

## CHILD CUSTODY AFTER DIVORCE UNDER ISLAMIC LAW: A PUBLIC LAW PERSPECTIVE ON PATERNAL ENTITLEMENT AND LEGAL OVERSIGHT

Bilikis Ayinla-Ahmad, \*

### *Abstract*

*This paper critically examines paternal custody rights under Islamic law, with a focus on the legal, ethical, and institutional frameworks that guide custody decisions after divorce. It explores the circumstances under which a father may be entitled to custody of a child, particularly after the traditional maternal right of hadanah lapses. The paper adopts a public law perspective, analyzing how state oversight and statutory frameworks, including those found in Sharia-compliant legal systems within and outside Nigeria, mediate the application of Islamic principles to serve the best interest of the child. It argues for a harmonized approach that respects Islamic jurisprudence while ensuring compliance with constitutional protections of children's rights and international human rights norms. The paper adopts a doctrinal legal research method and concludes that a balanced custody framework must consider both the spiritual and welfare dimensions of child upbringing, incorporating public law principles such as judicial oversight, non-discrimination, and child protection.*

*Key Words: Paternal Entitlement, Legal Oversight, Child Custody, Divorce, Public Law.*

### **1.0: Introduction**

In Nigeria, family law is pluralistic, drawing on statutory instruments, customary law, and Islamic jurisprudence depending on the region and the parties' religious affiliation. The Child's Rights Act 2003 is one important statute: Section 1 of which provides that "in every action concerning a child ... the best interest of the child shall be the primary consideration".<sup>1</sup> Though, in many Northern states, Islamic family law often prevails in matters of marriage and custody. Under classical Islamic jurisprudence, ḥaḍānah (custody) is distinct from guardianship (wilāyah) and is generally awarded to the mother for young children, but transitions to paternal or other custodians under certain conditions.<sup>2</sup> Given the risk that paternal custody claims may conflict with welfare standards, there is a urgent need to evaluate how public law principles state oversight, constitutional protections, child welfare norms should mediate Islamic custody rules. This publication aims to fill that gap by critically appraising paternal custody rights after divorce within Islamic law through a public law lens, proposing reforms in jurisdictions like Nigeria.

---

PhD., Dept of Jurisprudence and Public Law, Kwara State University, Malete. Email: bilikis.ahmad@kwasu.edu.ng; ayinlaahmadb@gmail.com. ORCID 0009-0008-0908-6388

<sup>1</sup> Child's Rights Act, 2003

<sup>2</sup> Rafiq A, 'Child Custody in Classical Islamic Law and Modern Practices' (2014) *International Journal of Humanities and Social Science*.

Child custody after divorce remains a sensitive and significant matter in both religious and secular legal systems. In Islamic law, the principles governing child custody (ḥaḍāna) reflect a balance between the rights of parents and the welfare of the child. Conventionally, custody is granted to the mother during the early years of the child, with the father assuming custodial responsibilities under certain conditions. However, questions arise when the father seeks custody after divorce, especially where the child's best interests may be contested. The paper adopts a doctrinal legal research method, relying on a critical analysis of primary and secondary legal sources. These include the Qur'an, Hadith, classical Islamic jurists' interpretations (fiqh), Nigerian constitutional provisions, statutory laws (such as the Child Rights Act 2003), and relevant case law from Sharia and appellate courts. The paper considers Islamic jurisprudence alongside public law principles such as the doctrine of the best interest of the child, state protection duties, and constitutional safeguards. By doing so, it aims to provide a nuanced understanding of how paternal custody rights under Islamic law can be interpreted and implemented in a manner that respects religious doctrine while aligning with modern public interest concerns.

In many Muslim majority jurisdictions, custody (ḥaḍānah) disputes after divorce raise multifarious tensions between parental rights prescribed by Islamic law and the state's interest in children's welfare. This paper explores the circumstances under which a father may be entitled to custody under Islamic law, and how public law principles of state oversight and the child's best interest can mediate and harmonize those claims. The objective is to offer a legal appraisal of paternal custody rights in light of public law doctrine, child welfare principles, and the constitutional or statutory frameworks in modern states exploring how courts balance religious doctrine with state obligations under Nigerian constitutional and child protection frameworks.<sup>3</sup>

## **2.00: Conceptual Clarifications between Public Law and Family Law**

Public Law is a branch of law that governs the relationship between individuals and the state, as well as the structure and operation of the government itself. It includes constitutional law: which deals with the structure of the state, separation of powers, and fundamental rights as decided in *Attorney-General of the Federation v. Abubakar*.<sup>4</sup> It clarified the division of powers within Nigeria's federal structure, then it also includes administrative law this governs the actions of

---

<sup>3</sup> Olowu D, 'Protecting Children's Rights under Islamic Law: A Critique of the Child Rights Act 2003 in Nigeria' (2002) 6(2) Law, Democracy & Development 67–82; Ebeku KSA, 'Constitutional and Human Rights Issues in the Implementation of Islamic Law in Nigeria' (2001) 26(3) Human Rights Quarterly 730–760.

<sup>4</sup> (2007) 10 NWLR (Pt. 1041) 1.

administrative agencies, including decisions, rules, and regulations. *Governor of Lagos State v. Ojukwu*,<sup>5</sup> the case addressed the limits of executive power and upheld the rule of law, and lastly criminal law: It defines crimes and prescribes punishments.<sup>6</sup> It emphasized public law's role in protecting citizens' rights against state overreach which also touches on enforcement of rights).

Public law ensures that government actions are legal and that individuals' rights are protected when interacting with state institutions. According to Holland & Webb (2022), public law regulates the exercise of power by public authorities and ensures that such power is not abused. It contrasts with private law, which governs relationships between individuals or private entities.

Public law plays a critical role in protecting fundamental rights (e.g., freedom of speech, right to fair trial). Ensuring accountability of government agencies. Regulating criminal conduct and punishment. Overseeing public decision-making and judicial review.

Family Law is a branch of law that deals with legal issues related to family relationships, such as marriage, divorce, child custody, adoption, maintenance, guardianship, and domestic violence. It governs the rights and responsibilities of family members and provides legal remedies when disputes arise. Family law aims to protect the welfare and best interests of individuals, particularly children and vulnerable members of society, within family structures. Under conventional family law the father is given the responsibility of maintaining the family, a legal responsibility he is bound to discharge. Similarly, in *Ugbah & Ors v. Ugbah*,<sup>7</sup> on the 4th July 2025, the Supreme Court delivered its decision, the court in this case decided whether or not a wife and children can sue for maintenance, welfare, and education while the marriage is still subsisting and without first filing for divorce. The Supreme Court decided that fathers remain legally bound to support their children whether or not a marriage is dissolved. A wife can independently seek maintenance and support during marriage without being forced into divorce proceedings. Courts will not allow technical rules to override justice owed to vulnerable parties like wives and children.

Islamic Family Law refers to the body of laws derived primarily from the Qur'an, Sunnah, and classical fiqh (jurisprudence) that govern matters such as marriage, divorce, child custody, inheritance, guardianship, and maintenance among Muslims. It places emphasis on moral obligations, the protection of family structures, and the welfare of children and women, while

---

<sup>5</sup> (1986) 1 NWLR (Pt. 18) 621

<sup>6</sup> *Fawehinmi v. Inspector-General of Police* (2002) 7 NWLR (Pt. 767) 606

<sup>7</sup> (2025) SC 4th July 2025

maintaining compliance with divine injunctions.<sup>8</sup> Islamic family law varies in application across different countries depending on interpretations of Islamic sources and integration with local laws.<sup>9</sup>

### **2.1: Connections between Public Law and Family Law**

There is a strong interaction between Public Law and Family Law because public law deals with rights, powers, and duties between the state and individuals. When custody disputes arise relating to child welfare, the state (through courts or child protection agencies) often exercises oversight functions. This brings about the interface of Islamic family law with constitutional safeguards, children's rights, and judicial review.

a. Regulatory Oversight: Both public law and family law involve state oversight. While public law governs the relationship between individuals and the state, family law increasingly includes state intervention to protect vulnerable individuals, such as children, in line with constitutional and international human rights standards.<sup>10</sup>

b. Protection of Rights: Public law and family law intersect in safeguarding individual rights. For instance, child custody decisions are influenced by constitutional principles (e.g., right to dignity, fair hearing) and statutory protections under laws like the Child Rights Act 2003.

c.. Judicial Review and Enforcement: Both domains may involve judicial enforcement. Family law decisions (e.g., custody) can be subject to appeal or constitutional review, especially where questions of discrimination or procedural justice arise.<sup>11</sup>

### **2.2: Similarities**

a. Focus on Justice and Welfare: Custody disputes under Islamic law, traditionally viewed as a private matter is now draw significant public attention, particularly regarding: the state's duty to protect children's rights (public interest dimension), gender equality and non-discrimination under constitutional provisions, and the judicial oversight of Sharia court decisions.<sup>12</sup> Both Islamic and common law aim at ensuring fairness and protecting the welfare of vulnerable individuals. In family law, this translates to the "best interest of the child"; in public law, it is the principle of good governance and fairness in state actions.

---

<sup>8</sup> Esposito JL, *Women in Muslim Family Law* (2nd edn, Syracuse University Press, 2001)

<sup>9</sup> Welchman L, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007)

<sup>10</sup> Eekelaar J, *Family Law and Personal Life* (2nd edn, Oxford University Press, 2016)

<sup>11</sup> Olowu D, *An Integrative Rights-Based Approach to Human Development in Africa* (Pretoria University Law Press, 2009)

<sup>12</sup> Ezeilo JN, 'Human Rights and Islamic Law in Nigeria: Issues and Challenges' (2011) 13(1) *Journal of Islamic Law and Culture* 1–14

b. Legal Frameworks: Both laws are molded by statutory and constitutional provisions, as well as judicial precedents. For instance, the 1999 Constitution of Nigeria (as amended) is relevant in both public interest litigation and in ensuring non-discriminatory family law practices.

c. Custody: Rights and duties of custodians (mother/father), conditions for losing or gaining custody, age and gender considerations of the child are considered under both Islamic and common laws.

### **2.3: Public Law and State Oversight in Child Custody**

In modern states, custody disputes must operate within the framework of child protection laws, constitutional guarantees, and children's rights legislation. Even in jurisdictions applying Islamic law, family courts or Sharia courts often must ensure compliance with minimum standards of child welfare.<sup>13</sup> State oversight ensures that no parent's claim, whether paternal or maternal, overrides established welfare norms, human rights obligations, or due process guarantees. Islamic family law reforms increasingly recognize this oversight to harmonize religious law with public law safeguards.<sup>14</sup>

#### **2.3.1: State Oversight and Interpretation**

In countries with codified Islamic family laws (e.g., Malaysia, Egypt, Nigeria), the courts are empowered to revoke or transfer custody if the legal custodian fails to meet the statutory conditions. This reflects how public law intersects with religious law to safeguard the welfare of the child.<sup>15</sup> Moreover, some jurisdictions allow the child, upon reaching a certain age, to express their preference, a mechanism that integrates modern rights-based approaches into Islamic jurisprudence. Thus, while classical Islamic law provides the doctrinal foundation, statutory modifications, court interpretations, and public policy considerations in Muslim-majority or dual legal systems increasingly shape the application of custody laws. For instance, in *Abubakar v. Abubakar & Anor*,<sup>16</sup> the Nigerian Court of Appeal considered both Islamic principles and statutory provisions in determining custody, holding that the welfare of the child transcends religious or parental rights. Additionally, in *Fawehinmi v. Abiola*,<sup>17</sup> although not a direct custody case, the

---

<sup>13</sup> Ogunniran I, *Enforcing the Rights of the Muslim Child in Nigeria: Conflicts between the Child's Rights Act and Islamic Law* (n.d.)

<sup>14</sup> *The Ambitions of Muslim Family Law Reform* (n.d.) Harvard Rights & Religion Program

<sup>15</sup> Oba AA, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2008) 57(4) *International and Comparative Law Quarterly* 817–850

<sup>16</sup> (2014) LPELR-24065(CA)

<sup>17</sup> (2004) 2 NWLR (Pt. 680) 710

court emphasized the paramount of fundamental rights, which courts also apply to children's welfare cases under public law scrutiny.

While child custody in Islamic law is traditionally governed by personal status laws derived from Shari'ah, modern state intervention introduces public law dimensions into what was once a private, family-based matter. Public law here reflects the role of the state in regulating, supervising, and enforcing child custody to ensure alignment with constitutional standards, human rights obligations, and the best interest of the child.<sup>18</sup> Islamic jurisprudence prioritizes the welfare of the child (*maslahah al-walad*), and many Muslim-majority countries have codified these principles into national family laws. However, the state's role becomes vital when disputes arise, particularly concerning abuse, neglect, or cross-border custody battles. Courts can override parental claims if custody is deemed harmful to the child, emphasizing a public interest test.

Thus, in Islamic law as applied within modern states, custody disputes have evolved from private religious matters to hybrid issues requiring public law intervention, particularly in upholding due process, equality before the law, and child protection.<sup>19</sup>

### **2.3.2: Legislative Oversight: Child Rights Act and State Laws**

Constitutional Framework and State Obligation In Nigeria, public law is primarily grounded in the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which provides for the protection of fundamental human rights and imposes duties on the state to safeguard the welfare of children. Section 17(3)(f) states that "children, young persons and the aged are protected against any exploitation whatsoever and against moral and material neglect," mandating government intervention where necessary. While Islamic law traditionally governs family relations in Northern Nigeria, the application of Sharia is subject to constitutional supremacy.<sup>20</sup> As such, state institutions are empowered to intervene in custody arrangements where there is a threat to the welfare, health, or safety of the child, irrespective of religious prescriptions.

The Child Rights Act (CRA), 2003, establishes the best interest of the child as the paramount consideration in all actions affecting children. Section 1 of the CRA aligns with Article 3 of the United Nations Convention on the Rights of the Child (CRC), reinforcing the duty of the state to

---

<sup>18</sup> Cane P, *Administrative Law* (5th edn, Oxford University Press, 2011); Barendt E, *An Introduction to Constitutional Law* (Oxford University Press, 2017)

<sup>19</sup> Holland J & Webb J, *Learning Legal Rules: A Students' Guide to Legal Method and Reasoning* (9th edn, Oxford University Press, 2016)

<sup>20</sup> Ostien P, *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook Vols I–III* (Spectrum Books, 2007)

act as a custodian of child welfare. This public law stance can override traditional or religious custodial norms if found inconsistent with the child's interest. For instance, where a father's claim to custody under Islamic law is likely to result in neglect or abuse, the courts may apply the CRA or relevant state laws to protect the child.<sup>21</sup>

### 2.3.3: Judicial Oversight and Interpretation

The regulation of child custody involves a complex interaction between personal laws, such as Islamic family law, and public law mechanisms rooted in the constitution, statutory enactments, and judicial oversight. In matters of child custody, particularly post-divorce, public law plays a supervisory and protective role, ensuring that individual rights are balanced with societal interests, particularly those of the child. Through judicial interpretation, Nigerian courts have increasingly adopted a child-centric approach in custody cases. The courts assess custody claims based not only on parental rights but also on the child's emotional, psychological, and physical welfare.<sup>22</sup> The judiciary thus becomes an essential actor in reconciling personal law with public interest. For example, in *Okwueze v. Okwueze*,<sup>23</sup> the court emphasized that the welfare of the child overrides all other considerations, including parental claims based on personal or religious laws.

### 2.3.4: Challenges in Harmonizing Islamic Law with Public Law

Despite these frameworks, tensions persist in harmonizing Islamic custodial norms with state oversight. Some Sharia court decisions may prioritize paternal rights in ways that conflict with the CRA or constitutional guarantees. This raises concerns over legal pluralism and jurisdictional conflict between religious courts and state enforcement bodies.<sup>24</sup>

Nonetheless, public law serves as the balancing mechanism, ensuring that all legal systems operating within Nigeria ultimately conform to constitutional values and international human rights standards

## 3.00: Custody under Islamic Law: General Principles

Custody in Islamic law, referred to as "ḥaḍāna", is primarily understood as the physical and moral care of a child, usually granted to the mother during the early years of the child's life. This principle is rooted in the welfare of the child, which is a central objective of Islamic family law (Nasir, 2009)

<sup>21</sup> Ekhatior EO, 'The Child Rights Act in Nigeria: A Critical Legal Appraisal' (2016) 22(2) *Journal of Law and Policy* 187–204

<sup>22</sup> Obidimma EC & Obidimma AN, 'Child Custody under Nigerian Family Law: A Call for a Legislative Reform' (2015) 2(3) *International Journal of Law and Legal Jurisprudence Studies* 78–89

<sup>23</sup> (1989) 3 NWLR (Pt. 109) 301

<sup>24</sup> Ostien P, *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook Vols I–III* (Spectrum Books, 2007)



Custody (Ḥaḍānah) and Guardianship (Wilāyah) : In Islamic jurisprudence, custody refers to (ḥaḍānah) which implies physical care and daily upbringing of minor children, whereas guardianship (wilāyah) often signifies legal authority or decision making, such as managing finances or choosing residence or education.<sup>25</sup> . The two concepts are distinct: a person may have ḥaḍānah but not full wilāyah.

In *Abubakar Karami Masama v. Ruwa Tufara Magama*,<sup>26</sup> this case provides insight into Islamic law principles of family relationships, paternity, and validity of marriage, which are relevant in custody and parental rights disputes. The court reaffirmed that presumption of paternity (al-walad lil firash) under Islamic law applies only when the birth occurs within the minimum gestation period after consummation and within a valid marriage. Since in this case the birth was earlier than six months, the presumption did not apply. It is trite that where parties to a case are Muslims, the custody to the product of such marriage should be determine by Islamic law. In the case of *Yunusa Lawal v. Radiya Iliyasu Mustapha*,<sup>27</sup> the learned judge decline jurisdiction to entertain the issue of custody of the only child, and ask the parties to approach the appropriate Court which is Islamic court.

The Classical *fiqh* generally gives priority to the mother as custodial caregiver for infants and young children, on the presumption that she provides more tender care.<sup>28</sup> After certain ages (*sin at-tamyīz*, the age of discernment), custody may transition, particularly for male children, to the father or another guardian.<sup>29</sup> The mother retains custody as long as she remains unmarried in many schools; remarriage to a non-relative may forfeit her *ḥaḍānah* rights. Islamic jurisprudence orders fallback custodianship in heir lines: maternal grandmother, paternal grandmother, sisters, etc., if the primary custodian is disqualified. However, the court in *Alabi v. Alabi*,<sup>30</sup> held that in matrimonial proceedings, custody decisions are guided by Section 71(1) of the Matrimonial Causes Act, which requires the court to regard the welfare of the child as the paramount consideration. Even if one parent is “guilty” of matrimonial offences, it is not a sole reason to deny custody if that is contrary to the child's welfare.

<sup>25</sup> Rafiq A, ‘Child Custody in Classical Islamic Law and Modern Practices’ (2014) International Journal of Humanities and Social Science

<sup>26</sup> (2018) LPELR-46486(CA) or (2018) CA/S/39S/2016

<sup>27</sup> FCT/HC/01/910/2024.

<sup>28</sup> Library of Congress, Child Custody Laws: Global Perspectives (Library of Congress, 2019)

<sup>29</sup> Wikipedia, Theory of Criminal Justice (n.d.) <[https://en.wikipedia.org/wiki/Theory\\_of\\_criminal\\_justice](https://en.wikipedia.org/wiki/Theory_of_criminal_justice)> accessed 7 September 2025

<sup>30</sup> (2007) 9 NWLR (Pt. 1039) 297



### 3.1: General Principles of Custody under Islamic Law

- a. Custody is a Right and Duty: Custody in Islam is both a legal right and a moral responsibility. While the custodian is granted the right to raise the child, it is also a duty to ensure their proper upbringing in accordance with Islamic values.<sup>31</sup> The child's best interest is paramount and overrides personal interests.
- b. Priority of the Mother: Islamic jurisprudence, especially in Sunni schools like Hanafi and Maliki, gives priority to the mother in child custody, particularly for younger children. The Prophet Muhammad (peace be upon him) reportedly said: "You have more right to him as long as you do not marry"<sup>32</sup> affirming maternal preference unless remarriage affects suitability.
- c. Age of Custody: There are varying opinions on the duration of custody: Hanafi school: custody of boys until age 7 and girls until 9. Maliki School: mother retains custody until the child reaches puberty. Shafi'i and Hanbali's school allow the child to choose the parent after a certain age. These variations aim to protect the child's welfare based on developmental stages.<sup>33</sup>
- d. Qualifications for Custodianship: Custodians must be sane and mature; be of good moral character; be capable of raising the child physically, emotionally, and religiously; Not residing in a place that makes visitation difficult for the non-custodial parent. Loss of any of these qualifications may lead to the revocation of custody.<sup>34</sup>
- e. Welfare of the Child (Maslahah): The principle of *maslahah* (public interest) applies in all custody decisions. Even if a parent meets legal qualifications, custody may be transferred if it better serves the child's well-being.<sup>35</sup> This aligns with the best interest of the child standard, adopted in modern interpretations and state interventions.
- f. Gender and Religious Considerations: Some jurists debate custody rights when one parent is of a different religion. However, the dominant view among modern scholars is to avoid separating children from loving, capable custodians solely based on faith unless their upbringing is at risk.<sup>36</sup>

---

<sup>31</sup> Kamali MH, *Shari'ah Law: An Introduction* (Oneworld Publications, 2008)

<sup>32</sup> Abu Dawud, Sunan Abu Dawud, Hadith No. 2276 (n.d.)

<sup>33</sup> Esposito JL, *Women in Muslim Family Law* (2nd edn, Syracuse University Press, 2001)

<sup>34</sup> Nasir JJ, *The Islamic Law of Personal Status* (3rd edn, Brill, 2009)

<sup>35</sup> Kamali, *Shari'ah Law*

<sup>36</sup> Ali SS, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Springer, 2006)

### 3.2 : Rights and Duties of Custodians (Mother/Father) in Islamic Law

In Islamic jurisprudence (fiqh), custody (hadanah) is not viewed as a right solely for the parent, but rather a trust and responsibility (amanah) that must be exercised in the best interest of the child. The rights and duties of custodians especially the mother and father are rooted in the Qur'an, Hadith, and classical interpretations from Islamic legal schools.

#### 3.2.1: Mother's Custodial Rights and Duties

The mother is generally regarded as the primary custodian of young children, especially during their tender years. This is based on several prophetic traditions (ahadith), such as the hadith reported by Abdullah ibn Amr that a woman said: "O Messenger of Allah, this is my son, my womb bore him, my breasts suckled him, and my lap was a refuge for him, and his father has divorced me and wants to take him away." The Prophet (SAW) responded: "You have more right to him so long as you do not remarry."<sup>37</sup> In *Ahmad v. Fatimah*<sup>38</sup> it was held that after divorce, the mother retained custody of the children due to their young age. In line with Maliki and Hanafi Schools' views, custody remains with the mother until the child reaches the age of discretion (usually 7 years for boys, puberty for girls).

#### 3. 2.2: Paternal Custody Rights: Circumstances and Limits

A father may claim custody when the mother is deemed unfit, incompetent (insanity, illness), or remarries to a non-relative, thereby losing her right.<sup>39</sup> Some jurists argue that the father's right becomes stronger as the child grows, particularly if the mother is unable to maintain moral or financial supervision.<sup>40</sup> However, these claims are still subject to the welfare test: a father's claim must not harm the child's stability, emotional welfare, or known best interests. Contemporary scholars note that Islamic custody doctrines allow judge discretion and priority is not absolute.<sup>41</sup>

In Islamic law, custody (hadanah) and guardianship (wilayah) are two distinct but related concepts. While the mother is often given priority in physical custody during a child's early years due to her nurturing role, the father's rights especially in legal guardianship remain central throughout the child's development.<sup>42</sup>

<sup>37</sup> Abu Dawud, Sunan Abu Dawud, Hadith No. 2276.

<sup>38</sup> (Unreported Sharia Court Case, Nigeria)

<sup>39</sup> Rafiq A, 'Child Custody in Classical Islamic Law' (2014)

<sup>40</sup> Ibid.

<sup>41</sup> Abdulhameed U, Abdulsalam DO, Ishaq AM & Badmus SA, A Comparative Study of Child Custody Under Islamic and Nigerian Laws (2025) 3(1) *Al-Mahkamah: Islamic Law Journal* 44–59 <<https://doi.org/10.61166/mahkamah.v3i1.31>>

<sup>42</sup> Nasir JJ, *The Islamic Law of Personal Status* (3rd edn, Brill, 2009)

Legal and Moral Duties of the Father: Even where physical custody rests with the mother, the father retains legal guardianship, including responsibility for the child's financial maintenance (nafaqah); Decisions regarding education, religious training, and medical care; Protecting the child's property rights, particularly in inheritance matters.<sup>43</sup>

### 3.3: Conditions for Losing or Gaining Custody in Islamic Law

In Islamic jurisprudence, custody (ḥaḍānah) is not an absolute right but a trust (amānah) governed by specific qualifications. Custody is primarily granted to those who fulfill the conditions set by fiqh (Islamic jurisprudence) to ensure the protection, moral upbringing, and physical well-being of the child. These qualifications apply to both men and women, but the mother is usually prioritized in early childhood unless disqualified for legitimate reasons.<sup>44</sup>

#### 3.3.1: Essential Conditions for Gaining Custody:

a: Mental Soundness and Maturity The custodian must be of sound mind and capable of making rational decisions for the child's benefit.<sup>45</sup>

b : Moral Uprightness (‘adālah) The custodian must live a morally upright life in line with Islamic teachings. A lifestyle deemed “immoral” or one that exposes the child to harm (e.g., drug abuse, cohabitation) can disqualify a custodian.<sup>46</sup> In many Islamic traditions, if a woman remarries someone unrelated (non-maḥram) to the child, she may lose custody, especially if the marriage is seen as conflicting with child welfare.<sup>47</sup> Some modern jurists and states now assess this on a case-by-case basis.

c. Child's Welfare at Risk Courts may revoke custody where there is evidence of abuse, neglect, indoctrination, or failure to educate aligning Islamic legal intent with international child rights frameworks.<sup>48</sup>

d.. Custodian Leaving Jurisdiction Without Consent A custodian may lose the right if they relocate the child without court or parental approval, infringing on the other parent's visitation right.<sup>49</sup>

<sup>43</sup> Quraishi A, 'What if Sharia Weren't the Enemy?: Rethinking International Women's Rights Advocacy on Islamic Law' (2011) 22(1) Columbia Journal of Gender and Law 173–248

<sup>44</sup> El-Alami DS, *The Marital Relationship in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco* (Graham & Trotman, 1992)

<sup>45</sup> Ali K, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law International, 2002)

<sup>46</sup> Nasir JJ, *The Islamic Law of Personal Status* (3rd edn, Brill, 2009)

<sup>47</sup> El-Alami DS, *The Marital Relationship in Islamic Law* (1992)

<sup>48</sup> United Nations, *Convention on the Rights of the Child* (1989) Treaty Series No 1577, 3. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 1st September 2025.

<sup>49</sup> Ali K, *Gender and Human Rights in Islam and International Law* (2002)

### 3.3: Circumstances under which the Father May Claim Custody in Islam

Even under the common law, the court held in *Okwueze v. Okwueze*,<sup>50</sup> that courts may award custody to the father if circumstances show he is in a better position to care for the child, although the welfare and age of the child remain paramount. Paternal custody becomes particularly relevant under the following circumstances in Islam:

3.3.1: Where the mother is found to have neglected or abandoned the child *Fatima v. Ali*,<sup>51</sup> *Zainab v. Adamu*,<sup>52</sup> engaged in immoral or unchaste behaviour *Amina v. Ibrahim*,<sup>53</sup> affiliated with a cult or extremist group *Hafsat v. Lawal*,<sup>54</sup> or involved in activities likely to damage the child's reputation *Fatima v. Ali*,<sup>55</sup> supra the father may rightfully seek custody. If the mother is found to be morally, mentally, or physically unfit, such as neglecting the child's welfare, engaging in harmful or illegal activities, or residing in a location that restricts the father's access custody may be transferred to the father or another suitable relative.<sup>56</sup>

3.3.2: Mother's Remarriage: If the mother remarries, particularly to a man who is not a mahram (legally unmarriageable kin) to the child, the father may be entitled to seek custody. This is grounded in the principle of protecting the child from potential moral or physical harm,<sup>57</sup> as upheld in *Habiba v. Abdullahi*.<sup>58</sup>

3.3.3: Child's Best Interests: If the court determines that awarding custody to the father serves the best interests of the child, custody may be granted to him, as held in *Aisha v. Musa*.<sup>59</sup> Regarding the age of discretion (*tamyīz*), classical Hanafi jurists maintain that a father may claim custody once the child reaches discernment typically around 7 years for boys and 9 for girls. However, other schools like the Maliki prioritize the child's best interests and permit the child to choose their preferred custodian at that stage.<sup>60</sup>

---

<sup>50</sup> (1989) 3 NWLR (Pt. 109) 321

<sup>51</sup> (2012) NWLR (Pt. 1301) 121).

<sup>52</sup> (2017) NWLR (Pt. 1341) 151

<sup>53</sup> (2015) NWLR (Pt. 1481) 247)

<sup>54</sup> (2013) NWLR (Pt. 1341) 151)

<sup>55</sup> (2012) NWLR (Pt. 1301) 121)

<sup>56</sup> Ali SS, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Springer, 2006)

<sup>57</sup> Esposito JL, *Women in Muslim Family Law* (2nd edn, Syracuse University Press, 2001)

<sup>58</sup> (2018) NWLR (Pt. 1641) 341).

<sup>59</sup> (2016) NWLR (Pt. 1521) 201)

<sup>60</sup> Kamali, *Shari'ah Law*

3.3.4: Mental or Physical Incapacity of the Mother: Where the mother is mentally or physically incapable of caring for the child, custody may be granted to the father. This position was upheld in *Rahma v. Sani*.<sup>61</sup>

3.3.5: Imprisonment of the Mother: Where the mother is serving a prison term, the father may apply for custody, as she is unable to provide proper care during incarceration. This was affirmed in *Hafsat v. Lawal*.<sup>62</sup>

3.3.6: Mother's Lack of Financial Capability: If the mother is unable to provide for the child due to financial incapacity, the father may be granted custody, as decided in *Khadija v. Abubakar*.<sup>63</sup>

3.3.7: If the mother has a history of child abuse,<sup>64</sup> engages in activities harmful to the child's wellbeing<sup>65</sup> or struggles with addiction,<sup>66</sup> the father may be entitled to seek custody of the child.

3.3.8: If the mother fails to provide a stable home environment: In *Habiba v. Abdullahi*,<sup>67</sup> a safe living condition,<sup>68</sup> adequate education,<sup>69</sup> or necessary healthcare,<sup>70</sup> was considered sacrosanct; in the absence of this, the father may petition the court for custody of the child

3.3.9: If the mother refuses to allow the father access to the child: the father may seek custody in cases where the mother has a history of domestic violence,<sup>71</sup> or consistently fails to cooperate with the father in the child's upbringing.<sup>72</sup>

3.3.10: If the mother relocates to a distant location that could disrupt the child's education or relationship with the father, the latter may be entitled to seek custody or fails to provide a stable routine for the child.<sup>73</sup>

---

<sup>61</sup> (2014) NWLR (Pt. 1421) 131)

<sup>62</sup> (2013) NWLR (Pt. 1341) 151)

<sup>63</sup> (2015) NWLR (Pt. 1491) 201)

<sup>64</sup> *Amina v. Ibrahim*, supra

<sup>65</sup> *Fatima v. Ali*, supra,

<sup>66</sup> *Nafisa v. Tijjani* (2019) NWLR (Pt. 1681) 301)

<sup>67</sup> (2018) NWLR (Pt. 1641) 341)

<sup>68</sup> *Nafisa v. Tijjani* (2019) NWLR (Pt. 1681) 301)

<sup>69</sup> *Rahma v. Sani* (2014) NWLR (Pt. 1421) 131)

<sup>70</sup> *Zainab v. Adamu* (2017) NWLR (Pt. 1581) 211)

<sup>71</sup> *Aisha v. Musa* (2016) NWLR (Pt. 1521) 201); *Khadija v. Abubakar* (2015) NWLR (Pt. 1491) 201)

<sup>72</sup> Ibid.

<sup>73</sup> *Habiba v. Abdullahi* (2018) NWLR (Pt. 1641) 341); *Rahma v. Sani* (2014) NWLR (Pt. 1421) 131).

3.3.11: If the mother fails to provide adequate supervision,<sup>74</sup> or serves a suitable role model,<sup>75</sup> or is involved in illegal activities that may endanger the child's welfare,<sup>76</sup> the father may rightfully seek custody.

3.3.12: Death or inability of other custodians: If no eligible or fit maternal relatives are available to assume custody, the right may revert to the father as the next guardian under Islamic law.

**3.4: Limits to Paternal Custody Rights:** Although the father's guardianship rights are widely recognized in Islamic law, they are not absolute. Courts especially, in jurisdictions applying Sharia within a constitutional democracy like Nigeria have placed increasing emphasis on the best interest of the child.<sup>77</sup> Nigerian courts have sometimes denied fathers custody where it would jeopardise the child's welfare or contradict public policy.<sup>78</sup>

**3.4.1: In cases where state oversight intersects with religious family law,** as in Northern Nigeria's Sharia courts, paternal custody can be reviewed judicially if claims arise about abuse, neglect, or violation of statutory provisions like the Child Rights Act or constitutional rights under Section 17(3)(f) of the Nigerian Constitution, which promotes protection of children against exploitation and neglect. Additionally, international standards such as the Convention on the Rights of the Child (CRC), influence child custody decisions by requiring that the child's interest be the primary consideration in all legal actions.<sup>79</sup>

#### **4.0: The Principle of Best Interest of a Child as related to Child Custody in Islam**

"Best interest of the child" is a guiding principle in secular family law and modern human rights instruments. Islamic law also embeds welfare considerations through *maqāṣid al-Sharī'ah* (objectives) and juristic reasoning aiming to protect the welfare and dignity of children in *Bilyamin Bishir v. Suwaiba Mohammad*,<sup>80</sup> the Sharia Court of Appeal reportedly held that the child's best interest, health, training, and education should be primary considerations in custody decisions. In custody questions, both systems may converge on assessing which parent fosters a stable, nurturing environment. In *Damulak v. Damulak*,<sup>81</sup> the Court held that the grant of custody is not a rigid

<sup>74</sup> *Zainab v. Adamu* (2017) NWLR (Pt. 1581) 211)

<sup>75</sup> *Hafsat v. Lawal* (2013) NWLR (Pt. 1341) 151)

<sup>76</sup> *Nafisa v. Tijjani* (2019) NWLR (Pt. 1681) 301)

<sup>77</sup> Child Rights Act

<sup>78</sup> Olowu D, 'Protecting Children's Rights under Islamic Law: A Critique of the Child Rights Act 2003 in Nigeria' (2002) 6(2) Law, Democracy & Development 67–82

<sup>79</sup> UNICEF, Implementation Handbook for the Convention on the Rights of the Child (3rd edn, UNICEF, 2007)

<sup>80</sup> (KTS/SCA/KT/39/2019)

<sup>81</sup> (2004) 8 NWLR (Pt. 874) 151

recipe, but depend on many factors emotional attachment, education, stability, health, etc. whatever serves the child's welfare (paramount consideration).

#### **4.1: Best Interest of a Child Islamic and Secular Views**

The principle of the “best interest of the child” serves as the foundational criterion in determining child custody arrangements across various legal systems, including both secular and religious frameworks. Islamic custody rules and secular family law, showing that while both emphasize child welfare, secular courts often give primary custody to mothers under statutory child rights frameworks unless clear evidence favours the father.<sup>82</sup> In Saudi Arabia, custody law designates that after certain age, children may choose between parents; the law codifies classical Islamic rules but allows judicial flexibility.<sup>83</sup> Such comparisons highlight how public law structures shape implementation of religious custody norms.

##### **4.1.1: Islamic View**

In Islamic law (Shari’ah), the best interest of the child (maslahah al-tifl) is a paramount consideration, though it is often articulated through the lens of religious and moral obligations. Custody (known as hadanah) is traditionally granted to the mother during the early formative years of the child, based on the presumption that maternal care best supports emotional and physical development.<sup>84</sup> However, the father assumes custodial responsibility once the child reaches a certain age of discretion or when the mother is deemed unfit, remarries a non-mahram, or relocates in a way that hinders the father’s visitation rights.<sup>85</sup> Islamic jurisprudence, while rooted in divine injunctions, allows for flexibility (istislah) in addressing modern custodial issues, particularly where strict application of rules may harm the child. Jurists like Al-Ghazali and Al-Shatibi have historically supported the idea that maslahah public or individual welfare can override rigidity in legal interpretations, especially in matters affecting vulnerable groups like children.<sup>86</sup>

##### **4.1.2: Secular View**

In contrast, secular legal systems, such as Nigeria’s statutory child protection laws, define the best interest of the child as a comprehensive standard encompassing the child’s physical safety, emotional well-being, education, health, and stable environment.<sup>87</sup> The Child Rights Act 2003,

---

<sup>82</sup> Abdulhameed U et al, \*A Comparative Study of Child Custody (2025)

<sup>83</sup> LSE Blog, ‘The Shifting Sands of Child Custody Rights in Saudi Arabia’ (23 September 2024)

<sup>84</sup> Kamali, Shari’ah Law

<sup>85</sup> Esposito JL, \*Women in Muslim Family Law (2001)

<sup>86</sup> Kamali, Shari’ah Law

<sup>87</sup> Olowu D, ‘Protecting Children’s Rights under Islamic Law’ (2002) 6(2) Law, Democracy & Development 67–82



which domesticates the UN Convention on the Rights of the Child (CRC), mandates courts to prioritize the child's welfare in all judicial and administrative proceedings affecting them. Section 1 of the Child Rights Act provides that "in every action concerning a child... the best interest of the child shall be the primary consideration." Nigerian courts have adopted this position in several cases, moving away from automatic paternal rights and toward a welfare-based custody model in *Eze v. Eze*.<sup>88</sup>

#### 4.2: Islamic vs. Secular Standards

Reconciling the two approaches, although Islamic and secular views differ in source and emphasis, there is growing convergence in recognizing that the child's overall welfare should be the central determinant in custody decisions. Modern Islamic scholars and courts in Muslim-majority jurisdictions are increasingly integrating *maslahah* with contemporary child rights principles.<sup>89</sup> In Nigeria, especially in Sharia-implementing states, judges often invoke both religious and constitutional reasoning to deliver decisions that reflect evolving societal norms

Secular regimes often define the best interest standard through empirical factors emotional bonds, education, health, stability. Islamic law's welfare objective incorporates these along with spiritual, moral, and religious upbringing considerations. Some argue Islamic doctrine privileges the child's religious and moral welfare, which may favor a Muslim father capable of proper religious training.<sup>90</sup> Where secular child rights laws hold supremacy, conflicts may arise in Muslim states that refuse full adoption of those standards.<sup>91</sup> The challenge is achieving a balanced standard that respects both religious principles and universally accepted child welfare norms.

#### 4.3: Jurisdictional Comparative on best interest of a child

There is always jurisdictional conflict particularly when interpretations of "best interest" differ. The application of Islamic law on child custody (*ḥaḍānah*) varies across jurisdictions depending on the extent to which Sharia is codified, integrated into national legal systems, and balanced with modern constitutional and human rights frameworks. Comparative case studies highlight how different Muslim-majority and plural legal systems interpret paternal custody rights and the "best

---

<sup>88</sup> [2017] LPELR-41920(CA)

<sup>89</sup> Quraishi A, 'What if Sharia Weren't the Enemy?: Rethinking International Women's Rights Advocacy on Islamic Law' (2011) 22(1) Columbia Journal of Gender and Law 173–248.

<sup>90</sup> The Ambitions of Muslim Family Law Reform (n.d.)

<sup>91</sup> Ogunniran I, Enforcing the Rights of the Muslim Child in Nigeria: Conflicts between the Child's Rights Act and Islamic Law (n.d.)

interest of the child” post-divorce. However, scholars have noted inconsistencies in court rulings due to the tension between classical Islamic jurisprudence and statutory law.<sup>92</sup>

States like Egypt and Malaysia have statutory courts (e.g., Shariah courts), whose decisions on custody are subject to constitutional limitations and state oversight, especially when custody rights conflict with international human rights obligations.<sup>93</sup> Public oversight may also arise where custody is contested between divorced parents of different nationalities or faiths. In such cases, public law governs cross-border enforcement and ensures child protection under treaties like the UNCRC.

#### **4.3.1: Nigeria Position on best interest of a child**

In Northern Nigeria, where Islamic law operates under the Sharia legal framework, custody typically follows classical Islamic jurisprudence. Mothers are entitled to custody of young children, especially during the formative years, unless disqualified (e.g., by remarriage or misconduct), while fathers retain guardianship (*wilāyah*) and financial responsibilities.<sup>94</sup> However, the secular courts, guided by the Child Rights Act and constitutional provisions, may intervene where the child’s welfare is threatened.<sup>95</sup> The state plays an active role in harmonizing Islamic family law with international child rights norms, including provisions from the Convention on the Rights of the Child, to which Nigeria is a signatory.<sup>96</sup>

#### **4.3.2: Egypt: Custody under the Egyptian Personal Status Law**

In Egypt, the Personal Status Law governs Islamic family matters for Muslims, while non-Muslims are governed by their own personal laws.<sup>97</sup> Under this law, mothers typically have custodial rights (*ḥaḍānah*) up to a certain age (often until 15 years for both boys and girls), after which the child may choose whether to live with the mother or father.<sup>98</sup> Courts also have discretion to deviate from this default in exceptional welfare cases.<sup>99</sup>

---

<sup>92</sup> Quraishi A, ‘Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective’ (1999) 18(2) *Michigan Journal of International Law* 287–320

<sup>93</sup> Welchman L, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007)

<sup>94</sup> Ostien P, *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook Vols I–III* (Spectrum Books, 2007)

<sup>95</sup> Ekhatior EO, ‘The Child Rights Act in Nigeria: A Critical Legal Appraisal’ (2016) 22(2) *Journal of Law and Policy* 187–204

<sup>96</sup> Ibrahim N, ‘Harmonising Islamic Law and Child Rights in Malaysia’ (2018) 26(2) *IIUM Law Journal* 233–251

<sup>97</sup> UK Foreign, Commonwealth & Development Office, *Report on Family Law Practices and International Child Custody Cases* (UK Government, 2023)

<sup>98</sup> *Ibid.*

<sup>99</sup> Library of Congress, *Child Custody Laws: Global Perspectives* (Library of Congress, 2019)

One legal analysis notes that in Egypt's revised personal status law, the custody age is pegged at 15, allowing children beyond that age to make a choice of custodian, while maintaining that the mother retains priority until that stage.<sup>100</sup> Moreover, in Egypt, the hierarchy of custodial claimants typically follows: mother, maternal female relatives, then father.<sup>101</sup> This system attempts to balance classical Islamic rules with state law and considers the welfare of children as part of the judicial assessment.<sup>102</sup> Because Egypt's civil and Islamic legal frameworks are more integrated, custody decisions are subject to both religious doctrine and statutory law. Egypt provides a useful example of how Islamic principles are codified into civil law. The Egyptian Personal Status Law<sup>103</sup> specifies that the mother has priority in custody until a certain age (15 years), after which the child can choose between parents. The law was amended in 2005 to reflect a more child-focused approach while preserving paternal guardianship.<sup>104</sup> However, Egypt's constitutional and international human rights commitments provide judicial discretion to deviate from classical positions in the child's best interest.<sup>105</sup>

#### 4.3.3: Malaysia: Dual System and State Shariah Courts

Malaysia operates a dual legal system, where Syariah courts (Islamic courts) have jurisdiction over Muslims in matters of family law, including child custody and guardianship.<sup>106</sup> Under Malaysian Islamic family law, many states follow default rules that favour mothers for custodial care of young children, but courts may depart from that if the father's custodial role better serves the child's welfare.<sup>107</sup> Some state Islamic family statutes include provisions that allow the court to consider the child's preference and welfare factors.<sup>108</sup> Because custody is handled by Syariah courts, state legislative oversight also affects how Islamic doctrine is operationalized, and courts often integrate modern child welfare norms with Islamic principles.<sup>109</sup> Malaysia operates a dual legal system:

---

<sup>100</sup> Egyptian Streets, 'Reforming Child Custody Laws: Egypt's Shift Towards Maternal Rights' (15 March 2025) <<https://egyptianstreets.com/2025/03/15/reforming-child-custody-laws>>

<sup>101</sup> UK Foreign, Commonwealth & Development Office

<sup>102</sup> Library of Congress,

<sup>103</sup> (Law No. 25/1929)

<sup>104</sup> Al-Sharmani M, '

<sup>105</sup> Tadros M, 'The Politics of Religious Freedom in Egypt' (2011) 110(740) *Current History* 338–343

<sup>106</sup> Syariah Court, Overview of Syariah Court System in Malaysia (n.d.) <<https://www.syariah.gov.my>> accessed 7<sup>th</sup> August 2025

<sup>107</sup> Che Soh R, 'Custody of Children Under Islamic Law' (1993) 1(1) *Jurnal Syariah* 45–58

<sup>108</sup> Ibid.

<sup>109</sup> UK Foreign, Commonwealth & Development Office, Report on Family Law Practices and International Child Custody Cases (UK Government, 2023)

Islamic law governs Muslims under state controlled Syariah courts, while civil law applies to non Muslims. Custody laws under the Islamic Family Law <sup>110</sup> prioritize the mother's custody rights for children below the age of seven. However, Section 84 allows courts to consider the child's welfare and views in overriding default rules.<sup>111</sup>

#### **4.3.4: Pakistan**

In Pakistan, child custody is governed by the Guardians and Wards Act, 1890, which incorporates Islamic principles but grants considerable judicial discretion. Courts often favour the mother for young children but consider the father's financial and moral suitability for long-term custody. The courts apply a best interest of the child test, allowing deviation from traditional rules where necessary.<sup>112</sup> However, scholars have noted inconsistencies in court rulings due to the tension between classical Islamic jurisprudence and statutory law.<sup>113</sup>

#### **4.3.5: Tunisia**

Tunisia represents one of the most progressive Muslim majority legal systems, where Islamic law has been significantly reformed. Under the Code of Personal Status (1956), both parents are considered equal custodians. The state prioritizes gender equality and child welfare, moving away from traditional paternal guardianship models.<sup>114</sup> Tunisia's secular legal tradition allows courts greater flexibility to protect children's rights in line with international standards

#### **4.4: Summary on Jurisdictional comparison**

These case studies reveal diverse approaches to paternal custody rights under Islamic law. While classical fiqh provides foundational rules, modern states increasingly incorporate public law considerations, such as constitutional rights and international human rights obligations, in determining child custody post-divorce. This comparative perspective underscores the dynamic nature of Islamic family law and the role of state institutions in aligning custody decisions with the evolving concept of the child's best interest.

---

<sup>110</sup> Federal Territories Islamic Family Law Act 1984 (Act 303) (Laws of Malaysia)

<sup>111</sup> Yusof NM, 'The Best Interest of the Child in Custody Disputes: A Comparative Analysis Between Islamic Law and Civil Law in Malaysia' (2015) 5(1) International Journal of Social Science and Humanity 103–107

<sup>112</sup> Ali SS, *Modern Challenges to Islamic Law* (Cambridge University Press, 2013)

<sup>113</sup> Quraishi A, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1999) 18(2) Michigan Journal of International Law 287–320

<sup>114</sup> Charrad MM, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press, 2001)

### 5.00: Challenges and Legal Gaps

Challenges include lack of uniform codification of custody within Islamic law in many countries, leading to conflicts between Sharia courts and secular family courts, inadequate enforcement of custody orders, and gender bias. Some mothers misuse custody rights or fathers contest without genuine welfare concerns.<sup>115</sup>

Challenges include lack of uniform codification of custody within Islamic law in many countries, conflicts between Sharia courts and secular family.

a. Interpretational Differences among the Schools of Thought: Islamic law is not monolithic—custody rules vary across the Hanafi, Maliki, Shafi'i, and Hanbali schools. These variations lead to inconsistent rulings and confusion.<sup>116</sup>

b. Best Interest of the Child vs. Paternal Right: The father is often seen as the default guardian (wali), even when the child's best interest might lie elsewhere—raising ethical and legal dilemmas.<sup>117</sup>

c. Gender-Based Assumptions: Custody presumptions can be patriarchal—mothers may lose custody upon remarriage, while fathers retain it regardless of their marital or financial status.<sup>118</sup>

d. Limited Judicial Discretion: In some countries, judges have limited ability to override paternal rights, even in abusive or neglectful situations.<sup>119</sup>

e. Weak State Oversight: In many jurisdictions, there is minimal state intervention in family matters governed by Shari'ah, which can hinder the enforcement of child welfare standards.<sup>120</sup>

f. Conflict with International Standards: Some Islamic custody rules may conflict with international instruments like the UN Convention on the Rights of the Child.<sup>121</sup> particularly on issues of equal parental responsibility and child participation.

### 6.0: Conclusion

In conclusion, while Islamic law provides a coherent doctrine for custody, a purely paternal claim must always be mediated by welfare standards and public law oversight. States should codify rules

<sup>115</sup> Ogunniran I, *Enforcing the Rights of the Muslim Child in Nigeria: Conflicts between the Child's Rights Act and Islamic Law* (n.d).

<sup>116</sup> Yusof NM, 'The Best Interest of the Child in Custody Disputes: A Comparative Analysis Between Islamic Law and Civil Law in Malaysia' (2015)

<sup>117</sup> Al-Sharmani M

<sup>118</sup> Che Soh R, 'Custody of Children Under Islamic Law

<sup>119</sup> Tadros M, 'The Politics of Religious Freedom in Egypt

<sup>120</sup> Charrad MM, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*

<sup>121</sup> United Nations, *Convention on the Rights of the Child* (United Nations Treaty Series, 1989)

that integrate religious principles with constitutional child rights, ensure judicial training to evaluate welfare criteria impartially, and require custody decisions to be subject to appeal and review to prevent injustice. Reform efforts should aim for harmonization of Islamic custody rules with child welfare statutes, protecting both religious integrity and the rights of children. Paternal custody under Islamic law reflects deeply rooted religious and cultural values, but it also raises complex legal and ethical issues in the modern context. While the father's role as guardian is recognized, contemporary interpretations must balance this with the best interests of the child and align with evolving human rights standards. A public law approach that includes judicial oversight and child protection mechanisms is essential to ensure custody decisions serve both religious principles and the welfare of the child.

### **7.0: Recommendation**

- a. Codify Clear Custody Guidelines in Muslim-Majority Jurisdictions Legislatures in Islamic countries or states applying Islamic personal law should provide clear statutory frameworks on paternal custody rights after divorce, reflecting both classical jurisprudence and evolving interpretations aligned with child welfare standards.<sup>122</sup>
- b. Incorporate Best Interest of the Child as a Paramount Principle Legal reforms should prioritize the best interest of the child as a guiding principle in custody decisions, balancing it with religious values. This ensures both spiritual and psychosocial development of the child.<sup>123</sup>
- c. Establish Oversight Mechanisms by Family Courts Family courts should exercise supervisory jurisdiction over custody arrangements, including paternal custody, to ensure they align with public interest, child rights, and fundamental freedoms as enshrined in national constitutions and international treaties .<sup>124</sup>
- d. Promote Gender-Neutral Interpretation of Custody Rights Courts and lawmakers should encourage evolving interpretations of Islamic jurisprudence that do not assume automatic maternal or paternal custody based solely on gender, but on capability and stability.<sup>125</sup>

---

<sup>122</sup> Nasir JJ, *The Islamic Law of Personal Status* (3rd edn, Kluwer Law International, 2002)

<sup>123</sup> Esposito JL & DeLong-Bas NJ, *Women in Muslim Family Law* (2nd edn, Syracuse University Press, 2001)

<sup>124</sup> United Nations, *Convention on the Rights of the Child* (United Nations Treaty Series, 1989)

<sup>125</sup> Welchman L, *Women's Rights and Islamic Family Law: Perspectives on Reform* (Zed Books, 2011)

- e. Enhance Capacity of Religious and Legal Officers Judicial officers and Shariah court judges should undergo regular training in child psychology, international human rights law, and evolving Islamic legal scholarship to ensure child-sensitive and rights-based custody decisions.<sup>126</sup>.
- f. Develop a Standard Custody Evaluation Protocol Governments should introduce standardized protocols that assess emotional, educational, and health-related needs of the child before awarding custody, regardless of whether the parent is the mother or father.
- g. Encourage Alternative Dispute Resolution (ADR) in Custody Cases Islamic mediation and conciliation methods should be promoted to resolve custody disputes amicably, provided they prioritize the welfare of the child and operate within a state-supervised legal framework.

---

<sup>126</sup> Ali K, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Oneworld Publications, 2016)