

**DIVORCE, CHILD CUSTODY AND MAINTENANCE  
UNDER THE SHARI'A LAW**

**BY**

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**BEING A PAPER PRESENTED AT THE INDUCTION  
COURSE FOR NEWLY APPOINTED JUDGES OF  
THE LOWER COURTS ORGANISED BY THE  
NATIONAL JUDICIAL INSTITUTE, ABUJA  
ON 20<sup>TH</sup> - 24<sup>TH</sup> MAY, 2024**

## In the Name of Allah, the Most Gracious, the Most Merciful

### BACKGROUND:

Mr. Chairman, Sir, Members of the High Table, Distinguished guests, my dear participants.

I feel delighted to be called-upon by the Administrator of the NJI, my Mentor, Hon. Justice Salisu Garba Abdullahi and his able team to make a little contribution in the on-going 2024 Induction Course for Newly Appointed Judges of the Lower Courts with a theme: **“Repositioning the Courts for Better Justice Delivery”** and I am given a topic to discuss; Divorce, Child Maintenance and Custody Under the Shari’a Law. The topic is apt. But in the course of writing I felt better to re-couch it to read Divorce, Custody and Child Maintenance because in Shari’a, one aspect must precede another. There must be divorce first, then issue of who is to take custody comes and thereafter who cater for the maintenance while under custody.

I am also delighted by the caliber of the people invited as participants most of whom are Judges of the Shari’a Courts of various grades and by implication, the main target audience on the topics. Other participants will add to their knowledge as to what obtains on the topic under the Shari’a Law. Indeed no knowledge is a waste.

On this premise, the paper is not meant for ordinary presentation. But as it is the current trend of training workshops in almost all jurisdictions, the paper is meant for live participation and professional discussions with a view of bringing out issues that touches on Divorce, Custody and Child Maintenance under Islamic Law; after which we hope our capacity building will be enriched.

Being in the system as Judges, I don’t think, even a professor of Islamic Law will stand before you with a view of teaching you the legal definition of Divorce, Custody or how Qamusul Lisanil Arab define Maintenance. That will be more applicable in academic community. **Here, we want rub minds with you to share our experiences; giving a bench approach to the discourse.**

As we know, nobody will come to a Shari'a Court to institute an action seeking for an interpretation of the words "Divorce, Custody or Child Maintenance" in relation to Islamic Legal System.

But every now and then, actions are being instituted in our courts seeking determination as to whether there is a legal divorce between a certain spouses and or couples, for instance as it usually comes before us, where a father pronounces divorce to his son's wife. Determination as to who has the right of custody after that divorce and whose responsibility it is for the maintenance of children after that divorce. As pointed out, the issue of Child Custody and Maintenance does not ordinarily arise, until after divorce.

As mentioned earlier, the focus of this paper will be a Bench approach on the issue. The paper therefore seeks to answer some questions by exploring the laws relating to Divorce, Custody and Child Maintenance from the perspective of the Shari'a. Alongside examining these issues, the paper will provide the definition of some terms to marry them with procedural/practical aspects at the bench.

No write up on Divorce, Custody and Child Maintenance can be complete without highlighting what forms the basis of the three aspects. What forms the basis of Divorce, Custody and Child Maintenance under Islamic Law is marriage.

### **THE CONCEPT OF MARRIAGE**

The institution of marriage (*Nikah*) occupies a paramount and pivotal position in the Islamic Family Law. It is a contract for the legalization of sexual intercourse and the procreation of children.

Islam view marriage as a strong bond (*Mithaqul-ghaleeza*). In the Holy Qur'an, marriage has been specifically referred to as "*Mithaqan-ghalizah*" a strong covenant where Allah says:

وَكَيْفَ تَأْخُذُونَهُ, وَقَدْ أَفْضَىٰ بَعْضُكُمُ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُم مِّيثَاقًا غَلِيظًا

سورة النساء (21)

### MEANING:

*“And how could you take it (back) while you have gone in unto each other, and they have taken from you a firm and strong covenant.” Qur’an 4:21*

It is apt to state that marriage as an institution has been in existence from time immemorial. This can be traced back to the creation of man and is considered to have spiritual, moral and social significance in the society. It is therefore revered as sacred and thus heavily guarded by various religions, traditions, social norms and laws alike.

Therefore, it is only where there is legal marriage, you can talk of divorce.

### THE CONCEPT OF DIVORCE:

Almost every normative system has made provision for marriage dissolution; and every society has its own structural means of ending a marriage which cannot or failed to fulfill its functions.

In Islam, *Talaq* (divorce) is a verbal noun from the Arab Verb “*Talaq*” which means to untie, to free. Technically, *Talaq* is a unilateral power vested on a Muslim husband to repudiate his wife as and when he wishes. In law, it signifies the absolute power which a husband possesses of divorcing his wife as it is said:

الطلاق بيد الزوج --- الع

### MEANING:

*“Divorce is on the hand of a husband.”*

Different terminologies were ascribed to divorce under Islamic Law among which include: *Mubarat, Talaq, Khul', Ila', Li'an* and a Divorce at the Instant of the Wife. This shows that there are different forms and ways of dissolution of marriage.

### **Mubarah**

This is a divorce by mutual consent of the husband and the wife. Therefore, if both husband and wife wish, they can agree to it between themselves or with the intervention of their *waliy(s)* (marriage guardians(s)). In this type of divorce, the wife need not to pay anything; in other words, no redemption is considered.

Practically, even after doing that the parties or any of them usually report to the court to ask the court to adopt that divorce. Here, it is the duty of the Court/Judge to enter a consent judgement to that effect and avail the woman with a Divorce Certificate fully endorsed by the court on payment of a prescribed fee stipulated by various States' Shari'a/ Area Courts Rules in force.

We enjoined Muslims, to embrace this option of divorce where they considered the marriage cannot continue; instead of suffering the wife before she gets divorced.

Here is a poser to a scenario that usually comes before our courts.

What will be the position where a husband who resides overseas or elsewhere **called** his wife over the phone or while chatting on a video camera where they are **seeing** each other and pronounces divorce on her. Will that be different from a situation where he sent a **text** message in pronouncing the divorce ?

Consider the above three scenarios.

First, she only heard his voice.

Second, she was seeing him, and

Third, she only read the text.

And any of these three husbands is denying the divorce. Let's hear views from experiences of the participants.

## Khul'

This is when the woman or a third party offers to pay something in kind or in cash to set the woman free from the bond of marriage. It is translated to mean Self-Redemption.

While Islam recognizes dissolution of marriage by mutual consent since about fifteen centuries ago, it is only recently that the Euro-Christian world come to accept it as a ground and then tied it to the confused and indefinite formula of the concept of "irretrievable breakdown" in the English Family Law which seems to be very subjective.

However, in the case of **Eze Vs Omeke (1977) 1 ANSLR 136** the court held thus: *"Any Order dissolving any marriage without a subsequent Order for the return or acceptance of the bride price or dowry is meaningless."*

This is in tandem with Islamic Jurisprudence but should have added: "If there is no fault/harm from the husband".

Considering what comes before our courts regarding *Khul'* decisions from the lower courts, whereby you find in the records, a court listing and valuing everything that has been given by the husband; sometimes including transport money paid to a driver to convey the bride.

And on the other hand, the bride will narrate all that her parents gave to the groom and his relations. The court then usually subtract from the amount and enter its judgement based on the figures remaining. This is of course, with due respect, a wrong procedure.

*Khul'* has its basis in the Holy Qur'an where Allah says:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ

سورة البقرة (229)

## MEANING:

*“ --- Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr) for her Al-Khul’ (divorce) ---” Qur’an 2:229.*

Ibn Kathir in his Tafsir, Vol. II, interpreted this Verse with a Hadith which says:

--- والخلع يكون على الصداق

## MEANING:

*“Self-Redemption is being based on Sadaq”*

It also derives its authority from the Sunnah of the Prophet (S.A.W.) where it is reported by Bukhari and Al-Nasa’i on the authority of Ibn Abbass.

The wife of Thabit bn Qais bn Shammas came to the Messenger of Allah (S.A.W.) and said: *“O Messenger of Allah (S.A.W.) I have found no fault in his disposition of religion, but I fear injury to my Islam”*. The Prophet (S.A.W.) said: *Would you return his orchard (dower) to him ?* She said: *“Yes”*. The Prophet (S.A.W.) said to Thabit: *“Accept your orchard and divorce her by one Talaq”*.

This is the first *Khul’* decision in Islam and has clearly shows that it is the dower that has to be returned and nothing else.

## Ila’

*Ila’* is a divorce through desertion of wife by the husband for more than four consecutive months.

This has been provided for in the Holy Qur’an Chapter 2: Verses 226 – 227 where Allah says:

*“For those who take an oath for abstention from their wives,  
a waiting period for four months is ordained ---*

*But if their intention is firm for divorce, Allah heareth and  
knoweth all sins.”*

### **Li’an**

*Li’an* is a divorce through oath of spousal accusation. It is where a husband accuses his wife of committing adultery and produces not four witnesses.

On her denial of committing the adultery, an oath is prescribed to be taken five times by each of them. Therefore, their marriage automatically dissolves; but the child only belongs to the mother thereby placing no any legal right or responsibility on the husband.

### **Zihar**

*Zihar* is where a husband compares his wife or any part of her body with any part of his female relations within the prohibited degrees on marriage with the intention of prohibiting her to himself.

In this case, he must expediate by freeing a slave or fasting for two consecutive months, or feeding sixty poor people.

If he fails, their marriage dissolves irrevocably.

To spice any discussion on divorce, it will be pertinent on the research to highlight certain conditions that can make a divorce to be valid.

## **CONDITIONS FOR A VALID TALAQ**

There are many conditions to be fulfilled for a divorce to be valid. Among the principal ones, include:



**1. Capacity:**

In Islam, only pronouncement made by a husband who is of sound mind, attained the age of puberty and with no compulsion can be considered as a valid *Talaq*. Any pronouncement of divorce made by persons of unsound mind is void.

**2. Free Consent:**

In all the four Schools of Thought, except under the Hannafi School of thought, the consent of the husband in pronouncing *Talaq* must be free and must not be influenced by whatever circumstances.

**3. Express Wordings:**

The wordings used by a husband in pronouncing divorce must be clear and unambiguous. It must be understood by everyone; that no sensible person can adduce any other meaning to it.

An ambiguity that can be legally accepted renders the divorce void.

## **CLASSIFICATION OF DIVORCE**

Islam has categorized divorce into two folds:

**1. Revocable Divorce (*Talaq Raj'iy*)**

This is a category of divorce that occurs when a husband divorces his wife; and enjoys a right to take her back.

**2. Irrevocable Divorce (*Talaq Ba'in*)**

This is a category of divorce by which a wife is separated permanently from her husband – and the husband forfeits the right to take back such a wife.

This category of divorce is of two kinds:

- (a) Divorce of Lesser Severance; and
- (b) Divorce of Greater Severance.

Under the two classifications of divorce, Islam has gone further to ascribe two types of divorce known as *Talaq Sunni* and *Talaq Bid'i*.

## TYPES OF DIVORCE

### 1. Talaq Sunni

Islam as a complete way of life to Muslims and everyone else has left no stone unturned thereby further sub-divided the *Sunni Talaq* into two; to cover the field by providing two types of *Sunni Talaq*:

**(a) Talaq Al-Ahsan:** This is where a husband makes a single declaration of *Talaq* to his wife.

In this case, he has the right to take her back, so long as she is still within her prescribed *Iddah* period. They need not contract a new marriage.

**(b) Talaq Al-Hassan:** This is where a husband pronounces a single *Talaq* and later during her prescribed *Iddah* period pronounces another *Talaq* making it two.

In this case, he can also take his wife back like we said, since she is still within her *Iddah* period and he collected nothing/redemption from her.

Principally, *Talaq Sunni* has three features thus:

- (i) To be during the purity of the wife in which case, she is not maritally intimated.
- (ii) To be a single revocable divorce.
- (iii) To be done not under influence of anger.

## 2. Talaq Bid'i

*Talaq Bid'i* is another type of *Talaq* the features of which:

- ❖ The divorce is pronounced during menstrual circle.
- ❖ Pronounced during purity in which the wife has been maritally intimated.
- ❖ It is the one which more than one divorce is pronounced in a single pronouncement; and or
- ❖ It is done under the influence of anger.

*Bad'i Talaq* is in most cases tied to the irrevocable divorce. In which, as stated earlier, the husband forfeits the right to take back his wife.

As stated earlier, there is Minor Irrevocable Divorce and Major Irrevocable Divorce.

(a) **Minor Irrevocable Divorce:** This occurs:

- (i) Where a husband divorces his wife once or twice and delays in taking her back, until after the expiration of her *Iddah* period.
- (ii) Where the wife agrees and returned to the husband the dowry he gave to her while contracting the marriage or gives him some consideration; This is *Khul'* as earlier discussed. If the husband agreed and collected it, their marriage dissolves automatically.

In these two instances, the husband cannot take back his wife unless she agrees and he pays a new dowry so that a new marriage will be contracted.

This is in line with a legal precept which says:

الخلع طلقة لا رجعة فيها إلا بنكاح جديدا وضراها

**(b) Major Irrevocable Divorce:** This consist of:

(i) **Triple Talaq:** Also known as *Talaq al-Bid'a*. It is where a husband pronounces triple divorce to his wife concurrently or consecutively.

In this situation, it is not allowed for them to reconcile until she marries another person and that new marriage consummated.

(ii) **Li'an:** *Li'an* as discussed earlier is where a husband accuses his wife of adultery and produces no four witnesses.

After taking the Legal Oath of *Li'an* five times by each of them, their marriage dissolves automatically and cannot re-marry again.

(iii) **Zihar:** As discussed earlier, where a marriage is dissolved through the process of *Zihar*, it is deemed to be a major irrevocable divorce.

As stated earlier, whenever issues arises on Divorce, Maintenance and Child Custody, one must precede the other.

Practically, there must be a divorce first which gives rise to issue of child custody and then, who is to cater for the maintenance of such a child.

Having extensively discussed issue of divorce, we now take a look at Child Custody under Islamic Law.

### CHILD CUSTODY

As stated elsewhere in this presentation, question as to who is entitled to hold custody of a child under the Shari'a does not normally arise during the subsistence of a marriage. It is the marriage that inter-connects the child with a certain man under Islamic Law on the authority which says:

الولد للفراش وللعاهر الحجر

MEANING:

"A child belongs to a wedlock"

If and when a marriage unfortunately comes to an end, the problems of the parties involved should not in any way affect the children. Children are a trust (*amanah*) from Allah, Most High, and they should be treated and looked after in a proper manner.

They have many rights, of which two are of utmost importance: To receive proper care and love, and the other, proper upbringing (*tarbiyyah*) since at that time they cannot distinguish fully between right and wrong. These rights of a child cannot be fulfilled except with the joint endeavor of the parents. The love, care and attention of the mother is just as important as the upbringing and training of the father.

And these are the same rights copied and domesticated by the Childs' Rights Act and the various States' Childs' Right Laws.

In the light of the above, divorce should definitely be avoided as much as possible, especially in the case where there are children involved. The Messenger of Allah (PBUH) said:

*“Divorce is the most hated of all lawful (halal) things in the sight of Allah”*

Sunan Abu Dawud No. 2178

Family is the basic unit of a society. Disruption of this basic unit has many consequences not just to the members of that family but also to the society as a whole. Therefore no society or religion encourages divorce or breakup of a family. Islam also encourages continuation of the family and discourages divorce as can be seen in the Holy Qur'an where Allah says:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا  
عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أَوْلَاتٍ حَمَلٍ فَانْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ  
فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ وَأُتْمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ  
تَعَاسَرْتُمْ فَسَتْرُضِعْ لَهُ أُخْرَىٰ

سورة الطلاق (6)

## MEANING:

*“Let them live where you live ‘during their waiting period’, according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver. And if they nurse your child, compensate them, and consult together courteously. But if you fail to reach an agreement, then another woman will nurse ‘the child’ for the father.”*

In another verse, Allah says wife and husband are like garments for each other. They cover each other’s shortcomings and help each other look good.

Generally, after a divorce, both parties are very bitter and angry. That parent’s separation in itself creates tension between them, which may lead to hostile and vengeful behavior. From experience in our courts, the party having custody use the child as a weapon to punish the other party by depriving them of visitation rights. This is totally against the concept of Islam and a severe, brutal and indeed a grave sin; and also very harmful to the child.

It is said:

*“No parent should be made to suffer in the matter of his or her child”*

## **UNDERSTANDING HIDHANA (CUSTODY)**

The term **Hidhana** (custody) in Arabic is derived from the root **Hadhana**. In Arabic Hadhana means “the distance between the armpits to the loins”, “the chest and the two arms and what includes in between”, that can be summed up as “embrace”.

Accordingly, **hidhana**, which can grammatically be either infinitive or noun, means “to clasp the baby to one’s breast”, “to nurture the baby” which can be viewed as a synonym to ‘nursing’ and ‘wet nursing’.

In Islamic jurisprudence, *hidhana* is used in its lexical meaning (legal reality) as some believe. Thus using the word *wilaya* in the meaning of “custody” for the definition of *hidhana* would not be correct.

*Hadhana* (custody) can literally be said to mean ‘to embrace or hug’. And in the Shari’a, it means “raising or bringing up of a child”.

*Hidhana* is a form of guardianship which women are more suitable to assume because they are more experienced in the area of looking after children, and they are generally more caring and compassionate.

Custody is granted to the child’s parents. There are two types of custody; physical and legal. Physical custody refers to the child’s daily life, such as living arrangements, medical care and other necessities. Legal custody refers to making major decisions on the child’s behalf. In some situations, a parent may have partial physical custody of a child and be allowed to live with them for some period of time and spend some time with them, but the parent is not legally permitted to make any official decisions on the child’s behalf.

In other words, when a married couple went through divorce and children were born in the marriage, the question of child custody arises to determine which parent will be the child’s primary caregiver. Child custody is defined by Black’s Law Dictionary as “the care, control and maintenance of a child awarded by a court to a responsible adult.”

Custody is often a very contentious issue in divorce proceedings and also has a lot of implications for the wellbeing of children who are in the centre of custody battles.

## SHARI'A BASIS FOR CHILD CUSTODY

The father is the legal guardian of his child at all times, whether during and after the specified age of custody. He is the general custodian of all that concern the upbringing of his child be it in religious, educational or intellectual aspects. In the event of dissolution of marriage between a husband and a wife, the claim of custody is always a subject of heated arguments among parties especially in our courts in Nigeria and indeed, in many other jurisdictions. Islamic Law however, entrusts the custody of children in their tender age to the lenient, tender and safer hands of their mothers. Providing a reason for this, Al-Imam Al-Qarify, a Maliki jurist, in his work titled, *Dhakhirah*, opined thus:

*The principle of Shari'a is to put square pegs in square holes by giving first consideration to the most competent hand in any given issue. For instance, in military expedition, priority is given to the experienced and bold person who is capable of creating panic in the minds of the opponents. An intelligent, pious and clever person is given first consideration in matters of judicial appointment. When it comes to entrusting the property of orphans to the competent hands, a person who has the skill to make the wealth grow is given priority. A person who is considered first in a situation may be considered last in another. So, a woman is of low rating in Imamship (political leadership or leading prayer), whereas she is considered first in child custody because of her special leniency, gentility and considerable patience.*

Having known the reason for the choice of women (mothers) as persons most preferred for the custody of children, there is still need to trace the Shari'a foundations of child custody to relevant textual sources. It was narrated that Abdullahi bin Umar said that a woman complained to the Messenger of Allah saying: "This child of mine, my stomach was his abode, my thigh was his playing centre and my breast was the reservoir to quench his thirst. His father wants to take him from me." He replied, saying: "You are more entitled to the custody of your child unless you re-marry." This hadith has since become a precedent adopted by the companions of the Prophet (PBUH) and later generations as well.



For instance, Abubakar Siddiq, the first Caliph in Islam, was guided by this precedent in case brought before him involving Umar bin Khattab and his one-time wife from the Ansar.

*On the authority of Yahya Ibn Sa'id, he said that he heard Al-Qasim bin Muhammad saying: Umar bin Khattab was married to a woman from Ansar. She had a child for him called Asim, later Umar divorced her. Umar went to Quba and found his child Asim playing at the corridor of the mosque. He took him by the arm and put him in his front on the animal he rode. The grandmother of the child pursued him and challenged him. They both appeared before Abubakar Siddiq. Umar said, 'my son' and she said, 'my son', Abubakar ordered Umar to let her have him. Umar did not contest it further. In another version, it was reported that Abubakar told him, 'the mother is more merciful, lenient, kind, more concerned, more selective and more sympathetic than the man and she has a better claim to the custody of her young child than the man, as long as she has not married.*

Following the above precedent in **Taibat Aduke v. G. A. Mustapha KWS/SCA/10/85 (Unreported)**, the Kwara State Shari'a Court of Appeal granted custody of the children to the Appellant and not the Respondent, her former husband, on the ground that she had not remarried. The Appellant as the mother of the children was considered first.

The above establishes clearly that the mother is most preferred to take custody of the male child until he is seven years old and her female child until she reaches the age of puberty according to the Maliki School. It should be emphasized that the custodian is entitled to wages for upkeep of the child and she is reimbursed for expenses incurred according to Maliki law.

When the period of custody lapses, a child can stay with either of their parents and where a child cannot make a choice, then a choice is made for him or her by lot-casting. Also, where one of the parents is negligent or morally bankrupt, the other gets priority of custody over him or her as the case may be.

Whoever has the custody at any given time, must allow the other party to exercise his or her right of visitation. The essence is to allow the concerned party to fulfill his or her parental obligation.

### **WHO HAS MORE RIGHT TO CUSTODY OF A CHILD**

If divorce did take place, and both parties demand their rights, then the right of custody will be in the following way, but should be remembered here that there is nothing wrong in making a mutual arrangement, as long as there is no objection from those who have a right to custody.

There are divergent juristic views on who has the right of custody under Islamic Law. But almost universally, the courts take into account the wellbeing of the child as the basis of awarding custody. In other words, court has flexibility and authority to decide this matter in the best interest of the child. The Maliki and Hannafi School of thoughts said this right is a right to the custodian and can forgo it even if he is not going to be paid, because if it were an obligatory right, it cannot lapse on him even if he forfeited it.

Some other jurists said it is a right of the one to be taken care of. And had he forfeited it, it has lapsed. But the question is how can someone to be taken care of, can forfeit his right? In a situation when he cannot distinguish between right and wrong or a person with mental dis-ease?

Therefore, the preponderant view is that custody is a right to the custodian which is the later view of majority of the Maliki School which most of the West African countries were inclined in their judgments.

To this effect, according to Imam Al-Haskafi, the mother has a right of custody for a male child until the child is capable of taking care of his own self. This has been approximated at seven years of age, and Fatwa (legal verdict) has been issued on this age, as normally children are able to take care of themselves at this age (See Radd al-Muhtar, 3/566).

This is because women are more compassionate and more kind, and they know better how to raise small children, and they are more patient in dealing with the difficulties involved.

In the case of a female, the mother has this right of custody until she reaches puberty. This has been declared at nine years of age (al-Mawsili, al-Ikhtiyar li ta'lim al-Mukhtar 3/237).

It is reported:

أن امرأة جاءت إلي رسول الله صلى الله عليه وسلم فقالت له: يا رسول الله إن ابني هذا كان بطني له وعاء، وثديي له سقاء، وحجري له حواء، وإن أباه طلقني وأراد أن ينتزعه مني، فقال: أنت أحق به ما لم تنكحي .  
أخرجه أبو داود والبيهقي والحاكم وصحح إسناده

**MEANING:**

*"A woman came to the prophet and said: O Messenger of Allah! I carried my son in my womb, suckled him my breast and hold him on my lap; yet his father has divorced me and wants to take him away from me".*

The Prophet (PBUH) replied:

*"You are more rightful of the child as long as you don't marry".*

According to this Hadith, some scholars said that even being a polytheist does not nullify the right of a mother to her child. Other scholars however, are of the opinion that being a Muslim is a pre-condition for custody.

Sunan Abu Dawud, No. 2276

Mustadrak al-Hakim 2/207

The presenter is more inclined to the former view because – **Kowa ya sayi rariya, yasan zata zubar da ruwa.**

And another Hadith in which the Prophet was reported to have said:

"من فرق بين والدة وولدها فرق الله بينه وبين أحبته يوم القيامة"  
رواه أحمد والترمذي والحاكم عن أبي أيوب وهو صحيح

In all these situations, the father of the child is responsible for maintaining the child; in the case of a female, until she marries; while in the case of a healthy male, until he reaches maturity. In the case of a disabled or physically challenged child (male or female), the father is permanently responsible.

When the mother has the right of custody but does not have a shelter to stay in with the child, the father must provide shelter for both (See **Radd al-Muhtar** of **Ibn Abidin**).

But what if she invites her boyfriends to the shelter provided for that purpose? We'll learn from your Honours and your Worships.

### **QUALIFICATIONS/PRE-CONDITIONS NECESSARY FOR HADHANA**

Although the mother or her relations (ذو رحم) and the father, his relations or executors can take care of a child up to seven years (or peculiarity of the case to be determined by the court in a particular jurisdiction it operates), the custodian has to meet certain qualifications which are pre-conditions for undertaking such a task, the lack of each one of which would lead to losing the competence to this end.

Of course, it is to be noted that if undertaking the child's custody is subject to the realization of these qualifications, there is no difference in this task between the mother and other people of equal rank or her successors. And among these include:

1. **Intellect:** Among the basic requirements of the mother's custody of her child is her being sane. If the mother does not enjoy the soundness of intellect, she cannot undertake her child's custody because she is not only unable to take care and safeguard her child, but she herself needs someone to take care and custody of her.

However, the jurists wonder if there is a difference between the periodical and chronic insanity in this respect. They have had different opinions. To our opinion, however, taking care of her child is possible for a mother only in case she enjoys soundness of intellect, i.e. being accountable, because how can an insane person who is unable to manage his or her own life, be able to take care of another person?

2. **Trustworthiness:** Among the qualifications mentioned in legal texts for permitting the mother to take the custody of her child is her trustworthiness. This has been interpreted in two aspects: Lack of sinful signs (depravity) and lack of negligence in the issues related to the child's life, which seems to be more pertinent. Since the very legislation for custody is for protecting the life and psycho-physical well-being of children after the ominous phenomenon of divorce; instead of engaging the children in such acts as beggary, windshield cleaning, etc. Can it be claimed that the Holy Lawmaker would consent to such an act?
3. **Unaffected with Chronic and Contagious Diseases:** We explained previously that the mother's insanity is a factor in disclaiming her competence in the custody of her child. Furthermore, some jurists have raised the question whether the mother having being affected with chronic and contagious diseases, as was the case for insanity, causes the loss of her competence or not.

The Maliki and Zahiri's raised the issue, that a child's living with its sick mother will cause harm to it and by referring to the Prophet's (PBUH) words warning to keep a distance from those infected with leprosy and not watering a diseased camel from the same place as the healthy animals drink. They claim that such medical considerations in a religious context prompted them to proclaim with certainty that a child must be separated from its sick mother.

Other qualifications include, but not limited to:

4. She should live in a place where the child may not undergo any risk morally or physically.
5. She should be of an age which would qualify her to bestow on the child the care which it may need; coupled with a good character.
6. If there are several relations, equal in degree or not, entitled to the custody of the child, the one who most tenderly looks after the child's interests is entitled to preference, then the one most virtuous and then the one senior in age. We can here see how Shari'a is more liberal and tolerant than most modern legislations.
7. And, for the mother not to re-marry as explained earlier in this paper.

#### **ON WHAT GROUND CAN CUSTODY BE TAKEN AWAY FROM THE MOTHER**

Once custody of the child is granted, it is not permanent. A significant change in the circumstances will be the basis of consideration by the court. A child can be turned over to its mother to be taken care of (custody) during its first two years of life (infancy) as long as the mother consents to breastfeed her child. However, if she rejects to do so, the father is permitted to hire a foster suckling-mother for the child and take its way from its mother.

A mother will lose custody:

1. If there is an impediment such as insanity or
2. Having re-married.
3. Also where she openly indulges in sins such as adultery and there is a fear of the child being affected; or
4. She does not attend to the child due to her leaving the house very often.
5. She demands payment for the upbringing of the child if there is another woman to raise the child without remuneration.
6. If she relocates to a long distance where the father cannot visit the child and come back in a day.

The question here is, His Lordship, in this context 'Her Lordship' may be working with National Industrial Court or Federal High Court in Kebbi State, transferred to Taraba where a befitting house awaits her with considerable security, can the distance be enough reason to take away custody from her?

#### 7. Contagious diseases.

### **RESTORATION OF THE RIGHT OF HADHANA**

It is important to note here that if these impediments are removed, then the right to custody is restored.

Where the custodian, on her own free will places herself, in such circumstances as render her incompetent to exercise the right of hadhana, such right will never be restored to her even though the cause of disqualification disappears. For instance, if she marries a stranger and the marriage consummated, her right to the custody of the child will not revive should she be separated from the second husband either by divorce or death. But if the right is lost involuntarily e.g. through illness or the father moving to another place of residence, her right will revive as soon as she is cured or the father returns to his former place or she moves to the father's new place of residence.

As earlier stated, significant change is a basis of consideration by the court. Therefore, if a mother had the custody and she re-marries, this would be considered a significant change. It does not mean that the custody will be revoked, it only means a review.

The jurists have differed in this matter. Some are of the opinion that if mother marries a close relative of the child, then there is no need for a review, while others opined that marrying a non-relative of the child should necessitate a review.

By the subsequent marriage of the custodian to a complete stranger, she does not lose the right until the marriage is consummated, and the father or other legal guardian does not within the space of one year from the date of the consummation of the second marriage and the date of his knowledge thereof, claim custody of the child, it would remain henceforward under her care.

The right of **hadhana** is also lost if the child is removed, without the consent of its father or guardian, to such a distance from his usual place of residence as would prevent him from exercising his right of general supervision and control. This rule is only effective, according to Maliki's and Hannafi's when the distance is more than 72miles which contemporary texts approximated at 115 kilometers.

But where the change of residence is a temporary one, the right of **hadhana** is not lost. If the father moves from his usual place of residence, he has the power of withdrawing the child from its custodian.

**Hadhana** is also lost by apostasy and such misconduct on the part of the custodian as is prejudicial to the interests of the child. But some jurists (after studying that renowned Hadith) on this matter in which the Prophet (PBUH) is reported to have said:

وقال المالكية: "تستمر الحضانة في الغلام إلي البلوغ علي المشهور, ولو مجنوننا أو مريضا, وفي الأنثي إلي الزواج ودخول الزوج بها, ولو كانت الأم كافرة, وهذا في الأم المطلقة أو من مات زوجها"

انظر الشرح الصغير 2 ظ755 وما بعدها

والقوانين القهية ص224 وما بعدها

نقلا عن الفقه الإسلامي وأدلته



The jurists said that being a polytheist does not nullify the right of a mother to her child. Other scholars however, are of the opinion that being a Muslim is a pre-condition for custody of a child.

With all respect, the later opinion does not sound correct because it is being said: *“kowa ya sayi rariya, ya san zata zubda ruwa”*. It needs to be noted here that all the jurists are silent on Christian and Jewish women. This is because Islam allows a Muslim male to marry a Christian or Jewish woman and therefore be entitled to custody of an issue therefrom.

### **OTHER PERSONS ENTITLED TO CUSTODY**

Under the Islamic Jurisprudence, mother is the first custodian for an infant or very young child. This is keeping in mind the best welfare of the child. If the mother is not fit for some reasons such as physical disability or mental illness, then the custody will be granted in the following order: (though there is no hard and parcel rule) the welfare of the child is the prime objective.

In default of the mother, the right passes to other relatives, priority being given to females and to the maternal side asserted by **Ibn Barraaj** as follows:

1. The mother's mother how high so ever (the mother's father's mother excluded).
2. The maternal aunt and grand-aunt.
3. The father's mother how high so ever.
4. The father.
5. The paternal aunts and grand-aunts.
6. The child's sisters and their daughters, priority being given to the full sisters, followed by uterine sisters and then consanguine sisters.
7. The father's executor or the executor's executor.
8. Anyone appointed by the Qadi.
9. The child brothers, uncles and paternal grandfather.

The reasons for this is that, in the early years, the mother and the other female relatives are more suitable for raising the young child (regardless of sex) with love, mercy, attention, and motherly care.

In contrast to this view, other views have also been raised by some jurists such as transfer of custody to the child's near kin according to the hierarchy of their inheritance '*awla bi mirathi hi*' (agnates in the science of inheritance). i.e transfer to the child's paternal kin, which, given the previous explanations, do not sound correct.

### **DURATION OF HADHANA**

The right of the mother to the custody of her male child, some said, extends until puberty and in the case of a female child until such a child is married and her marriage is actually consummated. And no male has the right to the custody of a female child unless she is a minor or a muhrim to him, that is within the prohibited degrees of relationship, and cannot under any circumstances marry her.

There is consensus of opinion among the jurists that custody begins right from the day a baby is born up to the time he can discern what is what. But they disagree as to the period to be in custody thereafter.

To the Maliki's, thereafter, the custody of the male child extends up to puberty, even if he is insane or had some disability. And to a female child until she marries and the marriage actually consummated and even if the mother is infidel, as pointed out earlier. And when the period of custody is over, the child is to be returned to its father, grandfather or his executors.

Once the child becomes older (than 2 years), the opinion changes. Some jurists believe that a male child should be returned to the father at age two. Others think this age is seven. In case of a female child, some jurists believe this age is seven while others think it is puberty. According to Fiqhul Ahmadiyya, the age when the child should be returned to the father is nine years in case of both male and female child.

In the Wilayat Al-Mar'ah Fil-Fiqh Al-Islami page 692, it is said that the period of custody lasts until the age of discretion and independence, i.e. until the child is able to discern what is what and is independent in the sense that he can eat by himself, drink by himself and clean himself after using the toilet, etc.

When the child reaches this age of independence, which is usually at the age of seven or eight whether the child is a boy or a girl, the period of kafaalah or sponsorship of the young begins, which lasts until the child reaches adolescence or in the case of a girl starts her periods, then the period of sponsorship ends and the child is free to make his own choice.

But according to Mufti Muhammad Ibn Adam of Darul Iftaa, Leicester, UK: The male child after reaching the age of understanding is in need of education and acquiring masculine traits, which is why he is then transferred to the father. The female child after reaching the age of understanding is in need of being inculcated with female traits, which she receives by living with her mother.

Some jurists have asserted two stages of child custody. According to them, the issue of child custody is examinable in two stages: the infancy and afterwards; or, in other words, before and after two years of age.

### **1. Child Custody before the Age of Two**

Some jurists believe that the custody of a child before the age of two is to be undertaken by the mother. Others believe that the custody of the child is upon both parents, even though they are separated.

### **2. Child Custody after the Age of Two**

In this respect, three hypotheses were formed.

- (i) The parents being alive.
- (ii) Either of the parents being alive.
- (iii) None of the parents being alive.

Which all suggests to the question of who will be entitled to custody as pointed out elsewhere.

## DURATION OF CUSTODY IN VARIOUS JURISDICTIONS

### IN KUWAIT

Research has shown that in Kuwait a girl remains in the care of Hidhana until she marries.

### IN MOROCCO

The length of period is 12 years for a boy 15 years for a girl. After this period, the child is given the choice to stay with the father, mother or another relative.

### IN EGYPT

It is 9 years for the boy and more than this for the girl.

## JUDICIAL DECISIONS ON CUSTODY

In the case of **BILYAMIN BISHIR VS SUWAIBA MUHAMMAD KTS/SCA/KT/39/2019** which is an appeal from Upper Shari'a Court No. II, Katsina to the Katsina State Shari'a Court of Appeal. It was the plaintiff Suwaiba, who had seven children with the defendant sued the defendant, her former husband Bilyamin, asking the USC II, Katsina to give her custody of 4 out of the seven children then in custody of the defendant; for her to put them together with the remaining 3 children with her to continue taking care of the 7 children since she did not re-marry. And asked the court to order him be paying their upkeep.

The defendant objected to her claim and added that they went to the Katsina Emir's palace where they attempted to settle the parties for the father to take 4 out of the children, and the mother to take 3. And to consider what the father will be paying for their upkeep.

The Upper Shari'a Court gave an option to the children to choose whom they prefer to stay with; on which they chose their mother. The Court left the custody with the mother and ordered the father to be paying her ₦7,500:00 monthly for their upkeep.

The defendant/Appellant appealed to the SCA, Katsina State and his grounds of appeal inter-alia include:

1. The trial court did not consider the ages of the children before giving custody to the mother which were Khadija 15, Muhammad 13, Fatima 12, Amina 10, Ahmad 8 and Zainab 3 years. And added that custody of a male child terminates at 7 and female child 9 years.
2. That the trial court did not consider the fact that the mother does not usually stay at home and she lives in a rented apartment where no one admonishes her on what she does.

In her response, the plaintiff/respondent argued that on the issue of ages of the children canvassed by the appellant, it is the views of Hannafi school of thought while Shari'a Courts in Katsina State are guided by Maliki Law and by Maliki Law, custody of a male child does not terminate until it reaches bulug; and to a female child until it get married and the marriage actually consummated.

On the other ground, the respondent argued that staying in a rented place is not an offence. The place is very close to her parents' residence and it is her father who pays the rent.

The appeal court formulated an issue thus: Is it right to leave all the 7 children with the respondent as decided by the trial court?

The court said before the law establishing the Shari'a Courts, i.e. **Katsina State Law No. 5 of 2000** placed the courts on Maliki Law, it had asked them to abide by Qur'anic provisions, Traditions of the Prophet (PBUH), Qiyas and Ijma'i (consensus of opinions) as provided by **Section 8 of the law**. And this may not be unconnected with what was obtained from the 4 leaders of the schools where each one of them says:

إذا صح الحديث فهو مذهبي

Therefore, the paramount issue to be considered in this case is attaining justice and the authorities relied upon in making the decision, but not the school of thought relied upon.

The court said that the first thing to be considered in custody matter is the child's best interests; his health, proper training and his education. That is why Abubakar Jabir Al-Jaza'iriy in his book Aysarut-tafaseer Vol. I, page 221, after he brought the tradition which says لا ضرر ولا ضرار, he then said: Here what is to be considered is the best interest of the child. The court will ascertain the person who will be capable of taking care of the child and give him proper training and counseling, and that: the preference should be given to a person who will be more lenient to the child.

The SCA said: in the matter before them, the children on whose custody is being litigated, Khadija of 15, Fatima 12, and Amina 10 years can all be married out and their husbands can in law consummate their marriages. Therefore, a degree of caution must be exercised regarding their custody.

In a book Al-Kharshiy Vol. 4, page 211 where an explanation is being made on the views of Sheikh Khalil where he said:

وحرز المكان في البنت يخاف عليها  
ومما يشترط ايضا في حق الحاضن ان يكون المكان الذي  
يسكن فيه بالنسبة الى البنت حرزا مصونا

MEANING:

*"There must be confidence on a person to be given custody of a female child.  
It is a condition that such a person lives in a secured environment."*

It is also made a condition in the case of a custodian that the place where he will be residing with the child to be safe and secured.

Also in a book *Al-Sharhul Kabeer of Ad-Dardeer Vol. II*, page 528, it is said: To a girl who reaches the age of puberty, there is need to have secured place where she can be protected from any abuse.

On the second ground that the respondent lives in a house rented by her father and she roam about and does not stay at home, the court said it is of course a problem that need to be considered. Because trustworthiness, as mentioned by Sheikh Khalil, in his book *Mukhtasar* at page 139, is one of the conditions for custody.

And in a book *Durrul-Muktarwa Hashiyat Ibn Abideen, Vol. III*, page 556, trustworthiness or integrity was interpreted thus: A child will not be jeopardized as a result of the mother not staying at home.

Also, in a book *Al-Mabsut Sarkhisiy Vol. V*, P. 208, it is explained that if a girl reaches puberty, she will need to be married and her desire may be high and in such a circumstance men are more jealous to their children than women. Therefore, the father will be vigilant than the mother.

Therefore, since one of the children, Muhammad is 13. At this age, he needs masculine gender training, to enable him learn how to go about life to be self-reliant. And such training is not meant to be given by feminine gender. That is why in a book called *Al-Mabsud* which the court cited earlier on, it is said: If a child reaches puberty, he will be in need of education and male gender activities which only father can introduce that to him in addition to his feeding and discipline unlike if under the custody of the mother.

The Katsina State Shari'a Court of Appeal said based on the facts and the reasons adduced by them, they are of the opinion that there is no wisdom in the decision of the trial court for leaving 7 children under the custody of the respondent.

We so therefore amend the decision. We have now given the Appellant custody of 4 children: Khadijah 15, Muhammad 13, Fatima 12 and Amina of 10 years respectively. While the respondent is to hold in custody of the remaining 3 children: Ahmad of 8 years, Aliyu 5 and Zainab 3 years up to the time prescribed by Islamic Law.

In addition, it is ordered that the appellant is to be giving ₦10,000:00 to the respondent for their upkeep. And he will be responsible to take care of their health, clothing and education as imposed to him by the shari'a, relying on Qur'anic provision in Chapter 2: Verse 233.

The writer will leave this decision for the participants to digest and comment.

In the case of **RABI ABDULMAJID VS ABDULMAJID ISMA'IL**, the plaintiff sued the defendant asking for confirmation of divorce and custody of their three children. In her testimony, she stated that she was a Christian before the defendant helped and converted her to Islam and married her. The marriage is blessed with three children. According to her, trouble started when she gave birth to her third child who turned out to be a female child named Maryam. That when the defendant realized that the child was a female he started having affairs outside the marriage. She became frustrated and decided to resume her studies. He subsequently divorced her and when his father intervened, the marriage resumed. He later accused her of committing zina with a colleague of her's after seeing some Facebook messages on her phone. After this, the marriage deteriorated and finally came to an end with three irrevocable divorces pronounced by the defendant on 16/2/13. Thereafter, the plaintiff sued the defendant for defamation of character, confirmation of the divorce and custody of the three children. On this part, the defendant confirmed the three divorces. He also admitted accusing her of committing zina. On the issue of custody, he pleaded with the court to award him custody for the proper upbringing of the children according to the Islamic faith.



Surprisingly, the court decided to ask the parents of the parties for their views first and while the father of the defendant left the decision to the court, the plaintiff's mother asked the court to award custody to the father because as she said, 'he is also her son'. The court then awarded custody to the defendant's father i.e father's father and authorized the defendant to obtain accommodation for the plaintiff close to the father's father's house to enable her be close to her children. The questions or issues that beg for answers here are:

1. Is a mere allegation of immorality without proof sufficient evidence to deny the mother custody of her children?
2. Does being a convert deny the mother eligibility to custody of her child?

On the first issue, it is submitted that the mere allegation of immorality without proof is not and cannot be sufficient ground to deny the mother custody of her child. In fact, such an allegation without proof will amount to the offence of *qadhaf* for which the father could be punished but surprisingly enough, though the mother sued for *qadhaf*, the court was silent on the issue. Therefore, in the absence of such proof, her eligibility should be intact.

On the second issue, it is the position in Islamic law, relying on the traditions cited earlier that being a non-Muslim does not render a mother ineligible to custody. If a non-Muslim is entitled to custody, what more of a Muslim? A convert to Islam is a Muslim and there exists no tradition of the Prophet that excludes a convert from eligibility to custody. Agreed custody to a non-Muslim is frowned at but just like divorce, the dislike does not make it illegal.

However, in the case of **RAKIYAT SADIQ V. SADIQ ANIMAKUN** which is an appeal to the Shari'a Court of Appeal of Kwara State, the marriage was dissolved in Grade 1 Area Court Lafiagi at the instance of the husband and they granted custody of the eight year old daughter to the father by requesting the child to choose among the parents and the child chose the father.

This, the court did relying on a Sunnah of the Prophet as it stated. The mother appealed to the Shari'a Court of Appeal in Kwara against the award of custody. She argued that the father cannot take proper care of the daughter because being a police officer, he travels a lot and the daughter is left with her co-wife with whom they are not in good terms. She also informed the court that she had not remarried.

The court after hearing from both parties and relying on the following books: Jawahirul Iklil Vol. II, Order VII Rule 2 (1) of the Shari'a Court of Appeal Rules Cap. 112 Laws of Northern Nigeria 1963, Fiqhus Sunnah by Sayyid Sabiq Vol. II, Minhajul Muslim, Ashalul Madarik Vol. II, Al-Fiqh Ala Madhahibul Arba'a Vol. 4 and S13 (a) of the Shari'a Court of Appeal Laws Cap. 145 Laws of Kwara State of Nigeria 1994 allowed the appeal and awarded the custody to the mother based on the fact that the mother has not remarried, she has not been disqualified for any reason, that the judge applied the opinion of Hannafi and Shafi'i schools in giving the child the option of choosing at that stage instead of the opinion of Maliki School which is the applicable law in Shari'a Courts in Nigeria.

In the words of the court: For the above reasons, the judgment of the trial court is unfair to say the least. He did not follow necessary procedure in conformity with the applicable law before arriving at his decision. We therefore allow the appeal and set aside this decision with an order that the custody of Salamat is hereby awarded to the appellant since she has not remarried.....Appeal succeeds.

## MAINTENANCE UNDER ISLAMIC LAW

Maintenance, sometimes also referred to as Child's Support in some jurisdictions such as the USA, is defined by Black's Law Dictionary as "financial support given by one person to another, usually paid as a result of a legal separation or divorce."

It goes further to define child maintenance as "a parent's regular furnishing of necessities to his child including shelter, food, clothing and school supplies. This is a parent's regular monetary contribution sufficient to furnish such necessities, especially when made in accordance with a court order."

Child maintenance is usually required from the parent who does not have custody of the child after a divorce.

Maintenance and Child Custody are two thematic areas belonging to Islamic Family Law component. These two words are interrelated and are often discussed together by Shari'a scholars. Although, the word 'maintenance' which is represented in Arabic/Shari'a terminologies as *an-Nafaqah*, accommodates different dimensions of maintenance, including but not limited to maintenance of slaves, pets, poor parents, etc. The context of the topic of this lecture, however, seems to suggest maintenance with particular focus on wife and children.

Maintenance in Shari'a is the provision of food, clothing, shelter and other essential and welfare services such as medicare and education of children for one's wife and children even if the wife happens to be a rich lady. Relying on textual provisions from the Qur'an and Sunnah, Muslims jurists and scholars are in agreement that in a marriage, it is the husband's duty to maintain his wife and children in so far as the wife continues to observe matrimonial duties.

## TEXTUAL BASIS OF MAINTENANCE OF WIVES AND CHILDREN

Two types of maintenance are primarily our focus, namely: maintenance of wives and children. On the former, the Glorious Qur'an clearly explains the duties of a husband to his wife. Allah says:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ  
لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا  
لَا تُضَارَّ وَالِدَةٌ بَوْلِدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ

*"The Fathers (husbands) should bear the cost of their (wives) food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear."*

In the Prophetic tradition, the Prophet (PBUH) was asked about the duties of a husband to his wife, he answered:

أَنْ تُطْعِمَهَا إِذَا طَعِمْتَ، وَتَكْسُوَهَا إِذَا اكْتَسَيْتَ،  
وَلَا تَضْرِبِ الْوَجْهَ، وَلَا تُقِيحَ، وَلَا تَهْجُرَ إِلَّا فِي الْبَيْتِ

### MEANING:

*"To feed her the way you feed, to cloth her the way you cloth (yourself) and not to slap her on the face and not use insulting words against her."*

In another verse, Allah says:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ

### MEANING:

*"Men shall take full care of women with the bounties which Allah has bestowed in abundance on one above other, and with what they spend out of their possession."*

The rationale behind maintenance of wives was brilliantly elucidated by as-Sayyid Sabiq when he said:

*The Lawgiver imposes the duties of maintenance of wife on the husband because by the virtue of a valid marriage she has become restricted to her husband, as a right to its entirety and as endless source of satisfaction. She has to be loyal to him, remain in his house, manage his house, nurse and bring up his children. In lieu of these, he has to maintain her.*

Husband's obligation to be responsible to the care of his wife is beyond the peaceful periods and happy moment shared together by the couple, as the wife is equally entitled to full maintenance in the residence of her husband during waiting period called 'Iddah' in the event of a revocable divorce at the instance of the husband. Allah, the Most Merciful, directs:

وَالْمُطَلَّاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

**MEANING:**

*"For the divorced woman, maintenance should be provided on a reasonable scale. It is a duty on the righteous."*

In a like manner, a divorced pregnant woman is entitled to full maintenance as well by her husband until she delivers her baby. This is the Qur'anic guidance as contained in the following verse:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا  
عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ  
فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۗ وَأْتَمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۚ وَإِنْ  
تَعَاسَرْتُمْ فَسْتَزْضِعْ لَهُ أُخْرَىٰ

سورة الطلاق (6)

## MEANING:

*“Let them live where you live ‘during their waiting period’, according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver. And if they nurse your child, compensate them, and consult together courteously. But if you fail to reach an agreement, then another woman will nurse ‘the child’ for the father.”*

The Common Law mindset imposed on Africans has a contrary view on this as per Matrimonial Causes Decree (now Act). In **Okafor Vs Okafor (2007) 10 NWLR Pt. (1043) 521**, Oputa, JSC (of blessed memory) articulated the reasons for not granting spousal maintenance by judges where he said:

*“--- A petitioner seeking to sever all ties with her husband should not maintain any financial connection with a man she no longer has marital obligations.*

*--- Why shouldn't there be a complete dissolution, including the termination of all previous financial ties?”*

Also in **Adeleke Vs Adeleke (2010) LPELR - 3602 (CA)**, a Customary Court refused maintenance, asserting that “such support for a divorced woman is a foreign practice and not recognized under Customary Law”.

Like we said, Islamic Law which liberates rights of women than any other law accommodates such a practice.

Opinions however, differed among schools of Islamic jurisprudence on whether a wife is entitled to maintenance by her husband if the divorce is an irrevocable one. The jurists, however, agreed on the fact that following completion of her waiting period, a divorced woman is no longer entitled to maintenance as she becomes totally independent and free from all conjugal ties.

Islamic law places the burden of maintenance of male and female children on the shoulders of their fathers. The male child continues to depend on his father until a time he becomes capable of earning a living on his own and this is usually qualified as the period of puberty. While such duty of maintenance remains with the father of a female child as well, until she is married and the marriage is consummated. Suckling as a component of maintenance of children is a duty of both parents and its maximum duration is two years. The husband (i.e father of the baby) provides full maintenance for his wife (nursing mother), while the wife takes care of the suckling.

### **SOME LEGAL ISSUES ON MAINTENANCE OF WIVES**

Having clarified under the preceding section on textual origins, the general position of Shari'a on maintenance is that an irrevocable divorce is a divorce at the instance of the wife or the court or a third divorce pronounced by the husband. In such situation, the jurists differed on her maintenance by the husband. According to the Hannafi School, a woman in a waiting period after the irrevocable divorce is entitled to full maintenance by her husband like a woman of revocable divorce. They relied on Q2:241 above on the maintenance for divorced woman generally. The position of Hambali School is to the contrary i.e a woman in an irrevocable divorce is not entitled to maintenance during her waiting period. They relied and buttressed their position with an authentic Prophetic tradition in Sahih Muslim when Fatimah bint Qais was divorced by her husband, 'Amr bin Hafs when he was away and she was displeased. When she reported to the Prophet, he said to her that there is no maintenance for her from him.

To the Maliki and Shafi'i Schools, only shelter is guaranteed for a woman in an irrevocable divorce. They cited a textual authority in support of their stance:

*When you divorce women, divorce them at their waiting period and keep count of it, and fear Allah, your Lord. Do not turn them out of their houses, and they should not leave during that period unless they are committing clear immorality.*

The maintenance of a nursing mother who is in her waiting period may either come in form of full maintenance or remuneration. If she gets full maintenance, then there is no need for remuneration. Alternatively, where she does not get full maintenance, then she is entitled to remuneration as ordered in the verse:

فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ

**MEANING:**

*“And if they breastfeed for you, then give them their remuneration”*

Since there is no waiting period for a wife divorced before the consummation of the marriage, it follows too that there will be no maintenance. A parting gift, in form of prize, is however recommended. The legal provisions in this regard are in Q 33: 49 and Q 2: 236 – 237.

A widow is entitled to one year full maintenance covering food, clothing and shelter at the residence of her deceased’s husband. This one year period was initially the waiting period for widows until it was abrogated and replaced with four months and ten days in yet another verse. Jurists deduced the one year maintenance ruling from the Arabic expression. "متاعًا إلى الحول غير أخراج" (maintenance for one year without expulsion). In the verse below:

*“And those who are taken in death among you and leave behind widows should make Will of **maintenance for one year without expulsion** for them. But if they leave of their accord, then there is no blame upon you for what they do with themselves in an acceptable way. And Allah is Exalted in **Might and Wise.**”*



## QUANTUM OF MAINTENANCE

There is no specific amount of measure for maintenance under Islamic law. That notwithstanding, there are general indications that the measure in any case should be according to the means of the husband, the needs of the wife and the social status of both of them. In this regard, the Glorious Qur'an provides some guidance:

لِيُنْفِقْ ذُو سَعَةٍ مِّن سَعَتِهِ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا

*Let a man of wealth spend according to his wealth, and he whose provision is restricted, let him spend from what Allah has given him. Allah does not charge a soul except according to what He has given it. Allah will bring about, after hardship, ease. Q2:236. And Q2:241*

Elaborating on measure of maintenance in Islamic law as contained in the general indications from the above verses, his Lordship and former Grand Kadi, Kwara State Shari'a Court of Appeal, Hon. Justice M. A. Ambali said:

*To determine the standard of maintenance to which a woman is entitled, the first factor is the financial capacity of the husband. The other factor is the consideration for the status of the woman. These factors are her beauty, nobility of birth, education and wealth. Next is the degree of urbanization of life in the community where the couple lives and finally, is the prevailing cost of living at any given time. As all these situations change from time to time, upward or downward reviews are due in the standard of maintenance expected from a husband. As wives can request for upward review of maintenance as they move from rural to urban area, so the husbands too can ask for its downward reviews if he suffers a reversal of fortune.*

## CONCLUSION

Child custody and maintenance of children are very significant in the upbringing and overall welfare of a child. In most instances, the two determines what or who the child turns out to be later in life. As stated earlier, children are gifts from Allah and a trust (*amanah*) in our custody. We must therefore care for them and preserve them by implementing the teachings of Islam and following what the Holy Prophet (PBUH) guided us to in his prophetic tradition where he said each of you is a shepherd and each of you will be accountable for his flock.

In its legislations and jurisprudential laws, Islam pays special attention to women and children. The main purpose of *hidhana* is caring for the child, and the women being generally more caring and compassionate, they are more suitable for custody and even from the literal meaning of *hadhana* which means "to embrace" shows that custody is the domain of women.

Where a marriage terminated by death or divorce, the custody of a child is with the mother but its maintenance remains with the father. i.e, the mother keeps or lives with the child, its father provides all the necessities for the child and if it happens the child is to make any financial dealing or some other transactions, the right to guide or making the transactions is with the father, his representative or a family head from the father's side.

This paper therefore, brings to light that, Shari'a attitudes toward women and children is unique and sufficient.

Islamic Law pays special attention to the distinct needs of male and female gender. For instance, in Islamic inheritance male child take a double of his sibling sister because Shari'a provides that if she is young, her parents take care of her; if she marries, her husband takes care of her and in case she is divorced, if the father is no more, her male brothers take care of her.

Therefore, there is logic in giving her half of what a male child inherits.

On the other hand, women are adequately compensated in maintenance and child custody because of the pain they go through in conceiving and nursing children; the custody is vested on them.

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