

CHILD CUSTODY (*HADANAH*) IN ISLAMIC FAMILY LAW: AN ANATOMY OF WOMEN'S RIGHTS IN NIGERIA AND MALAYSIA

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Abstract: The Qur'an, the Hadith and the Shari'ah recognise the rights of women to custody of their children when they are no longer with their husband, provided they do not remarry. This right is known as *hadanah*. The study examines the conditions for the award of *hadanah* in Nigeria and Malaysia with a view to determining whether its practice is in conformity with the Islamic injunctions. The qualitative approach is used. The qualitative approach includes content, deductive, and inductive analysis as well as comparative method. The references used in this study are the primary and secondary sources. Both materials are analysed accordingly to get the information related to this study. The paper found that women in Nigeria and Malaysia are subjected to ill treatment due to misconceptions about *hadanah* as an Islamic practice. The study found that women are disadvantaged when securing divorce and custody of their children. The paper concludes that the practice of *hadanah* in both countries contravenes the constitutional provisions on gender equality. The study recommends that legislative measures be put in place in Nigeria and Malaysia to address the pitfalls of gender-bias.

Keywords: children, *hadanah*, Islamic Family Law, constitution, gender equality.

Introduction

Custody under Islamic law is composed of *hadanah* (nursing), *al-wilaya al-nafs* (guardianship of a child's person) and *al-wilaya al-mal* (guardianship over a child's money/property). *Hadanah*,¹ the nursing of the child, is the primary duty of the mother.²

Hadanah is one of the typical issues resulting from divorce. In the era of Rasulullah (peace and blessings be upon him), there was a debate among the Companions about who has the most right to the custody of children after a divorce. Presently, the issue of *hadanah* is still occurring when parents get divorced and each of them claims that they hold the utmost right to child custody without taking into consideration their children's needs and wants, especially

concerning the children who have reached puberty and *mumayyiz*. Children will always suffer the after effects of their parent's divorce as they will lose love, attention and happiness as well as facing some psychological issues, including the issue of custody. Parents fighting for child custody will add to a child's psychological burden. Therefore, a divorce cannot deny the children's rights as conferred by Shari'ah. Parents should take good care of the gift given to them by fulfilling those rights. Among the rights of children that should be fulfilled by the parents are; right to love and attention, right to alimony, right to live with the parents, right to education and safe life guarantee. 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 purpose of determining whether its practice is in conformity with the Islamic injunctions.³

Concept of *Hadanah*

Hadanah can be defined as the act of educating or nurturing children by anyone who has been given such rights by Shari'ah. It is also defined as nurturing and taking care of people who are not able to take care of themselves as they cannot differentiate between good and bad things (not *mumayyiz*), as children cannot. *Hadanah* also comprises the act of providing for the needs of children; for example, food, drink, clothing, health, education and other necessities.⁴

There are several definitions of *hadanah* in the Qur'an and the hadith:

- i. **The Qur'an and the Shari'ah:** The Qur'an Chapter 4 recognises the right of the mother to protect and nurse the child. The Qur'an (2:233) provides thus "And the 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 mother's) feeding and clothing according to usage..."
Hadanah in the Shari'ah means raising or bringing up a child. There is no verse in the Qur'an on custody of minors but the classical jurists have referred us to the verse on fosterage (*ayat al-radh'at*) which suggests that mothers should breast feed the child for 2 years.
- ii. **Hadith:** On the authority of the cases decided by the Prophet, three basic principles have been laid down. Firstly, the mother possesses prior right to the child so long as she does not remarry. Secondly, where both parents decide to change their religion, the child should be given to the parent who embraces Islam. Thirdly, where the child is above the age of minority (7 years) he will be given the option to decide between the two parents. The mothers hold the rights for nurturing and taking care of the

children compared to the fathers. Islam prioritises women to hold the *hadanah* rights as women naturally have strong maternal instincts and love towards children as well as patience in educating and nurturing them compared to men. If the mother has passed away or the mother refuses to take care of her children, the child's custody will be the responsibility of the grandmother. In addition to that, it is a lot better if the child's custody is given to the maternal grandmother. If the maternal grandmother could not take the responsibility of the child's custody, the right would go to the paternal grandmother. If the paternal grandmother could not take custody, the mother of the grandmother should take the responsibility. Thereafter the priority of who should hold the child's custody is arranged as follows; sisters of the same parents, sisters of the same mother, aunts of the mother's side, aunts of the father's side, daughters of the brothers and lastly daughters of the sister.⁵

***Hadanah* under Islamic Law**

It is recognised that the prevention of any possible injury to a child and the preparation for his/her upbringing and safeguarding is one of the objectives of Islamic family law. Among its goals is to assure the preservation of a child's health and well-being. Besides being suckled by the mother, a child also needs guardianship, which according to Islamic family law, means care of the child and looking after his/her upbringing. Accordingly, the parent is under an obligation to support his or her children. If the parent neglects that duty, any person who supplies items such as food and clothing is deemed to have an implied promise to pay on the part of the parent. The reasoning behind this rule is the inability of the child to care for himself because his mind is supposed to be still imperfect. Similarly, Islamic family law considers the child innocent during childhood, and therefore, damage caused by him has to be repaired by the guardian. This is supported by a hadith which states:

“The recording pen (responsibility) is lifted in three cases: a boy (a minor) till puberty; a sleeping person till he wakes up; and a mentally sick (mad) person till he recovers.”⁶

Islamic family law is concerned with preventing any mental and physical abuse of the child. According to the Sunni school of *fiqh*, the mother has the right to custody of the child during infancy unless the court decides otherwise. Furthermore, it is the general rule in Islamic family law that during immature stage, the custody of a child belongs to the female relations of the child over the father's side. As stated, the female's relatives in order of precedence in this

connection are: mother's mother (*umm al-umm*); mother's mother's mother; father's mother; father's father's mother; sister; sister's daughter; mother's sister; and father's sister and so on.⁷ However, a father's relation who is not awarded custody still has the right of reasonable visitation with such child. This rule, according to Abu Zahrah, has strong rational reasons.

The first phase of the first guardianship, which is called that of dependence (*hadanah*), is overseen by women and not by men. The condition is made that the woman who takes care of the child during the period of dependence shall be of sound mind, trustworthy, capable of looking after the child, that she shall not be distracted by other activities from caring for the child and looking after his/her upbringing, and that she should not take the child to live with one who is of a different religion (*ajnabi*) from the child.⁸

In the realm of Islamic jurisprudence, the rule that the mother is entitled to the custody of the child is controversial as regards the length of time the child can remain in her custody. Below are the opinions of the various law schools on this issue:

- **Hanafi:** 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 at age 9.
- **Maliki:** The mother has the right to her son's custody till age of maturity and the girl's custody till she marries or till the marriage is consummated.
- **Hanbali:** 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.
- **Shafi'i:** There is no definite period of custody; the child shall remain with the mother until they reach the age of discernment and thereafter are able to choose between the two parents. If a boy chooses to stay with his mother, he will stay with her during the night and spend the day with his father, so that the father can arrange for his instruction. If a girl chooses to stay with her mother, she will continue to stay with her during the day as well as in the night. If the child chooses both the parents together, lots will be drawn between them, and if the child keeps quiet and does not choose any one of them, the custody shall lie with the mother.
- **Imamiyyah:** The period of custody for a boy is 2 years, and for a girl 7 years. After this, the custody shall lie with the father until the girl reaches the age of 9, and the boy the age of 15; thereafter they can choose to live with one of the parents.

Conditions

The various schools of Islamic law support the right of the mother to the custody of a child of tender age subject to the following conditions:

- The mother cannot travel far with the child without the father's consent (The Maliki school suggests 72 miles as the limit), unless the journey is purposeful. See *Laaro Adegboye Vs. Falilatu Adegboye*.⁹
- Where the mother decides to remarry before the prescribed age for the child, she automatically waives her right to custody.
- Similarly, the mother cannot marry a *ghayr mahram* (strangers according to Shari'ah) of the child.
- The mother cannot convert from Islam to all other religion.
- When the child is in the custody of the mother, the father will be responsible for his *nafaqa*.
- The mother cannot demand remuneration for the upbringing of the child, especially if there is another woman to rear the child without remuneration and the father cannot afford to remunerate her.
- The mother must attend to her responsibilities for the child, for instance by not leaving the child in the house very often without a responsible person to take adequate care of the child
- The mother cannot openly indulge in sin with there being a risk of the child being affected or influenced.¹⁰

Position of "Remarried" Mother in Nigeria and Malaysia

According to the hadith of the Prophet and the conditions laid down by the schools of Islamic law, when a woman remarries, she loses her right to custody of the child. This has subjected women in Nigeria and Malaysia to ill treatment due to the misconception of *hadanah*.

Nigeria

The situation in Nigeria can be summarised 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 will automatically lose custody. Thus, children are often left in their stepmother's care or they may go and 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.
 - iv. Divorced Muslim women lose custody if they remarry, whereas divorced non-Muslim women retain custody, especially where the father failed to apply (most common) for custody.
 - v. Divorced Muslim women lose custody if they remarry, whereas divorced non-Muslim women retain custody through the courts when they have been educated and/or are economically self-sufficient.
 - vi. Women are denied their right to the custody of their children by threat or force by men. Some women will not pursue their rights to custody in court for fear that their former husbands will not provide maintenance to support the children.

Malaysia

In Malaysia, the Islamic Family Law Act, 1984 (IFLA), section 82 (a) states that one of the conditions of a person entitled to the custody of a Muslim child is that they are also Muslim. Thus, when there is a dispute over the custody of a child between a non-Muslim and Muslim parent the custody shall be awarded to the Muslim parent. This is in order to protect the religion of Islam, which is given special status under Article 3 of the Federal Constitution. The requirement that the custodian must be a Muslim is highly emphasised in the Islamic Family Law Act/Enactment. It is further supported with another requirement in the Act, where it declares that the right to child custody is lost if the custodian mother renounces her religion of Islam (Section 83(d) of the Islamic Family Law Act, 1984). This condition is based on the assumption that religion is associated with the good character of a person, which is another important condition stipulated in the Islamic Family Law Act.¹¹

The Malaysian Syariah courts emphasise religion and religious values as the main consideration for determining the welfare of the child.

In *Tunku Mahmood Shah v Noor Faridah Sutherland*,¹² the mother initially claimed custodial right over her thirteen and ten year old daughters but, a Muslim convert, she later renounced Islam after the divorce. The father then took the eldest daughter with him, while the youngest remained with the mother, as there was no agreement as to their custody after the divorce. The father argued that the mother had no capacity as custodian or *hadanah* since she subsequently married another man. The court subsequently gave the custody, care and control of both

children to the paternal grandmother who was earlier included as the second plaintiff. The court's decision to give custody to the Muslim custodian was based on the welfare of the child: to safeguard the religious belief and upbringing of the children, particularly the elder sister. The court acknowledged the wishes of the elder sister as she had obtained sufficient age to choose, but since the paramount consideration was her welfare, the court made the order as prescribed. Similarly, in *Ex-Parte Application of Zaimas bt Ibrahim*, the Shariah High Court awarded the custody of two children to the mother after the court was satisfied that the father had apostatised.

In *Faridah v Mohd Firdaus Abdullah and Jettle Francis*,¹³ custodial right was given to the maternal grandmother, who was a Muslim by birth, as the court was satisfied that the behaviour of the converted father was unreasonable and the children may be influenced to behave in a non-Islamic manner, which would affect the welfare of the children. In this case, the court allowed the application of the mother to make her mother a party in the custodial proceedings involving her two daughters. Subsequently, the custody of two female children was awarded to the maternal grandmother because the mother was considered to be disqualified for *hadanah* as she was already married to another man.

Another important qualification for *hadanah* is having a good Islamic character. This requirement is further supported by another provision of the law which stipulates that a mother will lose her custodial right if she openly indulges in immoral activities.¹⁴

Observations from decided cases reveals that the Syariah courts interpret good conduct to mean a person who is not *fasiq*. This concurs with the view of classical Muslim jurists, who disqualified a *fasiq* person for *hadanah*.

In *Khairul Huda Carol Abdullah v Shahrudin Hj. Yasin*,¹⁵ the father was found not to have a good Islamic moral character for he did not even know how to perform his prayer (*solat*). Besides, he also consumed alcoholic drinks, which is forbidden in Islam. For this reason, the court ruled that he was not qualified for the custody of his son. The court, nevertheless, awarded the converted mother only temporary custody since she intended to return to her home country, Australia, which in the court's opinion is not conducive for the child to grow up as a good Muslim. The permanent custodial order was given to the father's family.

In *Rahanim bt Mohd Yobe v Adnan bin Ahmad*,¹⁶ the mother's conduct was put into question as she was allegedly not performing daily prayers and not fasting during Ramadan. The allegation, however, was proven baseless and therefore she was granted the custody of her child. It seems that the requirement of having good Islamic conduct is interwoven with the condition of being Muslim. This is actually to ensure that the child's interest, particularly in religious upbringing, is well safeguarded.

The situation in Malaysia can be summarised as follows:

- i. Women found guilty of immorality or adultery or of committing gross and open immorality are often denied custody.
- ii. Where the mother has custody, the father, as the lawful guardian, maintains control where the consent of the guardian is required (e.g. permission to obtain a passport, registration for 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 cases. In *Shamala A/P Sathiyeseelan v Dr. Mogarajah*,¹⁷ Mogarajah instituted an ex-parte application in the Syariah court to claim custody of their child. They are both Indian and Hindu. At the point when their marriage was breaking down or had broken down, Mogarajah converted to Islam without the knowledge of Shamala. When Shamala failed to appear in court the court issued a bench warrant against her. In a related action instituted by Shamala in the High Court, the court gave the custody of the child to Shamala with the condition that the child should be allowed to practice Islam against her wish. It is important to note that the decision attracted criticisms from jurists in Malaysia who saw the decision as discriminatory against non-Muslim women.¹⁸
- 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

Islam provides clear and comprehensive guidelines regarding *hadanah*. *Hadanah* is not merely a right but also a responsibility that should be clearly understood and accomplished for the sake of the children. Islamic law stresses that in the issue of *hadanah*, a child's welfare and benefits should be the main priority. That means, once the decision is made, the guardians should carry the responsibility as much as possible.¹⁹

In the foregoing analysis, attempts have been made to examine the practice of *hadanah* in Nigeria and Malaysia. The analysis has shown that the practice of *hadanah* in both countries has made it difficult for women to secure divorce, placed them in a weaker position and provided them 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 be

put in place in Nigeria and Malaysia to address the pitfalls of gender bias. It is therefore recommended as follows:

- There should be strict adherence to the ideals of *hadanah* as laid down in Shari'ah.
- The courts should comply strictly with the orthodox Islamic law materials when deciding custody cases.
- The Maliki position in which *hadanah* terminates at puberty for male children and marriage and consummation for female children should be adopted in Nigeria.
- The recently codified family law in Malaysia should be amended to remove the provisions that discriminate against married women on the issue of child custody.
- Enlightenment programmes in the form of seminars, conferences and symposiums should be organised to sensitise women to their rights to seek legal redress in court when their rights to custody are threatened.
- All forms of discrimination against women should be eliminated, with equal treatment being given to them, like their male counterparts.

Notes

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1. Wahbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuh*, vol. 7 (Dimsiyiq: Dar al-Fikr, 1985).
 2. 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) of the parents is known as *Hadanah*. See M.A Ambali, *The Practice of Muslim Family Law in Nigeria*, (Kongo Zaria: Tamaza Publishing Ltd., 1998). Islamic law takes the 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 Abdul Rahman I Doi and Abdassamad Clarke, *Shariah: Islamic Law* (London: TA-HA Publishers, 2008), 331.
 3. M. R. Ibrahim, *Munakahat: Law and Procedures* (Ampang: Publishing House, 2006). See also A.B. Mohamad, R. Machae, and M. Khareng, 'Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand,' *Asian Social Science* 12, no 10 (2016), 18.

4. Mohamad, Machae, and Khareng, 'Children's Protection in the Issue of *Hadhanah*,' 19.
5. A. Z. Y. Al-Nawawi, *Raudhah al-Talibin*, vol. 9 (Beirut: Maktab al-Islami, n.d), also Mohamad, Machae, and Khareng, 'Children's Protection in the Issue of *Hadhanah*,' 18.
6. Abu Dawud, *Sunan Abi Dawud, Kitab al-Hudud, Bab fi al-Majnun yasriq aw yusib haddan*, hadith no 4384. See also R.C. Soh and N.A. Hak, 'Application of *Maslahah* (Interest) in Deciding the Right of *Hadanah* Court of Malaysia,' *Journal of Applied Sciences Research* 7, no. 13 (2011): 2182-8.
7. Afzal M. Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Other Relatives* (Kashmir: Upright Study Home, 1995), 225-6. See also Soh. & Hak, 'Application of *Maslahah*.'
8. Abu Zahrah, 'Family Law,' in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955), 154. See also Soh. and Hak, 'Application of *Maslahah*.'
9. (1987) (unreported) KWS/SCA/28/86 delivered on 7th April, 1987.
10. 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 the father of the children; and having failed to take proper care of the child.
11. Najibah Mohd Zin, 'Resolving the Conflict in Family Disputes Involving Conversion of a Spouse to Islam Under the Malaysian Law,' *The Law Review*, 1(2007): 66.
12. (1997) 11 JH 227.
13. (2002) 15 JH 227.
14. Section 83(b) of the Islamic Family Law Act, 1984).
15. Case no. 23/86, Seremban Syariah Court.
16. (1994) 9 JH 216.
17. (2003) 6 MLJ 515.
18. The decision regarding Shamala drove home the realisation that the amendment to Article 121 of the Malaysian Constitution to separate the jurisdiction of the Civil and Syariah courts has spelled a grave consequence for human rights.
19. Mohamad, Machae, and Khareng, 'Children's Protection in the Issue of *Hadhanah*.'