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Research Article

A Comparative Study of Child Custody Under Islamic and Nigerian Laws

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Abstract. Child custody cases have been attended to differently in term of jurisdiction within the frame of Islamic and Nigeria laws. Although like *Shari'ah*, Nigeria laws also emphasize the importance of the interest of the child, despite this, there are numerous dissimilarities that lie between the Islamic and Nigeria laws on the issue of child custody. Therefore, this paper aimed at analyzing the differences that are inherent in the two laws with a view to showcasing the similarities and dissimilarities. It also aimed to assess the Islamic principles governing child custody, including the factors considered in determining the most suitable guardian, the rights and responsibilities of the custodian, and the legal procedures involved. The paper adopted descriptive and analytical methods of research in carrying out the study. The descriptive method was used in explaining how child

custody is being maintained under Islamic and Nigerian laws while analytical method was used to discuss the similarities and dissimilarities between the two laws. The paper revealed that the common similarity between them on child custody is in the area of interests of the child in choosing his custodian. It also found that Nigeria law always gives priority to father in most cases in Nigerian customary law except where the child has not reached the age of puberty. The paper concluded that the parents are custodians of their children and are responsible for them before Allah. Therefore, the paper recommended that couples should find possible means of avoiding separation and when it becomes necessary the interest of the children should be given priority.

Keyword: *Ḥaḍānah*, Child Custody, Islamic Law, Child Welfare, Parental Rights,

INTRODUCTION

During the sweetness and romantic moment of the marriage, the question of custody of child does not arise because it is a common knowledge that the child belongs to the wedlock. Marriage naturally connects children with their fathers. However, when the union does not seem feasible again and separation seems imminent, it is then crucial that it does not leave a negative impact on the child upbringing. Child custody is a significant aspect of family law that addresses the care, upbringing, and well-being of children when parents separate or divorce. The determination of child custody involves complex considerations, which may vary across different legal systems and cultural contexts.

The decision on child custody is very crucial that as it can affect the child negatively or positively, but, since children are trust from Allāh (Al-Bukhārī, 1991), they should be treated with care and affections and the separation of couples should not leave them with negative impacts. It is apposite to note here that children have certain rights that must be protected among which is reception of proper care and love. During their period of childhood, they need both financial as well as emotional support which can only be made possible through the cooperation of both parents (Ibrahim, 2018). Leaving children wanting of these two important supports will not only cost the parents but also the society which will bear the brunt.

In this case, Allāh repeatedly tells believing couples to be patient and overlook each other's faults in order to be saved from the evil of divorce. Thus, the Qur'ān says in Q 65:6.

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 the same vein, the Prophet emphasizes that:

ما أحل الله شيئا أبغض إليه من الطلاق

“Divorce is the most hated of all lawful (*Halāl*) things in the sight of Allāh” (Abu Dawud, 2007)

Based on the above quotations, it can be said that not all marriages ride on ecstasy till the end. At one point, love might turn into sourness. Thereby, Islām enjoins couples to seek out to manage their differences through the help of family members (Ibn Kathir, At-Tabari and Al-Qurtubi). However, if all peacemaking attempts fail, divorce is an option. Although divorce is disliked because of its attending consequences, Allāh makes it an option for couples to relax, and re-access themselves. Thus, it is a legal process with many things involved (Morin, 2022).

Following the separation of the union, most couples are always bitter and vengeful because of the highly-charged emotions which often lead to hostile against each other. The party that is most resourceful and having the custody weaponries to punish the other party by denying the other visitation rights is the father which is capable of affecting the child moral, socially and psychologically.

Accordingly, the Islamic and conventional systems project the issue of assuming the custodian of child as one of the vibrant cases to be attended to after divorce. Although, there are similarities and disparities between *Sharī'ah* and other legal systems, despite this, there is no any law that fails to take care of child custody and custodian. Unlike the assumptions that the partner with more resources should easily win the custody, both Islamic and Nigeria legal system are in agreement that the interest of the child is paramount based on emotional needs (Rafiq, 2014). Material needs can easily be transferred but it is difficult in the case of emotional needs. Although like *Sharī'ah*, Nigeria law emphasizes the importance of the interest of the child, but there are some areas which Islamic law, on child custody, is in conflict with Nigerian family law.

It is against this backdrop that this paper aims at delivisation in the similarities and dissimilarities between Islamic and Nigerian legal Law. In order to achieve this, the paper has been divided into ten sections; abstract, introduction, conceptual analysis of **custody and guardianship**, concept of child custody in Islām, qualifications for the rightful possession of *Ḥaḍānah*, concept child custody in Nigerian law, cases of child custody in Nigeria courts, similarities and dissimilarities as well as conclusion.

Definition of *Ḥaḍānah* and Guardianship: A Conceptual Analysis

Ḥaḍānah is referred to as child custody. It is a decision by the court as to which parent will have the care, custody, and control of a child (Legal Dictionary, 2022). Custody may be assigned to one parents, or to both parents jointly. The legal and physical relationship between a parent and his or her child is referred to as “child custody” (Club, 2022). The parent who has custody of the child is entitled to raise,

look after, and decide on the child. All decisions pertaining to the child's residence, healthcare, education, and religious upbringing should always be made by the child's biological parents. Child custody laws and the court become engaged when a child's upbringing and custody are in question.

Without getting into the legal terminology, child custody often refers to who has physical custody of a child, but in legal application, child custody is linked to guardianship of the child (Club, 2022). Therefore, "Guardianship" in the Oxford English Dictionary, is defined as "*the condition or position of being responsible for someone/something*" (Oxford Dictionary, 2022). In other word, child custody is defined as the care, control and upbringing of a child which may be awarded by a court to one of the parents as in a divorce proceeding (Oxford Dictionary, 2022). In relation to children, custody is an act of assuming responsibility for the child's development in all ramification.

The term 'custody' in Arabic is known as *Ḥaḍānah*. It is derived from the verbal root which is *Ḥa-ḍa-na*. It means 'to embrace' or 'hug'. In Arabic, *Ḥaḍānah* means "the distance between the armpits to the loins", "the chest and the two arms and what includes in between", which can be summed up as "embrace" (Amin, 1999). Accordingly, *Ḥaḍānah*, as an 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" (Omar, 2019). Thus, in the *Sharī'ah*, it means "raising or upbringing of a child" (Wahbah, 1998).

In the light of this, *Ḥaḍānah* can be viewed as **the protection of children from harm, to set up their fostering, and to give them the attention and care to which they entitle. Custody is the care and control of the child which may be awarded by court following divorce process.** In most times, people misinterpret custody with guardianship, while the two terms are not in contract. To understand the basic difference in the child's parentage: Custody describes a parent's care of a child which includes financial and emotional (Rafiq, 2014). In contract, guardianship is granted to someone who is not necessarily the child's biological parent (Rafiq, 2014). However, in some situations, a child may be under the guardianship of an individual while remaining in the custody of their parents to a degree.

As it is evident in a *Ḥadīth* that a child was asked to make a choice of under whose (between his/her parent) he wanted to remain (Abu Dawud, 1992), then it becomes the absolute right of the child, and not of either of the parents or any other person laying claim, to choose his/her custodian. The most important concern is to provide the child with a friendly atmosphere to grow up as a better member of society (Dhorat, 1996). Islām protects the institution of marriage by making various legislations, the rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man's job to earn livelihood and provide sustenance to the family, the mother is saddled with the responsibility of weaning

judgments. To this effect, according to Al-Imām Abū Ḥanīfah, 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 *Fatwā* (legal verdict) has been issued on this age, as normally children are able to take care of themselves at this age (Amin, 1999). This is because women are more compassionate, 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. It is reported from the Prophet that:

أن امرأة جاءت إلى 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.

A woman came to the Prophet and said: "O Messenger of Allāh! I carried my son in my womb, suckled him my breast and held him on my lap; yet his father has divorced me and wanted to take him away from me" (Al-Asqalānī, 2003). The Prophet replied: "You are more rightfully of the child as long as you don't marry".

Pre-Conditions Necessary for Ḥaḍānah

Although the mother or her relations 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 (Muhammad, 2003), 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. **Sanity:** 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 reason, 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 of her.

However, the jurists wonder if there is a difference between the periodical and permanent insanity (*Junūn*) in this respect. They have had different opinions (Muhammad, 2003). However, for the mother to take care of her child is possible 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 (Amin, 1999).

3. **Unaffected with Chronic and Contagious Diseases:** It is 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. On this, the Mālikī and Zāhirī'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 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 (Amin, 1999).

Others 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. It can be seen here how *Sharī'ah* is more liberal and tolerant than most modern legislations.

7. And, for the mother not to re-marry as indicated by the Prophet in the below *Hadīth*.

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.

A woman came to the prophet and said: O Messenger of Allāh! 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" (Asqalānī, 2003). The Prophet replied: "You are more rightfully of the child as long as you don't marry" (Asqalānī, 2003).

It is important to note that the mother can lose the custody of her child when the opposite of the above points occur. Accordingly, 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 (Hadjian)

Concept of Child Custody in Nigerian Law

According to Nigerian family law, the question of child custody arises after the commencement of divorce process. Mostly, the case of child custody is given fast hearing (Ambali, 2002). Before granting child custody, the court primarily considers the best interest of the child (Ambali, 2002). If the children can take decisions, the court asks them. For the minor, the court takes it upon itself to study the circumstances around by asking questions and reports from welfare officer. To determine what makes up the best interest of the child, the court can only study the circumstances surrounding the case at hand such as age, sex, personal preferences of the child, the emotional attachment of a child to a particular parent, financial status, education and the likes (Ambali, 2002). There are different types of custody in Nigeria Family Law (Oyitso), which are as follows:

1. **Joint Custody:** In Joint Child Custody, both parents have equal rights both on custody as well as making decisions on the child. The court ruling allows the child to stay anywhere at any time without any of the parent obstructing the child.
2. **Split Custody:** In split child custody, physical custody is granted to a parent and other parent is given the right to take major decisions like religion as well as academics. Also, in this, the children may be split between the couples
3. **Divided Custody:** Divided child custody means the custody is divided among the two. The court, acting on the interest of the child gives each parent the role that he can play better. Sometimes, the parent with more resources is given the spending role and other with custody role to maintain relationship between the two.
4. **Temporal Custody:** In temporal custody, when the couples instituted divorce process, then one of the parents has the custody according to the court till the case is finalised. The basic principle here is always the financial needs till court decides.
5. **Third Party Custody:** this is a situation where both parents are not fit and custody granted to someone not the mother or father. This happens if both parents are not interested in applying for the custody. In this type of situation, the court, acting in the best interest of the child may grant custody to the uncle or aunt of any other family member who has been adjudged to be able to fulfil the child's needs. Section 71(4) of matrimonial causes act gives room for the parents to have access to their child.
6. **Total Custody:** this means custody with no input from the other party.

In deciding the custody of child in Nigeria, some important aspects are taken into consideration (Oyitso). These are as follows:

(a) The divorce should not take maximum disruption in the life of the child. Acting in the best interest of child, court understands that mothers are the care giver of children. It considers mothers most in child custody. Since mothers understand children better, court considers mothers than men who may end up living them with nannies without proper care.

(b) In some cases, court uses the concept of user possession. After the father loses the custody, he is asked to leave the house if he cannot afford to pay for a new accommodation for the children.

(c) Naturally, a suckling child is under mother's custody most of the time unless in the case of serious medical threat to the child.

(d) Welfare of the child is crucial as in the financial, medical, and emotional needs.

Islamic and Nigerian Law on Child Custody: A Comparison

Islamic law and Nigerian Family law have similarities as well as dissimilarities. Thereby, the similarities are the following:

1. **Right to Child Custody:** Both in Islām and Nigerian family law, child custody is not meant to reward either of the parents or punish the erring parent. Both parties have equal claim to child custody. It is left to the court of competent jurisdiction to study it and make a proclamation (Rafiq, 2014).

2. **Imperativeness of the best interest of the child:** There is similarity between both Laws regarding the interest of child to select his custodian. In Islamic Law, it is unanimously agreed by Islamic scholars by emphasising on the sacredness of the best interest of the child which is primary for the determination of the custody (Omar, 2019). Moreover, under section 71(1) of Matrimonial Causes Act, it provides thus,

In the proceeding with the respect to the custody, guardianship, welfare, advancement or education of the children of the marriage the court shall regard the interest of those children as the paramount consideration, and the subject hereto the court may make such order in respect to these matters as it thinks proper (Law of Nigeria, 2022).

In Islamic family law, the welfare and best interests of the child are of paramount importance. The primary concern is to ensure the child's physical, emotional, and psychological well-being. Islamic Family Law recognizes that the child's best interests may vary depending on their age, gender, and specific circumstances. The decision regarding custody aims to provide the child with a stable and nurturing environment that promotes their overall development.

Similarly, Nigerian Family Law also prioritizes the best interests of the child. This is evidenced based in section 71(1) of Matrimonial Causes Act quoted above.

The Nigerian law recognizes that the well-being of the child is of utmost importance in custody cases. The court considers factors such as the child's age, health, emotional needs, and any special requirements when making custody decisions. The goal is to ensure that the child's needs and interests are protected and promoted.

Both Islamic and Nigerian laws acknowledge that the best interests of the child should guide the custody decision-making process. This approach recognizes that children have a right to be raised in an environment that is conducive to their physical, emotional, and psychological development. The law also aims at ensuring that custody arrangements prioritize the child's overall welfare and create an environment that fosters their proper growth and well-being.

It is worth noting that while the principle of the best interests of the child is a fundamental aspect of both Islamic and Nigerian family law, the specific application of this principle may vary depending on the circumstances, cultural norms, and legal interpretations within each respective system.

3. **Consideration of Mothers:** In Islamic family law, there is a general preference for granting custodial rights to mothers, especially for young children who have not reached the age of maturity. This preference is based on the belief that mothers possess natural nurturing qualities and are better equipped to provide care, emotional support, and meet the physical and emotional needs of their children. It is rooted in the notion that mothers have a special bond with their children and are more capable of providing a loving and nurturing environment.

Within Nigerian family law, there is often a preference for granting custody to mothers, particularly for young children. This preference is influenced by cultural and societal norms that view mothers as the primary caregivers. Nigerian courts generally recognize the important role of mothers in the upbringing of children and consider their ability to provide care, love, and support as a determining factor in custody decisions.

It is important to note that while there may be a preference for mothers, both Islamic and Nigerian family law acknowledges the rights and responsibilities of fathers in child custody matters. Fathers are typically granted visitation rights and are encouraged to maintain a meaningful relationship with their children, even if they do not have primary custody. This recognizes the importance of the child's bond with both parents and aims to ensure their continued involvement in the child's life.

Moreover, it is pertinent to note that the preference for mothers in custody decisions is not absolute in either Islamic or Nigerian family law. In cases where the mother is deemed unfit or unable to adequately care for the child, custody may be granted to the father or another suitable guardian, considering the best interests of the child as the primary factor.

4. **Consideration of Father's Rights and Responsibilities:** In Islamic family law, while there may be a preference for mothers as custodial guardians,

fathers are recognized as having important rights and responsibilities in relation to their children. Fathers are typically granted visitation rights, known as "custody of access" or "visitation rights," which allows them to maintain regular contact and a meaningful relationship with their children. The specifics of visitation arrangements may vary depending on factors such as the child's age, the parents' geographical proximity, and the child's best interests.

In the same vein, within Nigerian family law, fathers are recognized as having rights and responsibilities in relation to their children. Even if the mother has primary custody, the father is typically granted visitation rights to ensure his continued involvement in the child's life. Nigerian courts often emphasize the importance of maintaining a relationship between the child and both parents, recognizing that the child benefits from the presence and support of both parents.

It's important to note that the specific visitation arrangements and the extent of the father's involvement may vary depending on the circumstances of each case and the best interests of the child. The courts aim to strike a balance between the rights and responsibilities of both parents, considering factors such as the child's age, the parents' ability to provide care and support, and any other relevant considerations. In both Islamic and Nigerian family law, the involvement of fathers in the lives of their children is considered crucial. While custody may primarily be granted to the mother, the rights of the father are recognized, and efforts are made to ensure that the child maintains a meaningful relationship with both parents.

Nevertheless, the specific application of father's rights and visitation arrangements may vary in individual cases, and decisions are made based on the unique circumstances and the best interests of the child as determined by the court.

5. **Mediation and Dispute Resolution:** In Islamic family law, preserving the child's religious and cultural identity is considered a significant aspect of custody decisions. Islamic principles emphasize the importance of raising children within the framework of their respective religious beliefs and cultural practices. When determining custody, courts take into account the ability of each parent to provide an environment that fosters the child's religious upbringing and cultural heritage. This includes ensuring that the child has access to religious education, participation in religious practices, and exposure to their cultural traditions.

Nigerian family law recognizes the significance of maintaining the child's religious and cultural identity. The courts acknowledge the importance of the child's connection to their religious and cultural background and strive to ensure that custody arrangements support the child's continued participation in religious activities and cultural traditions. This includes considering the parents' ability to provide a nurturing environment that allows the child to grow within their religious and cultural community.

The aim of both Islamic and Nigerian family law is to protect and promote the child's religious and cultural identity while making custody decisions. This

recognition stems from the belief that children benefit from being raised in an environment that fosters a strong sense of identity and connection to their religious and cultural heritage. While there is an emphasis on maintaining religious and cultural identity, this consideration is balanced with the overall best interests of the child. In cases where there are conflicting religious or cultural practices that may negatively impact the child's well-being, the court may intervene to ensure the child's welfare and make decisions that prioritize their overall development. Therefore, both Islamic and Nigerian family law recognizes the importance of maintaining the child's religious and cultural identity in custody decisions. This consideration reflects the belief that children should have the opportunity to grow within their religious and cultural communities, fostering a sense of belonging and identity.

Dissimilarities between Islamic and Nigeria Law on Child Custody

Although the importance of child interest is duly stressed and other important concepts in both laws, there are variations in the two laws approach to child custody. These are:

1. **Legal Framework:** Islamic law is primarily based on religious teachings and principles derived from the Qur'ān and the *Hadīth*. It is applied in varying degrees across different Muslim-majority countries. In contrast, Nigerian law is made up of a secular system that is based on statutes, legislation, and common law principles. The Nigerian law incorporates various statutes and case law that govern child custody matters.

2. **Primary Consideration:** Islamic law generally prioritizes the best interests of the child in custody decisions. However, it also takes into account factors such as the child's gender and the age at which custody transitions from the mother to the father. In contrast, Nigerian law places a stronger emphasis on the best interests of the child as the primary consideration in custody matters, without specific gender-based distinctions.

3. **Maternal Preference:** While both Islamic and Nigerian law may show a preference for mothers in custody decisions, the degree of preference can differ. In Islamic law, there is often a stronger preference for granting custody to the mother, particularly for young children. In Islamic law, in a case of demise or inability of the mother to win custody, custody is awarded to the mother's mother, or maternal aunt, or mother's maternal aunt, father's mother before the father. In Nigerian family law, the father is considered first after the mother. While in Islamic law, a mother can never be given the full custody of the child which includes guardianship. Rather, the father is the natural guardian that makes major decision like who to marry and religion to follow. In contrast, Nigerian law may exhibit a more balanced approach, considering the best interests of the child and the abilities of both parents in determining custody.

4. **Legal Procedures and Requirements:** The legal procedures and requirements for child custody may differ between Islamic and Nigerian law. In Islamic law, custody matters are often resolved through informal processes such as mediation or arbitration, guided by Islamic principles. Nigerian law, on the other hand, typically follows formal legal procedures, including court hearings, submissions of evidence, and adherence to statutory requirements.

5. **Lack of duration of Custody for women:** Unlike Islamic law that gives conditions for male child custody till attainment of puberty, Nigerian law allows the male child to stay with the mother as long as she won the custody in court. The right of a mother, unlike the female child that only terminates when she is married, terminates when the male child reaches puberty. In Islamic law, he should be groomed by his father who teaches him masculinity.

6. **Custody of an illegitimate child:** In Islamic law, child born out of wedlock is not ascribed to the man who has illicit affairs with a woman; the child belongs to the mother. However, in very real circumstances in Nigerian law, such custody may be given to the father.

7. **Consideration of religion:** According to the majority of the scholars, when disagreement arises, the person that professes Islām wins the custody. This is according to the Prophet when a man called Rafi' bn Sinan accepted Islām but his wife refused to accept Islām. The Prophet made the mother sit down to a side and the father to another, and then made the son sit down between them. The son inclined to his mother. The Prophet then said: "O Allāh, give him guidance" then he inclined towards his father and he took him (Abu Dawud, 2007)

In allude:

حَدَّثَنَا إِبْرَاهِيمُ بْنُ مُوسَى الرَّازِيُّ، أَخْبَرَنَا عِيسَى، حَدَّثَنَا عَبْدُ الْحَمِيدِ بْنُ جَعْفَرٍ، أَخْبَرَنِي أَبِي، عَنْ جَدِّي، رَافِعِ بْنِ سِنَانَ أَنَّهُ أَسْلَمَ وَأَبَتْ امْرَأَتُهُ أَنْ تُسْلِمَ فَأَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ ابْنَتِي وَهِيَ فَطِيمٌ أَوْ شَبْهُهُ وَقَالَ رَافِعُ ابْنَتِي . فَقَالَ لَهُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " أَفْعُدْ نَاحِيَةً " . وَقَالَ لَهَا " أَفْعُدِي نَاحِيَةً " . قَالَ وَأَفْعُدِ الصَّبِيَّةَ بَيْنَهُمَا ثُمَّ قَالَ " ادْعُوهَا " . فَمَأَلَتِ الصَّبِيَّةَ إِلَى أُمِّهَا فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " اللَّهُمَّ اهْدِهَا " . فَمَأَلَتِ الصَّبِيَّةَ إِلَى أَبِيهَا فَأَخَذَهَا .

'Abd al-Hamid ibn Ja'far reported from his father on the authority of his grandfather Rafi' ibn Sinan that he (Rafi' ibn Sinan) embraced Islām and his wife refused to embrace Islām. She came to the Prophet (ﷺ) and said:

My daughter; she is weaned or about to wean. Rafi' said: My daughter. The Prophet (ﷺ) said to him: Be seated on a side. And he said to her: Be seated on a side. He then seated the girl between them, and said to them: Call her. The girl

inclined to her mother. The Prophet (ﷺ) said: O Allāh! Guide her. The daughter then inclined to her father, and he took her.

The above *Ḥadīth* is used by Islamic law to place significant importance on maintaining the child's religious and cultural identity. It emphasizes raising the child within the framework of their respective religious beliefs and cultural practices. While Nigerian law recognizes the significance of religious and cultural identity but does not explicitly prioritize it in custody decisions. Instead, the focus is on the child's best interests, which may encompass factors beyond religious and cultural considerations.

Conclusion

It is vividly clear that not all marriages ride on ecstasy till the end, however, if all peacemaking attempts to restore peace between couples fail, divorce is an option despite that it is disliked because of its attending consequences. Therefore, following the divorce, the issue of who to champion the affairs of the child(ren) of the fallen marriage is put to question. Thereby, in Nigeria, there exist different laws (i.e The Islamic, Customary and Nigerian Matrimonial Law) that tend to answer the question. This paper, therefore, has been able to sketch out the differences between the Islamic and Nigeria Legal System. Having analysed the similarities and dissimilarities, this paper found that Islamic Law has more considerations than Nigeria Law on child custody especially on the gender issue. It specifies that female child should reach the age of puberty before she can choose her custodian while the male child should reach the age of seven (7) before he can choose his custodian. While in the Nigeria Legal System all these are missing.

In lieu of the above, the paper recommends that:

1. Customary court, in Nigeria, should always engage *Sharī'ah* court on Muslims related child custody cases. This will give them (Muslims) the opportunity to enjoin the dictate of Islām on child custody.
2. Child born out of wedlock should be totally considered to be under the custody of his/her mother. This may, perhaps, reduce fornication and adultery that have widely spread.
3. The Matrimonial act which allows the male child to stay with his mother as long as she won the custody in court should be re-assessed. This is because, after the child has attained maturity, there is limitation to what the mother can instruct him to do and the level at which the child will respond to.
4. Couple should find possible way to solve any rancor that happens between them in order to way out possible divorce.
5. The religion or the belief of the custodian should be carefully considered along with that of the child while choosing custodian of a child.

6. Couple should exercise patient on whatever discord that may come their ways. While patience is taken, there is possibility that divorce will be reduced if not curbed.
7. Child should be given possible chance to exercise his choice of choosing who will be their guardian or custodians.
8. Tenable reasons should be the priority of judge before action can be taken or deciding on separation.
9. Mass awareness on the advantages of *Sharī'ah* law over the common laws.

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