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14 THE IMPACT OF CUSTOMARY COURT JUDGMENTS ON THE RIGHTS OF MUSLIM CHILDREN IN YORUBALAND

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INTRODUCTION

Islam is a long extant religion amongst the Yoruba people of South-Western Nigeria. By the time colonialists arrived at Yorubaland, Islam was already firmly established, though syncretism was prevalent in the land. Similarly, some towns in Yorubaland had Islamic law courts before the advent of the colonialists, who eventually put an end to the law.² The putting to an end of the Islamic legal system in some parts of Yorubaland by the colonial masters did not go unchallenged by the Yoruba Muslims.

In 1894, the Muslim community of Lagos delivered a written petition to the colonial governor demanding the application of Islamic law courts in matters concerning Muslims. Further, in 1923, the demand for Islamic law courts followed the negative reaction of the Muslim community of Lagos to the ruling of an English court in the case of Awawu Thomas, a Muslim woman who had been married against her wishes.³ A few years later, in 1948, there was a further formal demand for Islamic legal system by a group of Islamic scholars and Muslim students at Ibadan,⁴ which was similar to another petition submitted to the Brooke Commission of Inquiry by the Muslim Congress, which was based in Ijebu-Ode. The Muslim Congress also sent a letter to the chief secretary to the government demanding the recognition of the rights of Muslims through the establishment of Islamic law courts. The various efforts made by Muslims to demand Islamic law courts for the Muslims, as existed in some towns, were futile. Though the reason for the colonial administration's failure to accede to the demands of the Muslims was not disclosed, Tajudeen Gbadamosi, a scholar of Islamic history, is of the view that the petitions failed mainly due to the policy of the British government to rule in accordance with native law and custom.⁵ That notwithstanding, the British government's reluctance in acceding to the demands of the Muslims may not have been unconnected with differences in religion.

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 - 2 Abdul-Wahab TA. 2007. *The Institution of Shari'ah in Southern Nigeria: The Hoax, the Truth*. Shaki: Al-Furqaan Publishers, 29-30.
 - 3 Ajetunmobi MA. 2017. *Shariah Legal Practice in Nigeria 1956-1983*. Ilorin: Kwara State University Press, 32.
 - 4 Noibi DOS and Malik SHA. Memorandum to Members of the Constituent Assembly on the Shariah in the Draft Constitution. 8 February 1978.
 - 5 Gbadamosi TGO. 1978. *The Growth of Islam among the Yoruba, 1978-1903*. London: Longman Group Limited, 69.

The post-colonial era had its own share of the calls for the actualisation of the Islamic law for Muslims in Yorubaland. In 1976, the National Joint Muslim Organisations of Nigeria (NAJOMO), which was then an umbrella body for all of the Muslim organisations in Yorubaland, spearheaded efforts aimed at introducing Islamic law in old Oyo State. Thereafter, in 1978, a petition was sent to the Constitutional Conference for the establishment of Islamic courts in Yorubaland by two scholars and leaders of the Muslim community, Dawud Noibi and Sayed Malik. In 1984, the League of Imams and Alfas, an umbrella organisation of imams and Islamic scholars in Yorubaland, along with the Muslim Students' Society of Nigeria, demanded Islamic courts in Yorubaland.⁶ It should be noted that the yearning of Muslims for Islamic courts in Yorubaland is inexhaustible. There was frustration for Muslims in each of these demands for Islamic courts to adjudicate Muslim civil and family matters and to incorporate Islamic law into customary law. This eventually culminated in a private arrangement, whereby Muslims established Independent Sharia Arbitration Panels in some parts of Yorubaland, specifically in Oyo, Osun and Lagos states.⁷ However, it should be noted that the awards and judgments issued by these panels are purely advisory.

Legal recognition was given to the Lagos State Independent Sharia Arbitration Panels on 6 November 2008, when a Lagos high court presided over by Justice Hakeem Osodi ruled that Islamic law is not synonymous with customary law. Consequently, the customary court had no jurisdiction over the Islamic marriage matter that was brought before it. Instead, the court noted, that the matter should have been taken to one of the Independent Sharia Arbitration Panels in Lagos State.⁸ Legal scholar Abdulmumini Oba points out that going by the range of cases recorded at the Independent Sharia Arbitration Panels, there is an urgent need to institute Islamic law courts in Yorubaland.⁹

In 2009, Muslim Rights Concern (MURIC) called the attention of the Federal Government of Nigeria to six points which they argued were necessary for a true restructuring of the country.¹⁰ One of the six points centres on the need for the establishment of Islamic law courts for Muslims in Yorubaland due to their significant numbers and antecedents in the practice of the law before the advent of the colonialists who imposed Christo-Western courts. The group noted that Muslims in South-Western Nigeria are compelled to take civil and family matters to the Christo-Western

6 Makinde AK. 2007. *The Institution of Shariah in Oyo and Osun States, Nigeria, 1890-2005*, PhD thesis, University of Ibadan, 226.

7 Makinde AK. 2017. "The Entanglement of Shariah in South-Western Nigeria", *Africology: Journal of Pan African Studies* 10(5):87-88.

8 Makinde, "The Entanglement of Shariah in South-Western Nigeria", 85.

9 Oba AA. 2011. "Religious and Customary Laws in Nigeria", *Emory International Law Review* 25(2):891.

10 Muslim Rights Concern (MURIC) is an Islamic advocacy NGO established in October 1993 with the aim of advocating against the discrimination of Muslims, suppressing of their rights and conversion of Muslim children. For more information on MURIC, see: <https://www.muricnigeria.com/>

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courts instead of Islamic law courts.¹¹ In a swift reaction to MURIC, the Pentecostal Fellowship of Nigeria (PFN) warned the government not to succumb to the pressure of introducing Islamic law courts, as they were alien to the culture of religious existence and would pit Christians against Muslims.¹²

Furthermore, the debates over the establishment of Islamic law courts to adjudicate civil matters has often centred on other issues. The proponents have observed that their freedom of religion cannot be adequately guaranteed in an atmosphere where their cases are referred to non-Islamic courts to adjudicate, as Islam is inseparable from its law. Opponents of the institution of Islamic law maintain that Islam is comparable to other religions in being able to compartmentalise its law and theology from secular realms of life. Whereas Islam is both a belief and a way of life with its own distinct legal system, other religions are mostly confined to beliefs and canon laws that are restricted to their places of worship. An example of other religions mentioned above is Christianity.¹³ Opponents of Islamic legal systems have also referred to Nigeria as a secular country to argue that it must not operate religious courts. Still other opponents of Islamic law have pointed out that the establishment of such Islamic law courts would lead to a plurality of court systems.¹⁴

Responding to some of the views raised by the opponents of Islamic law courts as mentioned above, Justice Abdul Mutalib Ambali, Grand Kadi (Chief Judge) of the Sharia Court of Appeal of Ilorin noted that the Nigerian Constitution makes provision for Islamic family law, which can only be applied within the ambit of the opposed Islamic law courts. Moreover, the laws of the land make adequate provision for Christian family law as contained in the Marriage Act.¹⁵ The Marriage Act deals with issues relating to the registration of churches for the purpose of marriages and the settling of disputes arising from such marriages at the high courts. There is also the Wills Act, which is meant for the Christians, as the Islamic law has its own.¹⁶ Last is the case of bigamy, which is viewed as a criminal offence attracting both fine and imprisonment.¹⁷ Bigamy is allowed not only in Islam, but also in the Yoruba culture. Hence, the Marriage Act falls under what MURIC call Christo-Western Law. It also defeats the argument that Nigeria is a secular state and is devoid of religious law.

11 "Islamic Group MURIC Demands Establishment of Shariah Courts in South-West". *Bellnaija*, 10 October 2017.

12 Waheed A. 2021. "PFN warns Against Introduction of Sharia Law in South West", *Leadership*, 29 May.

13 Oba, "Religious and Customary Laws in Nigeria", 884.

14 Basri G. 1994. *Nigeria and Shari'ah: Aspirations and Apprehensions*. Leicester: The Islamic Foundation, 43-45.

15 Laws of the Federation of Nigeria, 1990. Marriage Act, Chapter 218.

16 Wills Act, Cap. 414. Act 1 of 1979.

17 Ambali QAA. 2001. *Shariah and its Relevance in the Contemporary Nigeria*, in AbdulRahmon MO (ed). *Perspectives in Islamic Law and Jurisprudence*. Ibadan: National Association of Muslim Law Students, University of Ibadan Chapter, 81-82.

It should be noted that the Nigerian Constitution recognises three legal systems: the common, Islamic and customary legal systems. In Nigeria's federal system of governance, each of thirty-six states of the federation is allowed to institute, in addition to the general common law, either or both Islamic and customary systems as the state deem fit. A preponderance of the citizens of the South-Western part of Nigeria are Muslims. Section 275(1) of the Constitution of the Federal Republic of Nigeria, 1999, stipulates that "There shall be for any State that requires it, a Sharia Court of Appeal for that State."¹⁸ Section 277(2) stipulates that the Sharia Court shall determine any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant.¹⁹ Section 280(1) further stipulates that "There shall be for any State that requires it, a Customary Court of Appeal for that State."²⁰ States in South-Western Nigeria, otherwise known as Yorubaland, like many states across the country, have established customary courts to determine customary marriage cases. The customary courts also adjudicate issues pertaining to marriages contracted according to Islamic law.

As Muslims have been subjected to customary courts in Yorubaland, the courts usually pass judgments that are at variance with the religious teachings of Islam. Since the judicial system of a place reflects the religious beliefs and common values amongst members, Muslims in Yorubaland can be described as having been at the receiving end of an injustice when it comes to their access to appropriate courts.²¹ Additionally, Yoruba customary courts are often referred to *cotu kokokoko* (courts meant for divorce). This is because it is common knowledge that most applications that are brought before Yoruba customary courts pertain to marital challenges, usually with plaintiffs seeking divorce. It is also axiomatic that overwhelming majority of the marital issues culminate in separation of the parties. The arbitration and dissolution of Muslim marriages in these customary courts has left the children of such marriages at a disadvantage.

In a bid to ensure that Muslim children of dissolved marriages get the best care and guardianship, this chapter addresses the effects of imposition of customary laws on Muslims in Yorubaland and how this amounts to total disregard for the Islamic family law, as enshrined in the Nigerian Constitution. Since the arrangement of appropriate custody of children in failed marriages goes a long way in shaping the society and the lives of the affected children, the chapter also investigates the implication of customary court judgments on Muslim children of failed marriages in Yorubaland.²²

18 Constitution of the Federal Republic of Nigeria, 1999 (CFRN), s 275(1).

19 CFRN, s 280(1).

20 CFRN, s 280(1).

21 Anyanwu O. 2009. "Enforcing the Shari'ah in Nigeria: Women, Justice and the Muslims' Collective Conscience", *American Journal of Islamic Social Sciences* 26(3):26.

22 Kelly JB. 1994. "The Determination of Child Custody", *Children and Divorce* 4(1):121.

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MUSLIMS IN YORUBALAND CUSTOMARY COURTS

To understand the problem faced by Muslims in Yoruba customary courts, it is worthwhile to examine some representative customary court cases concerning Yoruba Muslims. The sample cases examined here are drawn from Oyo and Ogun States, where there are significant Muslim populations.

The first case involved a communal rift between the village of the petitioner, Awofe, and his wife, Sinbiatu. This rift had affected their relationship as a couple. Hence, on 6 May 2002, Awofe petitioned the Akufo Customary Court, Ibadan, Oyo State, concerning his wife. The court dissolved the marriage, as it was under the impression that the case was a hopeless one, as a communal rift was regarded as a very sensitive issue. In an Islamic law court, the sole aim would have been to broker peace between the couples and by extension the community with the aim of establishing peace between parties.²³

In a second case, that of *Monsurat Jimoh versus Ganiyu Jimoh*, the former filed a case for the dissolution of their marriage at the Ake Customary Court, Abeokuta, Ogun State, on grounds of her husband's lack of interest in maintaining his family. Monsurat also notified the court of physical assaults from her husband. The court granted the plaintiff's request on 21 February 2013 and awarded the two of them the responsibility of joint custody of their children. The defendant was asked to make monthly payments as support to each of their three children.²⁴

A third case was held at Ake Customary Court, Abeokuta, Ogun State. The court granted the request Mulikat Adedeji to be legally separated from her husband Kehinde Adedeji, with whom she had been married for fourteen years. Mulikat, who was the second wife of Kehinde, premised her request on unwarranted assault by her husband. Two of the couple's children were residing with Kehinde, while the last one lived with Mulikat. Mulikat also petitioned the court to legalise her custody of the last of their three children. The court granted her prayers and ordered that the judgment be delivered to Kehinde, who was absent from the court despite receiving three court notices. Kehinde was mandated to give a specified monthly support thereafter for the upkeep of his third child. The court also awarded Mulikat access to her two children living with Kehinde.²⁵

The cases of Monsurat Jimoh and Ganiyu Jimoh, on the one hand, and of Mulikat Adedeji and Kehinde Adedeji, on the other hand, could be remedied from having broken homes using the Islamic approach of conflict resolution. The parties needed to be admonished and the husband restrained from assaulting their wives by

23 Abdul-Azeez MA. 2017. *Judgments of Customary Courts on Yoruba Muslims and Awards of Independent Shari'ah Arbitration Panel in Oyo-State, 2002-2013*, PhD thesis, University of Ibadan, 132-133.

24 *Monsurat Jimoh v Ganiyu Jimoh*, 2013, CV/127/2013. Online at: <https://customarycourtcases.blog.yorku.ca/ibadan-customary-courts/>

25 *Mulikat Adedeji v Kehinde Adedeji*, 2013, C/249/2013. Online at: <https://customarycourtcases.blog.yorku.ca/ibadan-customary-courts/>

threatening to punish then whenever the assaults were repeated by them. This would likely have gone a long way in cementing the relationship in the marriage and safeguarding the interest of the children.

The last case is that of Zaka, a school proprietor who had in 2003 petitioned the Kininkinin Division of Customary Court of Saki concerning the unruly attitude of his wife after suspecting that he was having a relationship with Feyisade Muriana, a married woman who made and supplied school bags to Zaka's school. During the court proceeding, Zaka's wife could not comport herself. Her behaviour elicited the negative reaction of the court, which dissolved the matrimonial bond. An Islamic court could not have done same, as judgments are to be devoid of emotionality. Zaka and his adulterous mistress could have been admonished in an Islamic court on the limits of interaction between two married people of opposite sexes.²⁶ The dissolutions of marriages in the cases have serious implications for the lives of the adults who comprise the married couple, but they can have even more dramatic effects on the lives of children.

THE HISTORY OF CUSTOMARY COURTS IN NIGERIA

There are numerous definitions of customary law. As Justice Foloshade O. Aguda-Taiwo, president of the Customary Court of Appeals of Ondo State has defined it, customary law is "the body of unwritten norms, rules and regulations which a community accepts and recognises as binding and having force of law, which governs and regulates the relationship and transaction between members of that community".²⁷ Also, Justice Andrews Obaseki of the Supreme Court of Nigeria defined customary law as "the organic or living law of indigenous people of Nigeria regulating their lives and transactions".²⁸ Consistent with these definitions, customary laws are known for certain features. These features include dynamism, uncertainties, manifestation and perpetuation of hierarchical discrimination amongst members of the community and, lastly, a body of standards with fluctuating grades of binding force. In the contemporary period, the synthesis of customary law with the law inherited from the colonialists has resulted in a pluralistic legal system comprising common law, statutory law and international treaties.²⁹

Ahead of the coming of colonialists to the vast area later known as Nigeria, the indigenous people, known as in Nigeria as "indigenes", had their own legal system

26 Abdul-Azeez, *Judgments of Customary Courts on Yoruba Muslims*, 135.

27 Aguda-Taiwo FO. 2019. "Guardianship and Custody of Children; Customary Perspective". Paper delivered at the Refresher Course for Judges and Kadis at the National Judicial Institute, Abuja, Nigeria, 19 March, 2.

28 Makeri SH. 2007. "Jurisdictional Issues in Application of Customary Law in Nigeria". Paper delivered at the All Nigeria Judges Conference, Abuja, Nigeria, 5-9 November, 6.

29 Obatusi S. 2018. "Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Uganda and South Africa Courts", *Columbia Journal of Transnational Law* 56(3):25-26.

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by which their interactions were regulated.³⁰ In addition to the indigenous law, majority of the Northern region operated the Islamic legal system. Aside from the northern region, few of the paramount rulers in the South-Western region, otherwise known as the Yorubaland, operated the Islamic law.³¹ For instance, Oba Abibu Olagunju, the Timi of Ede applied the Islamic Law in his kingdom. Oba Timi Oyelekan continued this trend until the arrival of the colonialists in 1924.³²

Similarly, Oba Momodu Lamuye, the paramount ruler of Iwo town, now in Osun State, introduced the Islamic law in his domain. In fact, he appointed Muhammad-al-Awwal Akintayo Omojiro as the judge and provided for him a place to perform his duties within the palace. Reports have it that there were two other judges after Lamuye. The court often had about five individuals to assist him in discharging his duties. Amongst them was a scribe who took down records of proceedings in Arabic Language.³³ Moreover, in Ikirun, Aliyu Oyewole introduced Islamic legal system in his kingdom and presided over cases.³⁴ All of the above-mentioned Islamic law legal systems were abolished by the colonialists. In 1900, the colonial administration authorised the natives of the Colony of Lagos and its protectorates to utilise their indigenous laws, with the condition that they were not repugnant to natural justice, equity and good conscience nor incompatible with applicable laws. However, non-indigenes were to be referred to the Governor.³⁵

The native courts recorded some irregularities with regard to dispensation of justice. These irregularities prompted the enactment of Native Courts Proclamation of 1906 which provided for a twofold arrangement for native courts. These were the minor courts and native courts, with each of them having its specific limitation. The two courts were empowered to preside over cases involving natives, on one the hand, and consenting non-natives, on the other hand. Following the occupation of northern part of what is now known as Nigeria, the Native Courts Proclamation of 1906 was applied in northern courts. However, after the amalgamation of the Northern and Southern Protectorates in 1914, another law was enacted in 1915 to enhance the amalgamation. There was the enactment of the Native Courts Ordinance of 1915-1918. The law provided for the establishment of native courts by the residents subject to the approval of the governor. In Yorubaland, native courts later metamorphosed into customary courts with the passage of the Customary Courts Law of 1957.³⁶

30 Asiedu-Akrofi D. 1989. "Judicial Recognition and Adoption of Customary Law in Nigeria", *The American Journal of Comparative Law* 37(3):571.

31 The South-Western region of Nigeria comprises six states: Ekiti, Lagos, Ogun, Ondo, Osun and Oyo States. This region is known as Yorubaland.

32 Makinde, *The Institution of Shariah in Oyo and Osun States*, 68-69.

33 Makinde, *The Institution of Shariah in Oyo and Osun States*, 73.

34 Makinde, *The Institution of Shariah in Oyo and Osun States*, 76-77.

35 Makeri, "Jurisdictional Issues in Application of Customary Law in Nigeria", 3-4.

36 Customary Courts Law of 1957 (Cap. 31), Laws of Western Nigeria. See Makeri, "Jurisdictional Issues in Application of Customary Law in Nigeria", 5.

In 1933, there was a legislative move towards apportioning official jurisdiction to native courts with the enactment of Protectorate Courts Ordinance of 1933.³⁷ The ordinance limited the authority of the high courts which were to be established. High courts were constrained from hearing cases related to land, as they were placed under the jurisdiction of a native court. Nevertheless, the Governor in Council could exercise his power by directing land cases to high courts for necessary judicial action. High courts could also take appeals emanating from the native courts. The latter was covered under requirements of the Native Courts Ordinance of 1933. The rationale for placing lands under native courts was to ensure that legal mediation on the possession of land was handled by individuals adjudged by the community as experts in traditional matters.³⁸ Native court authority was further enhanced with the enactment of the Supreme Court Ordinance of 1943. The Supreme Court Ordinance removed matters of family status, marriage, guardianship of children and inheritance from the high courts and placed them under the jurisdiction of native courts. However, there were exceptions to the rule contained in the Protectorate Courts Ordinance of 1933.³⁹

THE ISLAMIC LEGAL SYSTEM AND ITS AIMS

Islamic law is a divinely ordained system aimed at guiding humanity alright towards peace in world and the hereafter. Hence, the worldly life of human beings is perceived in the light of the interest of the hereafter by God, the Lawmaker. The essence of Islamic law is mercy, which is to be shown to righteous beings in this world and even more to be shown in the hereafter, with the ultimate goal of spreading justice in the land.⁴⁰ The first purpose of Islamic law is to secure the interest of man in the Hereafter while the second is to secure the purposes of this world. The combination of the two purposes leads to the protection and preservation of man's religious interests. The religious interests include not only the protection and preservation of his religion, but also four other elements which are: life, wealth, family and intellect. This means that in order for human beings to identify what is beneficial or harmful to them regarding the elements, they must have recourse to the Quran and the *sunnah* (prophetic tradition), and if the answers are not found directly, they are to be determined by looking to what is usually considered beneficial or harmful. These are the requirements of a Muslim in order to be a true servant of Allah.⁴¹

37 Makeri, "Jurisdictional Issues in Application of Customary Law in Nigeria", 5.

38 Obilade A. 1973. "Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination", *Journal of African Law* 17(2):227.

39 Obilade, "Jurisdiction in Customary Law Matters in Nigeria", 228.

40 Muslehuddin M. 1986. *Philosophy of Islamic Law and the Orientalists*. New Delhi: TAJ Company, 97.

41 Nyazee IAK. 2000. *Islamic Jurisprudence*. Islamabad: The International Institute of Islamic Thought, 204-206.

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In fulfilling the purposes of the Islamic law, Muslims are obliged to follow Islamic rulings as contained in its sources. The sources are divided into primary and secondary sources. The primary source are sources that are agreed upon by the four major schools of law: Hanafi, Maliki, Shafi'i and Hanbali. These sources are revealed and transmitted in the Quran or the *sunnah* (prophetic tradition), which are generally definitive, given their undoubtable communication chain and their extendability for the purpose of forming new laws. The secondary sources of Islamic law are sources that are not unanimously accepted by the four major schools, but they are mostly rational and derive their contents from the primary sources. The primary sources, therefore, are the Quran, *sunnah* and *ijma'* (consensus of legal opinion).⁴² The secondary sources include *qiyas* (analogical deduction), *istihsan* (juristic preference), *istishab* (presumption of continuity), *maslahah* (extended analogy), *sadd al-dhari'ah* (blocking the lawful means to an unlawful end), *qawl al-sahabi* (companion's opinion), *shar' man qablana* (earlier scriptural rulings) and *'urf* (custom). Many of the differences in of opinion and methodology amongst the four major schools of thought arise as a result of acceptance and rejection of some of the disputed sources.

Aside from the difference of opinion that necessarily arise from the acceptance and rejection of the secondary sources mentioned above, differences also occur with regard to the conception of grammatical rules and differences in the interpretation of the meaning of words in few of the texts of the Quran and the *sunnah*. Further, there are differences in opinions necessitated by uneven availability of *hadiths* (prophetic narrations) and varied methods of authenticating them. Lastly, there are methodological differences amongst the major schools in interpretation when confronted with seemingly conflicting texts.⁴³

Having identified the primary and secondary sources of the Islamic law, what is likely to come to mind is that, can there be adaptability and appropriateness of Islamic rulings over time? Scholars have argued that rulings do not change, except when superior evidence has been found in the texts, especially in the *sunnah*. The application of the rulings in line with culture can also be accepted where texts are silent. In other words, the ruling will still be the same but there may be new insights into how it is to be applied. For instance, one of the requirements of a valid marriage in Islam is the payment of mutually agreed bride wealth to the prospective wife by the prospective husband. However, the option to publicise the value of the bride wealth or not will depend on the culture of such people concerned.⁴⁴

Another example that is often raised is the issue of gender rights under the Islamic law system. Islamic law scholar Mashud Baderin has claimed that Muslim scholars are convinced that the Islamic law has, over fourteen centuries, addressed the challenge of gender discrimination. Baderin has also claimed that Muslim scholars have not only argued that Islamic law allots a dignifying position to women in the

⁴² Nyazee, *Islamic Jurisprudence*, 149-150.

⁴³ Philips B. 1983. *The Evolution of Fiqh*. Riyadh: International Islamic Publication House, 99.

⁴⁴ Hilal A. 2007. *Understanding Usul al-Fiqh*. New Delhi: Revival Publications, 222-223.

society, but also that it allows them to share equal rights with their male counterparts in most aspect of life. Consequently, poverty, lack of education and conservatism are the factors exposing women to gender discrimination in the Muslim world.⁴⁵

Prominent Nigerian examples are the overturning of the death sentence in Safiyah Husaini's case in Sokoto and Amina Lawal's case in Katsina as a result of the advocacy of human rights groups, women's rights groups and other non-governmental organisations.⁴⁶ Although there were numerous campaigns by the various groups and organisations, the decision to overturn the initial judgment was reached as a result of rigorous and extensive consultation of classical Islamic law literature by the Federal Court of Appeal judges. The point I am making is that the valid evidence used at the appellate court was drawn from extant religious and juridical body of literature materials. Hence the Islamic law has its internal mechanisms to guarantee the rights of women. However, the rights are not just coined by some individuals or groups, but rather taken from the extant primary sources of Islamic law. Human rights advocated in contemporary society is a product of mental exercise which may be right or wrong. The standard by which Muslims measure the veracity of rights advocated in the contemporary world is the compatibility of the spirit of such rights with the higher purposes and intents of the Islamic law.

Similarly, Islamic law guarantees the rights of a child. In fact, Allah refers to children as *qurrat-l-a'yun* (comfort of the eyes). There are a number of passages in the Quran where the rights of children are mentioned. The rights of children in Islam include: right to legitimacy, right to good name, right to breastfeeding, right to maintenance and right to education amongst others. It is on this note that Islamic scholar Muhib Opeloye concludes that contemporary international convention on rights, including that of the child have Islamic antecedents.⁴⁷

On the relationship between Islamic law and custom, I have previously mentioned that custom, otherwise known as '*urf*', is one of the secondary sources of Islamic law. The word '*urf*' is associated with *ma'urf* (goodness). This implies that '*urf*' will only apply to what the Islamic law views as wholesome. Hence, a custom or practice cannot be accepted except it has been examined and certified good and acceptable by Islamic jurists.⁴⁸ Local customs were one of the secondary sources of Islamic law adopted by Imam Abu Hanifah, founder of Hanafi School of Islamic law. In this way, legal authority was placed on local customs obtainable in a particular area.⁴⁹ Similarly, Imam Malik, founder of the Maliki School of Islamic law, held that

45 Baderin MA. 2003. *International Human Rights and Islamic Law*. New York: Oxford University Press, 61.

46 Umar MS. 2007. "Gender Issues in Application of Islamic Law in Nigeria", *Al-Jāmi'ah* [The Encyclopedia] 45(1):39.

47 Opeloye MO. 2016. "Child Rights Act 2003 in Nigeria: What Implications for Application of Child's Rights in Islam". *International Conference on Women and Children Legal and Social Issues*, 185.

48 Nyazee, *Islamic Jurisprudence*, 257-258.

49 Philips, *The Evolution of Fiqh*, 75.

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laws could be derived from the customs and practices of the Muslim world on the condition that the customs and practices do not run contrary to the teachings of Islam.⁵⁰ Hence, customs of the Yoruba people could be accepted as part of Islamic law on the condition that such custom does not run contrary to the teachings of Islam. Also, it is not for the layman to determine whether an aspect of Yoruba culture is in line with Islamic teaching or not. The duty of verifying the acceptability or otherwise of different aspects of Yoruba culture is left in the hands of Islamic jurists.

THE RIGHTS OF THE CHILD IN ISLAM

Islamic law contains many protections of the rights of the child. It is natural that parents care and cater to the needs of their children. Although the divine Islamic text does not expound on this, it is natural that children reciprocate the goodness which they enjoy from their parents. Islam recognises the crucial role of the parent in providing guidance to their children. It also recognises that children have certain rights which are the duties of the parents.

Right to life

Islam emphasises, first of all, that children have right to life. Hammudah Abd al 'Ati, an Islamic scholar and sociologist, notes that in pre-Islamic Arabia, absolute patriarchal practice prevailed, though not on a large scale. In some cases, infanticide, where it occurred, targeted female children. This was justified for social, economic and religious reasons. From a social perspective, it was believed that a girl child might be promiscuous, thereby attracting shame to the family, which they try to avoid by getting rid of the child at an early age. From an economic perspective, the female child was thought to have low productivity in a context where strength was needed to drive the economy. From a religious perspective, the female child was viewed as a profane gender that should be killed, but without shedding the blood, leading parents to bury the girl child alive to avoid shedding the "profane" blood.⁵¹

In addition to the targeting of girl children described above, there was also infanticide that was not gender-related, but instead perpetuated out of poverty. Whatever the case may be, Islam prohibits the taking of the lives of fellow human beings, including children. Specifically addressing infanticide, the Quran states: "Come, I will rehearse what Allah has (really) prohibited to you" join not anything as equal with Him; Be good to your parents, kill not your children on a plea of want – We provide for you and for them."⁵² The Quran further states: "Kill not your children for fear of want, We shall provide sustenance for them as well as for you. Verily, the killing of them is a great sin."⁵³

⁵⁰ Philip, *The Evolution of Fiqh*, 80-81.

⁵¹ Abd al 'Ati H. 1977. *The Family Structure in Islam*. Oak Brook, IL: American Trust Publications, 84-87.

⁵² Quran, Al-Anfal [The Cattle] 6:151.

⁵³ Quran, Al-Isra [The Night Journey] 17:31.

Right to socialisation

Another right of the child is that of socialisation. The child should be given a good and pleasant name on their seventh day of birth. The baby's head is to be shaved. Then a feast is to be thrown with visible signs of charity. The weight of a child's hair is calculated in silver and gold and the monetary worth of it given out as charity and thankfulness to Allah. The mother gives physical care and attention to the child, while the father provides for the material needs of both mother and child, including the hiring of a maid to care for the child, if the mother cannot do it alone, in cases where the father can afford it.⁵⁴ Parents are obliged to raise their children in the best possible religious and moral way. The child is to be made to pray at the age of seven years and may be beaten lightly at the age of ten, if they fail to perform the obligation. The father must financially support the male child until he is of age and can earn a sustainable independent living and the female child until marriage. Socialisation of a child is further enhanced when both parents are Muslims and remain married.⁵⁵

Right to legitimacy

The child also has the right to legitimacy. In Islam, every child must have a father whose relationship to them is irrevocable once established. Hence, a woman should not misplace the child's legitimacy by attributing their fatherhood to persons other than her husband, nor must the father deny the responsibility for the child's conception. This requirement is so rigid in Islam that it may seem unusual to many people. Reinforcing child's legitimacy is the law that conception of a child takes at least six lunar months and at most four years.⁵⁶ This is because all the four major schools of Islamic law have agreed that a child born after six months into a marriage is legitimately that of the husband of the mother. However, Shafi'i and Hanbali jurists have, based on their observation of the gestation period of pregnancy in some women of Banu 'Ajalan, held that conception could last for four years.⁵⁷ This means that, a child born four years after a divorce, where the mother is not remarried, could be said to be the legitimate child of the former husband. Abdul-Rahman Nasir, an Islamic scholar, is of the opinion that the knowledge of the maximum gestation period of pregnancy is dependent on common experience as it is not found in the primary sources of Islamic law.⁵⁸ If records available to jurists at the classical period point to four years, we would be on the safe side to leave it the way it has been, especially if it is to protect the rights of children. In Islam, the denial of legitimacy of a child in marriage may lead to mutual imprecation (*li'an*) and then an irrevocable divorce. Therefore, men are to be very careful about the

54 Abd al 'Ati, *The Family Structure in Islam*, 169.

55 Abd al 'Ati, *The Family Structure in Islam*, 206.

56 Abd al 'Ati, *The Family Structure in Islam*, 190.

57 Zuhayli W. 1997. *Al-Fiqh al-Islamī wa Adillatuh*. Damascus: Dar al-Fikr, 7250-7251.

58 Abdul-Maqсуди A. 1995. *Fatawah Al-Mar'ah al-Muslimah*. Riyadh: Maktabah al-Tabiriyyah, 812.

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denial of the paternity of their children, as it is a very serious issue in Islam. It can also lead to the punishment of the mother for adultery (*zina*) and of the father for false accusation (*qadf*). These rights of a child are reinforced by the Islamic laws governing the institution of marriage and divorce.

MARRIAGE AND DIVORCE IN ISLAM

Marriage is a contract that permits two people of opposite sexes to live together as husband and wife. In Islam, marriage is both a religious duty and social necessity, meant for those who have the capacity for it. Hence, marriage is not meant for everyone. Marriage is compulsory for those who fear that abstinence from sexual intimacy could lead them astray. It is preferable for those who, though desirous of conjugal relationship, anticipate no tendency of committing excesses in the matter. However, marriage is not desirous for those who lack potency.⁵⁹

Marriage has a number of purposes. These include fulfilling the sexual needs of the spouses with the goal of maintaining chastity. From this concern stems another objective, namely, the continuity of human race. This goal necessitates mutual cooperation in raising a virtuous progeny for the preservation of life.⁶⁰ The marriage contract is entered into through the expression of mutual consent by two parties in the presence of at least two witnesses. The expression of mutual consent is called affirmation and acceptance in Islamic law. Then, the husband is to pay the *mahr* (nuptial gift), as a matter of necessity. The payment of the nuptial gift has been described as an admission of the wife's independence. This is in the sense that she becomes an owner of property soon after marriage. She can own properties independently of the husband.⁶¹ The marriage is then publicised at a ceremony during which a feast is thrown.

Allah has described the husband and wife as a single soul living in two bodies. This is contained in the verse of the Quran which states: "Among His signs is that He (Allah) created for you mates from among yourselves, that you may dwell in tranquillity with them, and he has put love and mercy between your (hearts). Verily in that are signs for those who reflect."⁶² Nevertheless, Islam is a pragmatic religion and way of life. It recognises that there may arise some conflicts in a couple's life. It sets out duties and privileges for each of the couples and makes the husband the custodian and maintainer of the house, while the wife gives direction to the home and the offspring through obedience to him and dedication. Allah's instruction to this end states: "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other and because they support them

59 Abd al 'Ati, *The Family Structure in Islam*, 53.

60 Abd al 'Ati, *The Family Structure in Islam*, 54-55.

61 Ali MM. 2014. *The Religion of Islam*. Ohio: Ahmadiyya Anjuman Isha'at Islam, 435-436.

62 Quran, Al-Rum [The Romans] 30:21.

from their means. Therefore, the righteous wives are obedient and guard in the (husband's) absence, what Allah would have them guard."⁶³

Islam recognises that despite efforts couples may have made in retaining their bonds of marriages, there are instances in which marriages require separation and dissolution. This is particularly necessary where one party has caused harm to another and such a harm can only be removed through divorce. To this end, Allah has placed the right to pronounce divorce in the hand of the husband and not the wife, despite her being a party to the marriage agreement. Kamal Sayyid Salim, a scholar of prophetic narrations and Islamic law, is of the view that this stand is to protect the marriage from the emotional, hasty and inappropriate decisions which may be taken by women owing to their peculiar sexology.⁶⁴ The position expressed by Sayyid Salim is based on personal opinion rather than the actual reason for the injunction. Sayyid Salim's opinion reflects what Asma Barlas, an academic who studies patriarchal exegeses of the Quran, describes as patriarchal interpretations of the Quran based on a dualistic impression of sexual diversity that presents the man as the primary being and woman the secondary being.⁶⁵

Jurists of the four major schools of Islamic law have classified the position of Islam on divorce into five categories. Islamic law scholars are of the view that divorce is prohibited if its due process is not followed. For instance, divorce is prohibited to take place during the menstrual cycle of the wife. Scholars are divided on whether a divorce is prohibited, or simply detestable, if there is no justification for it. Also, jurists opine that divorce is permitted if it is done as a result of continuous immoral behaviour on the part of the wife and efforts to correct it on the part of the husband has proved abortive. Lastly, divorce will be desirable if the wife has constantly neglected her religious obligations to Allah.⁶⁶ The following are the kinds of divorce in Islam.

Khul' divorce

Islam gives room for the protection of the interest of women. A woman may seek divorce from the husband under Islamic law. If the husband divorces his wife at her demand, it is known as *khul'*, or wife-initiated divorce. Though, the wife initiates the divorce, the husband actually implements the divorce by pronouncing the statement of divorce. In cases where the husband refuses to pronounce the statement of divorce, the wife can go to an Islamic court, which can examine the conditions necessitating the wife's initiation of the divorce. After investigation, the court is

⁶³ Quran, An-Nisa [The Women] 4:34.

⁶⁴ Sayyid Salim K. 2003. *Sahih Fiqh as-Sunnah wa Adillatuhu wa Tawdih Maddhahib al-Aimmah*. Cairo: Al Tawfiqiyyah Al-Maktabah, 3:235.

⁶⁵ Lamprey JT. 2013. "From Sexual Difference to Religious Difference: Toward a Muslima Theology of Religious Pluralism", in Aslan E, Hermansen M and Medeni E (eds). *Muslima Theology: The Voices of Muslim Women Theologians*. Online at: <https://www.oopen.org/> and <https://www.peterlang.com/>

⁶⁶ Sayyid Salim, *Sahih Fiqh as-Sunnah*, 3:234-235.

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expected reconcile the couple. However, if the court's efforts at reconciling the couples prove abortive, especially if the husband is discovered to have oppressed his wife, the court can then dissolve the marriage. *Khul'* was demonstrated during the lifetime of the Prophet when Zaynab the wife of Thabit bin Qays went to the Prophet to express her fear of remaining with her husband as a wife. She was then asked whether she would desire to return the *mahr*, which was an orchard. Upon her affirming, the Prophet asked her husband to divorce her. Thabit then complied with the instruction.⁶⁷

Ila' divorce

Other forms of divorce in Islam include *ila'*, or the oath of abstention. Here, the husband takes an oath that he will abstain from marital relationship with the wife for four months. If the oath is fulfilled for four months consecutively and the husband fails to resume relationship, the wife is allowed to report the situation to an Islamic court, where the husband would be compelled to resume sexual relationship with her or divorce her. The divine statement on this states that: "For those who take oath of abstention from their wives, a waiting for four months is ordained. If they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah hears and knows all things."⁶⁸

Zhihar divorce

Another form of divorce is called *zhihar*, or calling of the wife mother. *Zhihar* is an old pagan custom whereby men divorce their wives by saying to them: "You are to me as the back of my mother." The implication of the statement is that as the man's mother is forbidden to him for conjugal relationships, so is the wife forbidden to him. Following this statement, the husband is also not bound to support children from the divorced mother. The divorced woman is left hanging, as she may neither leave the divorced husband's house nor contract marriage with another man.⁶⁹ The injunction condemning this practice is as follows: "If any men among you divorce their wives by *Zhihar* (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave birth to them. And in fact, they use words (both) iniquitous and false but truly, Allah is one that blots out (sin) and forgives (again and again)."⁷⁰

Li'an divorce

Li'an, or mutual imprecation, is another form of divorce that is recognised in Islam. This takes place when either of the parties accuse the other of adultery. The standing

67 Abdul-Lateef A. 1994. *Summarised Sahih Bukhari*. Riyadh: Dar-us-Salam, 910.

68 Quran, Al- Baqarah [The Cow] 2:226-227.

69 Ali AY. *The Holy Qur'an: Translation and Commentary*. Birmingham: IPCI: Islamic Vision, 1625.

70 Quran, Al-Mujadalah [The Pleading] 58:2.

rule in Islam is that the onus lies on the claimant to produce valid and acceptable evidence that the defendant actually committed the adultery. The evidence should be the provision of four trustworthy witnesses to support their claim. Otherwise, the person laying claim would face the punishment of eighty stripes and rejection of future evidence. This is in line with the Quran, which states: "And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) flog them with eighty stripes and reject their evidence ever after. For such are wicked transgressors."⁷¹

However, in cases where one member of a couple lays allegations of adultery on the other partner, the spouse making the allegation is excepted from the rule of producing four witnesses. Rather, they are to swear by Allah four times that their accusation is genuine and the fifth time invoke the curse of Allah on themselves if they were lying. The defendant is obliged to follow the same course of action in defence of themselves. This form of divorce is stated in the Quran as follows:

And those who launch a charge against their spouses and have no evidence (in support). No evidence but their own. Their solitary evidence (can be received) if they bear witness four times (with an oath) that they are solemnly telling the truth. And the fifth oath should be that they invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife if she bears witness four times (with an oath) by Allah that (her husband) is telling a lie. And the fifth (oath) should be that she invokes the curse of Allah on herself if (her accuser) is telling the truth.⁷²

Having followed the prescription stated in the Quran, the marriage is automatically dissolved and the couples cannot remarry in future, perhaps due to the absence of mutual trust which, in my opinion, is an essential element in a happy marriage.

Whichever is the mode of divorce except in the case of *ila'*, the divorced wife should observe '*iddah*', or waiting period in the matrimonial home and under the maintenance of the husband for three menstrual cycles or three lunar months for those in menopause. It should be noted that any sexual intimacy between the couples during the period renders the divorce null and void. The essence of '*iddah*' is to foster reconciliation, except for *li'an*, where mutual trust is totally lost, and to prevent the mixing-up of lineage by ascertaining whether the wife is carrying the husband's pregnancy or not. The discovery of pregnancy at this stage postpones the period of '*iddah*' till her childbirth. The text of the Quran supporting '*iddah*' reads thus: "And divorced women shall wait concerning themselves for three monthly periods."⁷³ If there was no reconciliation or pregnancy at the end of the '*iddah*' period, the divorce becomes fully implemented. The next thing would necessarily be determination of the guardianship and custody of the children from failed marriage.

⁷¹ Quran, An-Nur [The Light] 24:4.

⁷² Quran, An-Nur [The Light] 24:6-9.

⁷³ Quran, Al-Baqarah [The Cow] 2:228.

CHILD GUARDIANSHIP (*WILAYAH*) AND CUSTODY (*HADANAH*) IN ISLAM

Child guardianship (*wilayah*) is the management of the affairs of a minor with respect to their person (*nafs*) and property (*mal*) by a mature and sensible person. The reference is to both property and the person. With regard to property, the guardian is expected to protect the child from exploitation and guide their financial transactions.⁷⁴ With regard to the person, it is expected that guardianship will cover the child's discipline, education and healthcare, giving of instruction, physical development and supervision of who to marry. The parent, as guardian, is responsible for providing guidance to the children regarding their future means of livelihood. The guardianship responsibilities necessitate that the guardian be a Muslim who is sane and mature. The guardian must also be capable of training a child and keeping the ward's character safe from negative societal influences.⁷⁵

According to the Maliki school of Islamic law, which is prevalent in Nigeria, the ordering of the most appropriate person to take up the responsibility of being a guardian starts with the son (as in the case of an incapacitated adult), then the person entrusted the duty by the father, then the full brother and his son, then the paternal uncle who is a full brother to the child's father and his son, then the paternal grandfather, then the paternal uncle who is a half-brother to the child's father and his son and finally to a judge who specialises in Islamic law.⁷⁶ The guardian is expected to be mature and to possess the ability to support the child. The guardian must also be trustworthy with regard to uprightness in religion and character. Such a person must be mentally alert and vigilant in raising children. As for the Hanafi school, the order of priority of who becomes the child's guardian is the son (is in the case of an adult incapacitated adult), then the father, then the grandfather, then the brother and finally the paternal uncle.⁷⁷

On the period requiring guardianship, the Hanafi jurists opine that for a male child, the period either ends when he reaches the age of fifteen years or when he starts exhibiting the various signs of maturity. They also stipulate that he must be of a discerning mind and capable of safeguarding himself. However, the jurists of the school put the period of guardianship of a female child at her marriage when the guardianship is legally transferred to the husband who is expected to provide for her accommodation. Otherwise, a woman who is mature enough for marriage but have yet to get married may be off guardianship on the condition that she has attained an advanced age and is capable of safeguarding herself. At this stage, the woman has the decision to either stay with her custodian mother or stay alone in another apartment. Though, the Hanafi jurists have not mentioned a specific age for the woman in question, they seem to be referring to an old woman who is no longer attractive to men. However, the Maliki jurists insist that guardianship for females

74 Zuhayli, *Sahih Fiqh as-Sunnah*, 7327.

75 Zuhayli, *Sahih Fiqh as-Sunnah*, 7327-7329.

76 Zuhayli, *Sahih Fiqh as-Sunnah*, 7338.

77 Zuhayli, *Sahih Fiqh as-Sunnah*, 7329

end when they are married while that of males will terminate when the conditions warranting it cease to exist.⁷⁸ While child guardianship has been examined, it would be worthwhile discussing the stand of Islam on child custody.

In Islam, child custody is referred to as *hadanah*. The term *hadanah* is interchangeably used with the term *kafalah*, except for the fact that while *hadanah* denotes custody alone, *kafalah* has the dual usage of custody and guarantee.⁷⁹ *Hadanah* is the protection given to those who are incapable of acting by themselves, such as children and the mentally incompetent, and the care offered to them with respect to basic necessities of life in a bid to promoting whatever draws benefit to them.⁸⁰ Custody is the right of the mother. If this is not possible, then Hanafi jurists claim that the right of custody will fall on the mother's mother, then to father's mother, then to full sisters then to uterine sisters,⁸¹ then to paternal sisters and then the daughters of full sisters. The list of custodians goes on until it reaches maternal and paternal aunts. For the Maliki jurists, the order is the maternal grandmother and her ascendants, then full maternal aunts, then mother's paternal aunt, then the father's paternal aunt, then the father's maternal grandmother, then the father's mother. The Shafi'i jurists hold that child custody should go to the mother followed by the maternal grandmother and her ascendants on the condition that she is entitled to the inheritance of her daughter,⁸² then the father, then the paternal grandmother and her ascendants on the condition that she is entitled to the inheritance of her daughter, then the nearest amongst female relatives and then the nearest amongst male relatives. The Hanbali jurists opine that the order of custody should be maternal grandmother, the father, his mothers, and then grandfather followed by his mother, then the full sister, then the uterine sister, then the paternal sister, then the full paternal aunt then the uterine maternal aunt.⁸³

Whoever the custodian is amongst the persons mentioned above, they should be sane, chaste and trustworthy. The person should not indulge in dancing, consumption of alcohol, nor be oblivious of childcare. The jurists of the four major schools of Islamic law give preference to the marriage of the custodian mother by willing members of the child's family who do not fall into the category of those prohibited for marriage. Consequently, all the jurists of the four major schools agree that the marriage of the custodian mother to a non-family member of the child's father leads to the loss of the mother's authority to the child's custody. Moreover, with

⁷⁸ Zuhayli, *Sahih Fiqh as-Sunnah*, 7330.

⁷⁹ Ministry of Endowment and Religious Affairs, Kuwait. 1990. *Al-Mawsu'ah al-Fiqhiyyah*. Volume 34. Kuwait: Ministry of Endowment and Religious Affairs, 287-288.

⁸⁰ Zahraa M and Malek A. 1998. "The Concept of Child Custody in Islamic Law", *Arab Law Quarterly* 13(2):156.

⁸¹ Uterine sisters are half-sisters by the same mother.

⁸² This is because certain factors could make her lose the right to inheritance. An instance of this is renunciation of Islam by her daughter whose child she is to take custody.

⁸³ Bakhtiar L. 1996. *Encyclopedia of Islamic Law: A Compendium of the Major Schools*. Chicago: ABC International Group, 469-470.

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the exception of the jurists of the Maliki school, the jurists of the other major schools believe that the loss of custody by the mother is permanent, even when she gets divorced and is later married by a relative of the child's father. On the period of custody of the child, there are a number of views. The one we consider the most is the Maliki jurists' opinion that the custody of a male child is to be from birth to puberty, while that of female child is till marriage. In addition, if the child is in the custody of the mother and the father wants to travel with the child, this will not be allowed according to the view of the majority. However, the mother can travel with the child on the condition that the place of travel is a place where the distance is such that she may decide to return before dusk. Otherwise, the place of travel should either be her hometown or place of marriage contract before the divorce.⁸⁴

Wahbah Zuhayli, a scholar of Islamic law and jurisprudence, gives conditions that can cause the custodian mother to lose their right to child custody. Zuhayli mentions that if the custodian-mother travels to a place remote from the child's father, making it difficult for him to pay visits to the child, the custodian mother loses her right to give care to the child. There can also be the situation where the custodian mother contacts a contagious disease or one that which reduces her ability to support the child. Then the child needs to be protected from harm. The religious and moral life of the child under custody is crucial. If the custodian is discovered to indulge in grievous sins, deficient in religious obligations or changes their religion, then the custodian loses their right to the child custody.⁸⁵

The custodial mother is not allowed to marry people outside the family of the child and still retains the custody of the child. However, custodial mother's marriage to the members of the child's family should be through the free consent of the parties concerned. This is to prevent the child from being treated with hatred, since the woman may be occupied with the new husband from outside the family at the expense of the care of the child. The child's stepfather must also be amongst the prohibited degrees to the child under her care. The prohibited degrees of male relatives to the child include their uncle but leaves out cousins, as they do not fall amongst the prohibited degree in marriage to the child. As it has been said, the father is to ordinarily provide for the financial needs of the child. If, however, the child's father goes bankrupt and he cannot fulfil his financial obligations, then the custodian mother is expected to cover the loophole. Otherwise, if child's mother refuses the care of the child for that purpose and another relative is awarded the child's custody, the child's mother permanently loses her right to the child's custody. This is the view of the Hanafi jurists. Finally, the child should not be forced to stay in a home that they abhor or whose members they dislike.⁸⁶ This can only be determined when the child is mature enough to identify those who show them love and affection.

84 Bakhtiar, *Encyclopedia of Islamic Law*, 472-473.

85 Zuhayli, *Sahih Fiqh as-Sunnah*, 7310.

86 Zuhayli, *Sahih Fiqh as-Sunnah*, 7308.

CUSTODY, GUARDIANSHIP AND THE RIGHTS OF MUSLIM CHILDREN

Two of the most protective rules regarding Muslim children are the concepts of *hadanah* (custody) and *wilayah* (guardianship). Whereas some marriages are dissolved in customary courts, others are done informally. As for marriages dissolved in customary courts, it has been estimated that 70% of them were those of Muslims. After the dissolution of marriages, customary courts stipulate that the general maintenance of the children should be the responsibility of the defunct husband, while the custody of the children go to the mother. The court can order the arrest and detention of the defunct husband for dereliction of duties if he is discovered to have absconded from his responsibilities. By the same token, the mother can lose her right to custody if she is discovered to have prevented the father from seeing his child or is found to be incompetent to care for the child. Further, the child is not given to the mother if she has abandoned the child for a long time, especially if the child was a baby or toddler who has been given to a family member for care.⁸⁷ As satisfactory an arrangement as this may sound, it is not in line with the provisions of the Islamic law on the custody and guardianship of children.

There are a number of cases of customary court rulings that run contrary to the Islamic provision for the care of the child. A few of the judgments on child custody will shed more light on this position. For instance, Anifa Agoro, formally married to Abdul-Jalil Danusi, was arraigned in court by the police for forcefully attempting, in the failed marriage, to take custody of her child from school without the permission or notice of his father. The Ajibade Customary Court of Akinyele Local Government in Ibadan ruled on 13 April 2010 that Anifa Agoro, who was by then remarried to a stranger to the child, had the right of custody. This runs against the earlier stated dictates of the Islamic law on child custody.⁸⁸ Similarly, Idris Olajide filed an application at Odinjo Customary Court of Ibadan South East Local Government concerning the custody of the daughter from the failed marriage between himself and Nike Solalu, who had converted to Christianity and remarried to a Christian. On 13 February 2012, the court insisted that the six-year-old child was better kept by the mother, irrespective of her religious affiliation. It then ruled to that effect and the prayer of Olajide declared null and void.⁸⁹ This is, no doubt, diametrically opposed to the Islamic law injunction, as set forth above. These customary court judgments are just the tip of the iceberg with regard to the handling of cases regarding custody of Muslim children in Yorubaland, a situation necessitating the agitation for Islamic law courts as earlier stated.

It has been observed that children from broken homes generally run into moral hazards in society. Abdul-Hakeem Olalekan, a school proprietor, explained that he had a practice of visiting notorious places looking for Muslim street children whom

⁸⁷ Interview with Qasim Abdul Hameed by M Noibi, Ibadan, Nigeria, 26 February 2020. Mr Abdu Hameed is the Court Registrar for Mapo Customary Court.

⁸⁸ Abdul-Azeez, *Judgments of Customary Courts on Yoruba Muslims*, 192.

⁸⁹ Abdul-Azeez, *Judgments of Customary Courts on Yoruba Muslims*, 193.

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he could reform. He asserts that a good number of the Muslim street children he had met were products of broken homes. Such children, he claimed, were abused and treated with iron hand.⁹⁰ Saeedat Raji, a secondary school administrator, observes that most of her students from broken homes find it difficult to socialise with other students. They also appeared at school in a haggard condition and were unable to concentrate in their studies. They were usually academically below their school mates in class. Such children saw the school as their comfort zone.⁹¹ Saeedah Abdul-Aziz, a teacher, observed that most of the children from broken homes performed poorly in school and were also unyielding to corrections. She added that they often contribute negatively to the society.⁹²

Many of the children in broken homes are not managed effectively and in accordance with the dictates of Islam, especially when *wilayah* and *hadanah* are considered. For instance, Musa Adejumo, a seventeen-year-old student who lived with his paternal grandmother, claimed that his parents separated a long time ago. When eventually his father died, there was not a paternal family member to take charge of his guardianship as specified in Islam.⁹³ Muritala Sadiq, who also lived with his paternal grandmother said that he could not express his personal and spiritual feelings to his grandparents. One of the regrets he nursed was his not staying with his parents.⁹⁴ Some children were put in the custody of their remarried mothers. This was the case with Shukurat Adebayo, who complained of maltreatment by her stepfather. She said that there was high burden of household chores placed on her and that her failure to discharge the weighty duties often resulted in flogging with insulated copper wire.⁹⁵

On child labour, Aishat Owolabi and Fausat Alabi, products of broken homes, had to sell food items before going to school. The abandonment of selling food items by any or two of them often led to their flogging by their mother with insulated copper wire. The frustration prompted Aisha to leave home and join a group of women who were actively involved in prostitution.⁹⁶ Similarly, Sadiq Yusuf was under the care of his father, who had remarried after divorcing his mother. He claimed that his stepmother usually deprived him of his meal and beating him mercilessly. The stepmother once deliberately soiled his school uniform and prevented him from attending an entrance exam into a secondary school. Sadiq had since left the house for a rented apartment from where he fended for himself.⁹⁷

90 Interview with Abdul-Hakeem Olalekan by M Noibi, Ibadan, Nigeria, 25 February 2020.

91 Interview with Saeedat Raji by M Noibi, Ibadan, Nigeria, 20 February 2020.

92 Interview with Saeedah Abdul-Aziz by M Noibi, Ibadan, Nigeria, 15 February 2020.

93 Interview with Musa Adejumo by M Noibi, Ibadan, Nigeria, 20 February 2020.

94 Interview with Muritala Sadiq by M Noibi, Ibadan, Nigeria, 20 February 2020

95 Interview with S. Adebayo by M Noibi, Ibadan, Nigeria, 20 February 2020

96 Interview with Saeedah Abdul-Aziz.

97 Interview with Sadiq Yusuf by M Noibi, Ibadan, Nigeria, 20 February 2020.

A major challenge that Yoruba Muslims in these situations are facing is the adjudication of their family problems by customary courts as opposed to Islamic courts. Islamic law is fundamentally different from customary law, and customary courts do not have the appropriate legislation and expertise to attend to cases concerning Muslims, especially in the area of marriage and divorce, child custody and guardianship.⁹⁸ If justice is to be done to the Muslim family and the rights of Muslim children guaranteed in Yorubaland, then the rights of the child must be protected, as enshrined in the Islamic law and in accordance with the United Nations Convention on the Rights of the Child to which Nigeria is a signatory.⁹⁹

CONCLUSION

In conclusion, this chapter traces the various movements for Islamic law rights from the era of colonialism to the contemporary period. The chapter has provided the history of customary courts in Nigeria and Yorubaland, as well as an overview of the Islamic law, its relevance to contemporary phenomena and its conception of the rights of the child. These rights include those of life, socialisation and legitimacy. A proper handling of challenges that ensue amongst Muslim couples is central to achieving the rights of children. Although marriages are easy to conduct, the dissolution of such marriages is not that easy to accomplish, except in cases of necessity. This rigidity facilitates the protection of the children in line with the spirit of Islam and the United Nations Convention on the Rights of the Child. There are comprehensive provisions in Islamic law to protect children after the dissolution of marriage. This is the case in each of the four major schools of Islamic jurisprudence. These provisions are the *wilayah* (guardianship) and *hadanah* (custody).

The judgments of the customary courts on the issue of child custody in Muslim marriages have been persistent in Yorubaland. Muslim children from failed marriages have been treated in a manner contrary to their faith and to their rights as children. Most of the problems affecting children of failed marriages ensue from the outcome of judgments of customary courts, as opposed to the teachings of Islam. These children are exposed not only to religious misgivings, but also to social and economic hardships. This has engendered many of the moral issues that not only hurt them, but also hurt the society. In order to change the narrative, there is need for the government and the society at large, without prejudice and in line with the Nigerian Constitution, to establish Islamic law courts to adjudicate family and personal matters concerning Muslims in Yorubaland.

98 Oba AA. 2002. "Islamic Customary Law and: The Changing Perspective in Nigeria", *The International and Comparative Law Quarterly*, 51(4):830-831.

99 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 9) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.