

CHILD CUSTODY (HADANAH) UNDER ISLAMIC FAMILY LAW: An Anatomy of Women Rights in Nigeria and Malaysia

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Hadanaah is the rights of woman to the custody of their children when they are no more with their husband. The Holy Qur'aan, Shari'ah and the Hadith permitted mother to keep custody of their children provided she did not remarry. However, with the codification of fiqh and the emergence of the leading Islamic schools of thought such as Hanafi, Maliki, Hambalifi and Safi the condition was further modified. The study examines the concept of hadanah, the conditions for the award of hadanah and the position of women in Nigeria and Malaysia for the purpose of determining whether its practice is in conformity with the Islamic injunctions. The study relies on primary and secondary sources of information. The information obtained through these sources was subjected to content analysis. The paper found that women in Nigeria and Malaysia are subjected to ill treatments due to the misconception of hadanah as practiced in Islam. The study also found that the practice of hadanah in both countries with regard to Islamic family law is making it difficult for women to secure divorce, places women in a weaker position and provided women with fewer rights in terms of child custody. The paper concludes that the practice of hadanah contravene the provision of the Nigerian and Malaysian constitutions on gender equality. The study recommended that legislative measures should be put in place in Nigeria and Malaysia to address the pit falls of gender-bias.

Introduction

Custody under Islamic law is composed of hadanah (nursing), 'al-wilaya 'la al-nafs (guardianship of child' person) and al-wilaya 'al-mal (guardianship over child's money/property). Hadanah, the nursing of the child, is the primary duty of the mother¹. The study examines the concept of hadanah, the condition for the award of hadanah and the position of women in Nigeria and Malaysia for the

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purpose of determining whether its practice is in conformity with the Islamic injunctions.

Concept of Hadanah

There are several definitions of hadanah in the Holy Qur'an, Shari'ah, Hadith, Companions of Prophet Mohammed (PBUH) and classical scholars:

- (i) The Holy Qur'an Chapter 4 recognizes the right of the mother to protect the child and nurse the child. Qur'an Chapter 2 verse 233 provides thus "And mother shall give suck to their children for two whole years, this is for those who desire to complete the suckling. And the man to whom the child belongs shall be responsible for their (the mothers) feeding and clothing according to usage..."
- (ii) Shari'ah. There is no verse in the Holy Qur'an on custody of minors but the classical Muslim jurists have referred us to the verse on fosterage (Ayat al Radh'at) which suggested that mother should breast feed the child for 2 years. In a case that was brought before Caliph Abubakar by a grandmother challenging the attempt to take his child away from her. In deciding the matter in her favour, he said "The mother is more compassionate, more kind, more generous, and she has more right to her child unless she gets married again"²
- (iii) Hadith. On the authority of the cases decided by the Prophet Mohammed (PBUH) three basic principles were laid down. Firstly, the mother possesses priority right of the child so long as she does not remarry. Prophet Mohammed (PBUH) once said to a woman "You are best entitled to custody of (your infant) as long as you do not get married" In another narration the Prophet (PBUH) "You have more right to him so long as you do not get married again" Secondly, where both parents decide to change their religion, the child should be given to parent who embrace Islam. Lastly, where the child is above the age of minority (7 years) he will be given the option to decide between the two parents.

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The above represents the position of Islam on hadanah. However, there appears to be a departure when fiqh was codified and the emergence of the leading schools of thought.

Hadanah under Islamic Law

In the realm of Islamic jurisprudence, the rule that the mother is entitled to the custody of the child is controversial among Islamic jurists such as the Hanafi school, Maliki school, Hambalifi and Safi.

- (i) Hanafi School. The length of time the child is expected to be in the custody of the mother depends on the sex of the child. If it is a boy the mother loses custody at age 7, but a girl child the age is 9 years.
- (ii) The Maliki School suggested that the mother has the right to his son's custody till age of maturity and the girl's custody till she marry or the marriage consummated.
- (iii) Hambalifi. The length of time set for the child to remain in the mother's custody is 7 years; thereafter the father remains the legal guardian of the child.
- (iv) Safi. The length of time is not fixed but they suggested that the child remains in the mother's custody until the age of discernment.

Conditions

The various Schools of Thought and Council of Muslim Theologians supported the custody of the child at tender age to the mother. However, there are conditions:

- (i) The mother cannot travel far with the child without the father's consent. The Maliki School suggested 72 miles as the limit. Except the journey is purposeful. See **Laaro Adegboye Vs. Falilatu Adegboye**
- (ii) Where the mother decides to remarry before the prescribed age for the child, she automatically waived her right to custody.
- (iii) If the mother remarries and the marriage is to a ghayr mahram (strangers according to Shari'ah) of the child.

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- (iv) Where the mother covert from Islam to other religions
- (v) When the child is in the custody of the mother, the father will be responsible for his nafaqa
- (vi) If the mother demands remuneration for the upbringing of the child whereas there is another woman to rear the child without remuneration and the father cannot afford to remunerate her.
- (vii) If the mother does not attend to the child responsibility: for instance, living the child in the house very often without a responsible person to take adequate care of the child
- (viii) If the mother openly indulges in sin and there is a risk of the child being affected or influenced.⁴

Position of “remarried” mother in Nigeria and Malaysia

The Hadith of the Holly Prophet Mohammed (PBUH) and the conditions laid down by the Schools of Thought in Islam no doubt pointed to the fact that when a woman remarries, she automatically losses her rights to custody of the child. These have subjected women in Nigeria and Malaysia to ill treatments due to the misconception of hadanah as practiced in Islam.

(a) Nigeria

The situation in Nigeria can be summarized as follows:

- (i) Divorced women who are poor and/or not formally educated are often compelled to leave their children in the custody of their fathers because fathers seldom maintain children not in their custody and there are no practical mechanisms for enforcement of their maintenance responsibilities.
- (ii) Many mothers believe that if they remarry (the most common outcome of divorce) they automatically loose custody. Thus, children are often left in their step mother’s care or they may go live with another relative of the father’s choice.
- (iii) Women do not initiate divorce until they feel their children are old enough to handle this traumatic change in care arrangements.

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- (iv) Divorced Muslim women loses custody if they remarry, whereas divorce non-Muslim women retained custody especially where the father failed to apply (most common) for custody.
- (v) Divorced Muslim women loses custody if they remarry, whereas divorce non-Muslim women retained custody through the courts when they have been educated and/or economically self-sufficient.
- (vi) Women are denied of their right to custody of their children by threat or force by men. Some women will not pursue their rights to custody in courts for fear that their former husbands will not provide maintenance to support the children⁵

(b) Malaysia

The situation in Malaysia can be summarized as follows:

- (i) Women found guilty of immorality or adultery or committed gross and open immorality are often denied custody.
- (ii) Where the mother has custody, the father, as the lawful guardian, maintains control over the matter where the consent of the guardian is required (e.g. permission to obtain a passport, registration into or change of school, or to undergo surgery, decisions regarding the ownership and disposal of the child's property.
- (iii) Women are often forced to subject themselves to the jurisdiction of the court against their wish in divorce case. In ***Shamala A/P Sathiyeseelan Vs. Dr. Mogarajah (2003) 6 MLJ 515***. Mogarajah instituted an (hadanah) ex-parte application in the Syariah court to claim custody of their child. They are both Indians and Hindu by profession. At the point when their marriage was breaking down or had broken down, Magarajah converted to Islam without the knowledge of Shamala. When Shamala failed to appear in court the court issued bench warrant against her. In a related action instituted by Shamala in the High Court, the court

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gave the custody of the child to Shamala with a rider that the child should be allowed to practice Islam against her wish⁶. It is important to note that the decision attracted violence and demonstration among jurists in Malaysia who saw the decision as discriminatory against non-Muslims women⁷.

- (iv) Unmarried daughters who have reached the age of puberty at the time of the divorce remain with the father, while unmarried sons who have reached puberty remain with the mother.

Conclusion and recommendations

In the foregoing analysis, attempts have been made to divulge the practice of hadanah in Nigeria and Malaysia. The analysis have showed that the practice of hadanah in both countries with regard to Islamic family law is making it difficult for women to secure divorce, places women in a weaker position and provided women with fewer rights in terms of child custody. All these contravene the provision of the Nigerian and Malaysian constitutions on gender equality. It is recommended that legislative measures should be put in place in Nigeria and Malaysia to address the pit falls of gender-bias. It is therefore recommended as follows:

1. There should be strict adherence to the ideals of hadanah as laid down in the Holy Quri'an, Shari'ah, and Hadith.
2. The courts should comply strictly with the orthodox Islamic law materials in deciding custody cases
3. The Maliki position which terminates hadanah at puberty for male child and marriage and consummation for female child should be adopted in Nigeria.
4. The recent codified family law in Malaysia should be amended to remove the obnoxious provisions that discriminate against married on the issue of custody of children.
5. Enlightenment programmes in form of seminars, conferences and symposiums should be organized to sensitize women of

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their rights to seek legal regress in courts when their rights to custody are threatened.

6. All form of discriminations against women should be eliminated and equal treatments should be given to women like their male counterparts.

Notes

1. The aspect of Islamic Personal Law which deals with the issue relating to the custody and general upbringing of children during the pendency of the marriage or after separation (divorce) between the parents is known as Hadanah. See Ambali, M.A. (1998) *The Practice of Muslim Family Law in Nigeria*, Tamaza Publishing Ltd. Firsted, Nigria. Islamic law takes a more practical approach of specifying that it is the role and right of the mother to take physical custody of the children especially at very young ages, while the father gives all other supports necessary for the proper upbringing and transformation of children into independent and functional adults. See Doi, A.I and Clarke, A. (2008) *“Shariah: Islamic Law”* TA-HA Publishers, London. P331
2. Shari’ah categorically gives custody of minor children to the mother: girls until they marry and boys until they reach the age of puberty and discretion. This ruling is based on the case that was brought before Caliph Abubakar by a grandmother challenging the attempt of the Umar to take his child away from her. Caliph Abubakar decided in her favour adding that “The hugs and kisses of that old woman to the child are more important and valuable than whatever material weather you can offer the child”. This provision of Shari’ah, besides granting rights to the wife, has the additional benefit of placing restraint on indiscriminate divorce. In effecting a divorce the husband has to consider the unpleasant prospect of losing custody of the children. Muslim Jurists unanimously agree that custody of young children is rightly in the hands of the mother and her relatives. In the order of priority outlined in Shari’ah, the father is fifth in line of eligibility to custody.
3. (1987) (unreported) KWS/SCA/28/86 delivered on 7th April, 1987
4. The common disqualification list for a mother to have custody include: Having renounced Islam; Having married a man not related to the child within the prohibited degrees; Being guilty of immorality or adultery; Having changed her residence/or having moved far away from

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the father of the children; and Having failed to take proper care of the child.

5. Quri'an 65:6; 2:233 provides that divorced mother is entitled for suckling the child of a husband who divorces her. Shari'ah stipulates that the father must provide his children's maintenance, and this includes funds for their education. However, it has been observed that few men voluntarily provide such maintenance after divorce. In the rare cases where they decide to provide support, husbands give far less than what will adequately cater for the maintenance needs of the children.
6. In a similar case, Subashini was married to Saravanan, both Hindus at the time of their marriage. In May 2006 Saravanan, converted with his 3 years old son to Islam. Subsequently, he applied through the Syariah to dissolve his marriage to Subashini and to obtain custody over their two sons. Subashini filed a petition in the High Court to annul the marriage and to prevent Saravanan from converting the two children into Islam without her permission. At the Court of Appeal two separate applications were filed, one by the Muslim husband at the Syariah Court and the other by the non-Muslim wife. However, in a majority decision Subashini lost her application to prevent her husband from dissolving their marriage in the Syariah court and from converting into Islam. The case spurred a flurry of protests, for example, an inter-faith religious coalition, the Malaysian Consultative council of Buddhism, Christianity, Hinduism, Sikhism and Taoism, expressed that there is a growing discomfort amongst the non-Muslims.
7. The decision in Shamala drove home the realization that the amendment to Article 121 of the Malaysian Constitution to separate the jurisdiction of the Civil and Syariah courts had spelled a grave consequence for human rights.

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