare Article 20 of Jordanian Personal Status Law No. 15 of 2019.

⁶ Hassan Kira, *Principles of Law: General Principles*, Mansha'at al-Ma'arif, Alexandria, 2001, p. 340.

⁷ Egyptian Council of State, Advisory Opinion No. 86/3/1102 on the custodial mother's educational guardianship, sitting of 15 May 2011.

⁸ Imam al-Nawawi, *Al-Rawda fi Fiqh al-Imam al-Shafi'i*, 2nd ed., al-Maktab al-Islami, Beirut, 1991, vol. 9, p. 98.

Subsection One: The Meaning and Legal Basis of Maintenance

Child maintenance is the duty to provide the resources required for a child's daily needs. It must take account of age, health, education, and social circumstances. It is not limited to food and drink. It generally includes housing, clothing, healthcare, education, and other necessities for the child's development.

First: Definition of Maintenance

The legal rules on maintenance vary between countries. National laws may determine its components, the persons responsible for payment, the duration of the obligation, and the procedures for claiming it. A precise legal assessment therefore requires reference to the law of the jurisdiction concerned.

Second: Legal Basis of Maintenance

The child's right to maintenance rests on several principles, foremost among them the right to an adequate standard of living. Article 27 of the Convention on the Rights of the Child recognizes a standard of living suitable for the child's physical, mental, spiritual, moral, and social development. It also recognizes the responsibility of parents and other carers to provide the conditions necessary for development, within their abilities and financial capacities.¹

The same article calls on states to take appropriate measures to recover maintenance from parents or other financially responsible persons, including across borders when necessary. This principle complements Article 18 of the Convention. That article affirms the shared responsibility of both parents for the child's upbringing and development, with the child's best interests as their basic concern.²

These provisions show that maintenance is not a voluntary gift. It is a practical means of securing the child's rights. National law determines who must provide it, while taking account of available means and the child's actual needs.

Section Two: Assessment of Maintenance and Its Governing Rules

Third: Criteria for Assessing Maintenance

The assessment of maintenance must balance the child's needs with the paying party's financial capacity. Relevant factors include the child's age, health, education costs, housing needs, and previous standard of living. The paying party's income and essential financial obligations must also be considered.

This balance must not leave the child's basic needs unmet. A realistic assessment considers the actual living conditions of those involved. A fixed amount may become inadequate as prices rise or the child grows. Some jurisdictions permit a review when needs or resources change substantially. Such a review remains subject to national law and procedure.

Subsection Two: The Best Interests of the Child

The child's best interests are a central criterion in decisions affecting children. Article 3 of the Convention on the Rights of the Child requires those interests to be a primary consideration in all actions concerning children, including judicial proceedings^[4]. Maintenance assessments should therefore focus on continuity of care and the child's needs. They must not become a means of settling parental disputes or exerting pressure on either parent.

This principle also requires attention to the effects of late or interrupted payments on the child's life. Procedures should make maintenance accessible without forcing the child to bear the consequences of parental conflict.

After divorce or khul', children's rights form an integrated legal and jurisprudential framework. Its principal aim is to protect the more vulnerable party and place the child's best interests at the centre of judicial decisions. This framework has two dimensions. Financial rights cover maintenance for food, clothing, housing, healthcare, and education. These rights belong exclusively to the child. The father must provide maintenance, and the parents may not waive this right by agreement. Non-financial and educational rights include custody, psychological care, and continuing contact with the non-custodial parent through visitation and overnight stays. They also include the right to maintain ties with grandparents on both sides.

Modern legislation has introduced preventive procedures to make these rights effective and to limit delays caused by judicial disputes. One prominent example is the maintenance fund. This public mechanism provides prompt and regular payments for children when the father lacks means, refuses to pay, or cannot be located. The state may then recover the amounts through compulsory enforcement in place of the custodial parent. Educational guardianship and joint parental supervision complete the framework. They help prevent the child from becoming a means of pressure or revenge. Parental duties thus move beyond a private obligation and become a broader social and legal responsibility supported by the state.

First: Enforcement Safeguards and Practical Challenges

Legal Means of Enforcement

A judgment or agreement establishing maintenance does not, by itself, protect the child's right. Effective enforcement is essential. The available mechanisms vary across jurisdictions. They may include deductions from income, seizure of assets under legal safeguards, or judicial measures in cases of non-payment. Some legal systems also provide procedures for cross-border recovery. This is consistent with Article 27 of the Convention on the Rights of the Child, which calls for recovery of maintenance both domestically and internationally.

Second: Obstacles

The main practical difficulties include concealed income, problems proving earnings, delayed proceedings and enforcement, changing economic conditions, and refusal to pay. These difficulties may undermine the child's living conditions and prevent essential needs from being met.

¹ Convention on the Rights of the Child, adopted by UN General Assembly Resolution 44/25 of 20 November 1989, Article 27, especially paragraphs 1 and 2 (ohchr.org).

² Ibid., Article 27(4) (ohchr.org).

Protection can be strengthened through faster procedures for assessing and enforcing maintenance. The amount should be reviewed when circumstances change, in accordance with the law. Better methods of verifying financial resources are also needed, alongside guidance and support for families. Measures that reduce the effects of parental conflict on children are equally important. They must not diminish the child's entitlement to maintenance.

Conclusion

The protection of children following marital dissolution is a sensitive legal and humanitarian issue. Islamic jurisprudence and statutory law place the child under judicial and institutional protection when shared family care comes to an end. This protection aims to prevent parental disputes from harming the child.

The rights protected after divorce or *khul'* fall into two complementary categories. Financial rights secure material needs, especially maintenance. Non-financial and psychological rights preserve the child's identity, education, and emotional stability. Maintenance is more than a financial obligation ordered by a court. It gives legal effect to the child's basic rights to life, dignity, and comprehensive development. This approach is consistent with Article 27 of the United Nations Convention on the Rights of the Child.

Financial rights, particularly maintenance, complement non-financial rights such as custody, visitation, and upbringing. Together, they form a coherent framework for protecting children after marital dissolution. Their effectiveness depends on prompt judicial enforcement. Maintenance funds and specialized family courts are examples of mechanisms that can translate legal principles into practice.

- Maintenance is a privileged, mandatory right belonging to the child. It is independent of the spouses' legal status and the reasons for separation. It should therefore not be waived or offset through agreements made during divorce or *khul'*.
- The introduction of maintenance funds represents a structural change in legal protection. It shifts maintenance from a religious and private debt between individuals to a protective responsibility guaranteed by the state. The child receives direct financial support. The state may then recover the sums from the defaulting debtor through compulsory legal measures.
- Material protection remains incomplete without psychological protection. This requires a gradual shift from conventional visitation to legally regulated overnight contact. Shared educational and health-related guardianship should also be strengthened to support the child's overall development.

Recommendations

- Strengthen specialized family courts and provide them with support from social workers and psychologists. Each case should receive an individual assessment. Expert reports on the child's best interests should inform decisions on custody and visitation.
- Adopt objective criteria for assessing child maintenance.
- Strengthen procedural safeguards against abuse and emotional harm, and make family mediation more effective.
- Establish psychological and social counselling centres under the ministries responsible for solidarity and justice. These centres should support children and parents in coping with the psychological consequences of marital dissolution.

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