



A comparative analysis of child`s paternity right: A case study Zanzibar

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Abstract

This study made a Comparative Analysis of Child`s Paternity Right: a case study Zanzibar. The research aimed at curbing the problem of increase in the number of illegitimate children and street children in Zanzibar due to the abuse or in effective enforcement of this right. The rate of divorce also has increased and, in most cases, men leave parenting to women. Most children guardians have become irresponsible in Zanzibar after the death of the child father. The study sampled a total of 53 respondents using sampling techniques. Data were collected using Interviews as a tool for collecting data. The data analysis was done in descriptive way. The research was successfully analyzed in relying with the objectives. The findings included existence of paternity problems in Zanzibar leading to deprivation of inheritance, deprivation of right to lineage, lack of child support, increase of street children, juvenile delinquency, discrimination, educational problems, psychological problems, knowledge problem of most Zanzibar inhabitants on the importance paternity right and challenges of lacking paternity right, lack of awareness of application of Kadhi`s Court and Children Court in Zanzibar on the issue of paternity and the need of having specific laws which deals with family matters in Zanzibar in order to protect children`s rights. The research also revealed that the effects of divorce or being born illegitimate on children often included emotional, custodian, inheritance, psychological and economical among others and recommended ways in which these effects could be minimized among children.

Keywords: Child`s Paternity, Right

Introduction

Paternity is the legal establishment of the identity of a child's father. It is from these right other rights of a child such as right to custody, maintenance and inheritance are established. The bond between child and parents is fundamental in a person's life. The parents' rights and obligations in relation to the child are linked to the legal parenthood. It is therefore important that parenthood is established as early as possible in the child's life. This will provide security and stability for the child. If a married woman gives birth to a child, the law presumes that husband of the child's mother is the father of the child.

Moreover, it is connected that

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

Legal parenthood is of importance to several rights and obligations. Parents must provide children with care and consideration. They are obligated to provide for the child, either directly or by paying child maintenance.

A child has right of access to his/her parents, also when they do not live together. Both parents are responsible for ensuring that the right of access is satisfied.

Background of the study

Establishing paternity is important because it gives the child the rights of custody, maintenance and inheritance.

Parentage is exclusively established with the real father and mother of a child, and only if they beget the child in a lawful matrimony.

In Islam paternity is considered the kernel of the entire family structure. Paternity in Islam, however, is not exclusively a legal issue but it is also an ethical one because it is linked to a certain moral vision of family, sexual conduct, and social order. It impacts several family status issues ranging from kinship boundaries to various entitlements and claims such as those related to inheritance rights. Islamic paternity regulations are anchored in definitive textual foundations both in the Qur'an and the Sunna of the Prophet, which explains the difficulty of modifying them. According to Islamic law, paternity is based on the existence of a licit sexual relationship. The word licit denotes sanction by Shariah either through marriage or, in the past, ownership of a slave-woman whereby paternity becomes primarily a legal relationship. The reason as to why an illegitimate child must be treated different from a legitimate child in Islam is because the Prophet (blessings and peace of Allah be upon him) said:

“The child is to be attributed to the bed (i.e., to the husband) and the adulterer deserves nothing.”

The relevant point here is that the Prophet (blessings and peace of Allah be upon him) did not describe the child as belonging to anyone other than the bed (i.e., the husband), and he said that the adulterer did not deserve anything at all. Attributing the child to the adulterer is attributing the child to someone other than the husband. The words: “The child is to be attributed to the husband” imply that attribution of the child is to be to the marriage only.

Statement of the problem

Zanzibar's Children's Act is a pioneering comprehensive child rights law covering custody, foster parentage, and guardianship, as well as the roles and responsibilities of professionals and institutions in providing services for children, dealing with children in need of care and protection and those in conflict with the law. Likewise, in the Zanzibar there is Kadhi's Court Act which *inter alia* stipulates the exclusiveness of Kadhi's Courts to deal with matters and proceedings between parties who are Muslim personal matters like marriage, divorce, custody and maintenance of children.

Several studies have elaborated on the importance of paternity right of children, However, a critical and comparative analysis on the problems associated with lacking of right to paternity of a child under Zanzibar frame work have not been covered and by this critical study it is expected to bring awareness and provide a best way of protecting this crucial right. For example, there has been an increase in the number of illegitimate children and street children in Zanzibar due to the abuse or in effective enforcement of this right. The rate of divorce also has increased and, in most cases, men leave parenting to women. Most children guardians have become irresponsible in Zanzibar after the death of the child father. The other issue is apart from evidence of marriage (nikah), confession (iqrar) and oath (al-yamin), the research aimed at finding as to whether paternity DNA tests should be used as independent evidence in Islamic Court to establish paternity in some instances or not.

Research design

The study used interviews, group discussions and questionnaires to representatives of different departments such as Mufti's office, Qadhi's Court, Juvenile Court, Zanzibar Female Lawyers Association (ZAFELA), Zanzibar Law Society (ZLS), Department of Gender and Children Affairs, a group of fathers, mothers, children and sheikhs.

1. Study Area

The study was conducted in Unguja and Pemba. This is because the tendency shows that these two Islands face the same problem hence easily to collect data.

2. Study Population

The population used involved in the study are Qadhi, magistrates, lawyers, sheikhs, human right activists and ordinary members of society.

3. Population Size

Fifty-three (53) respondents have been involved in the study in the following order:

S/N	Respondents	No. of people
1.	Magistrates	5
2.	Qadhis	3
3.	Lawyers	5
4.	Sheikhs	5
5.	Human right activists	5
6.	Ordinary members of the society (mothers, fathers and children)	30
	Total	53

4. Sampling technique

Purposive technique has been employed. This technique has helped to easily identify the cases, individuals, or communities best suited to answer the research questions.

5. Data Collection Techniques

The study used primary and secondary methods of data collection. The primary methods included observations, questionnaires and interviews. The secondary methods included government publications, Holy Qur'an, websites, books, journal articles, and any relevant statutes/laws. Data Analysis

A descriptive way has been used to interpret the available data. Descriptive analysis helped to conduct data mining, querying, describing, explaining and validating research findings.

Literature review

Ibn Qudama al-Maqdisi, in one of his chapters writes on the right of guardian to look after children and the insane mentioning that a boy who attains seven years of age has the right to choose one of the parents to stay with. He further stressed on the father's duty to feed the child. His work differs from this work as the current research goes further to address the problems which the children faces once they lack the right to paternity.

Moh'd, Aziza writes that illegitimate child remains of low status in Islam and of no value in the eyes of the society. What are his rights and does the law afford any protection for his sake. However, she did not go further to refer the treatment of illegitimate child during the time of the Prophet Muhammad (S.A.W) and the Khalifas of which in this study of mine is important taking into consideration Zanzibar uses both Islamic law and Common law.

Safir, Syed seeks to examine the impact of Shariah on the implementation of the non-discrimination provision in Article 2 (1) of the Children's Convention with respect to non-marital children in those States parties where Shariah governs family law matters of the Muslim population. He did not mention the specific case of Zanzibar where both Common Law and Islamic Law are used.

Sarumi, Isa Abdur-Razaq., Mod, Azizah., Ibrahim, Norliah write over the legitimation of illegitimate children under Islamic on which both opponents and proponents of the legitimation of illegitimate children among Muslim scholars buttress their arguments with the famously narrated hadith "*al-walad lil firash*" ("The child is traced to the owner of the bed that is the legitimate husband.") Therefore, this research explored juristic interpretations of the hadith and the rationale behind the scholars' dissention. I have gone ahead and study the legitimation under Common Law and Islamic Law in Zanzibar.

Itua, Paul Okhaide discusses on the interactions between common law, statutes and customary law on the subject of legitimacy and legitimation offer a more complex problem. The lacuna that still exist in spite of the Constitutional provisions can be addressed and further enhance the status of person born out of wedlock. However, the study did not thrive enough in the status of paternal rights of a child in Islamic law.

Katarina Trimmings, Anatol Dutta, *et al* address on the issue of mothers who, fleeing from domestic violence, take their children with them and thus become liable for international child abduction. It examines how protection measures can help the abducting mother in this context, with a special

focus on the utility of Regulation 606/2013 on mutual recognition of protection measures in civil matters and Directive 2011/99/EU on the European Protection Order, which allow cross-border circulation of protection measures. This book is very important to the research as it outlines problems facing children due to domestic violence; However, a specific issue of lacking paternity has not been covered and by this research the book has been a good guide to address the statement of the problem.

Marieke J. Hopman writes that since the adoption of the 1989 UN Convention on the Rights of the Child, all children in the world have rights that are protected by states - at least in theory. In practice, children's rights are grossly violated on a daily basis and on a global scale. This publication proposes that a better understanding of children's rights violations may be achieved if looking at law from a child's perspective. The study facilitated to focus on addressing the importance of UN convention in protecting the rights of children in Zanzibar especially those emanating from the issue of paternity.

Khamis, Muhyiddin Ahmad writes inter-alia that deviations of nurturing of children in Zanzibar are caused by ignorance of Islamic approach regarding nursing and nurturing. In addition, the problem is intensified by parents' negligence towards their duty to children. He managed to cover the deviations and provided the remedies thereof. His book provided superb guideline in writing this research. However, his writing did not cover the issue of problems associated with lacking of paternity right which this research managed to fill the gap.

Paternity in Islamic perspective

Paternity of a child under Islamic law is as important as life itself. It's an inalienable right of a child as every child must have a father and one father only. Therefore, no parent is permitted to disown a child legitimately born except where he has legally disowned the paternity of the child through the process of li'an that is Oath of Mutual Imprecation or where the child is born outside the minimum or maximum period of gestation.

Paternity is a natural or legal filial relationship between a father and his child. Thus, question of paternity arises through marriage, because Shariah asserts that paternity of every child emanates from lawful marriage between a father and a mother. However, there are certain factors Shariah considers in determining paternity of a child.

Associated right to paternity under Islamic law

Islamic Shariah has given utmost attention and care to the issue of parentage. This is reflected in the fact that preserving parentage is one of the higher objectives of Shariah. This is in addition to enacting provisions related to this issue in terms of legislating marriage, proving paternity, prohibiting Zina (Adultery/fornication) and the like. Islam leans favorably towards holding children to be of legitimate parentage. In Islam, a child born within 180 days or more after the parents concluded a valid marriage contract is deemed legitimate. Children born from adulterous relationships shall only have a maternal lineage for all legal purposes.

Rights associated with the right of paternity in Islam include

The Right of the Child to Kindred: Kindred bonds one human with other humans who are blood relatives. The family is the receptacle of kindred; within it, the newly born human forms the first bond with other members of the human community. One of the most important precepts guaranteed by the Shariah is the right of the child to kindred. Kindred has been given an esteemed position by the Almighty Allah, who, considering it one of the signs of His Power, says in the Qur'an:

“And it is He who has created man from water, and has appointed for him kindred by blood and kindred by marriage. And your Lord is ever all Powerful to do what He wills.”

It is for this reason that Islam has been attentive to genealogical clarity and the preservation of the family structure. To maintain that, Islam nullifies all those practices that may obscure or eliminate the blood bond, such as adoption as Allah SW says:

“...nor has He made your adopted sons your real sons...”.

Instead, it introduced sponsorship, which provides a child denied the warmth of his or her natural family with the warmth of an alternative and earnestly needed form of parenting care, without the confusion of kindred. The Prophet SAW said:

The best house among the Muslims is the house in which orphans are well-treated. The worst house among the Muslims is the house in which orphans are ill-treated’.

Right to Custody: According to the principles of established Muslim jurisprudence, father is the natural guardian (Wali) of the person and property of the minor child. Whereas custody (Hadhanat) is a right of the child and not of either of the parents, or any other person claiming through them. The basic consideration always is to provide to the child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society. Islam keeps the institution of family in high esteem and tries to preserve it. Child custody is a father's intrinsic duty, which is transferred to the mother for a limited period. After divorce from her husband, the woman has the right to take care of her child, whether it is a boy or a girl, up to the age of seven.

Right to maintenance: The responsibility of the father for the maintenance of his legitimate children is unconditional and absolute. The father cannot escape from this duty merely on the grounds that his children are disobedient or in the custody of the mother. It is settled in Islamic Law that it is the legal duty of the father to maintain his sons till they attain the age of majority and the daughters until they marry. With the proviso that if the children possess wealth of their own and they can be maintained from it, then the father's responsibility ends. If the father is indigent the maintenance responsibility lies with the mother if she is by the means. If not, it passes to the paternal grandfather.

Right to inheritance: According to Islamic law a child who is connected to the deceased by blood is entitled to inherit. This child must be obtained through a validly conducted Islamic marriage. In case if a child is born in waiting period whether after divorce or death, the child will still have the right to inherit, since it is presumed that the child is of a husband. Therefore, for a child to establish inheritance right he or she must be connected with the father by birth in a lawfully marriage; this implies that those children who were not born in lawfully marriage they have no right to inheritance from their biological father, however they can do so to their mother.

The courts in Tanzania are very keen in interpreting the Islamic principle which prohibit an illegitimate child to inherit his biological father, in different cases illegitimate child were deprived the right to inherit or being inherited by their biological father. In the case of *Said Aleiko (Administrator) v. Mwatatu Ibrahim*, the issue in this case was whether the father of a deceased child who was born out of wedlock will get a share of her estate. The father had admitted that he had not formally married her mother, but he argued that the child was legitimate because he had always accepted her, and the other offspring of this union, as his own. However, it was agreed by all parties that, in question of inheritance by parents, an illegitimate child is deemed the child of the mother only. Therefore, the court held that, under Islamic law, there can be no "marriage" without the proper formalities and the children of this union were therefore illegitimate, and the father may not inherit from them.

Another case which the court has denied the right of inheritance to an illegitimate child is *Amina Taratibu Mbonde v. Selemani Ahmed Mtalika*. The issue in this case was whether an illegitimate child can inherit the property of his biological father, hence the admnistrax exclude the son of the deceased husband, since he was born out of wedlock. The court upheld the distribution of estate by saying that according to Islamic law a child of out of wedlock has no right to inheritance.

Children act no.6 of 2011 and child paternity

This Act was established by the Government of Zanzibar to provide for the protection of the rights of the child. In doing so, the Act consolidates and expands on provisions relating to the care and protection of vulnerable children and children in conflict with the law. The Act is said to include provisions on custody, foster parentage, and guardianship, as well as on the roles and responsibilities of professionals and institutions in providing services for children and dealing with children in need of care and protection. According to Section 8 and 16 of the Law of the Children Act, parents have a common responsibility for taking care and protection of a child through provision of food, shelter, clothing, education, medical care, liberty and right to play and leisure. The best interest of the child is expected to be the main concern of parents and guardians in taking care of their children.

Child paternity under Kadhis court act no.11 of 2017

Islamic courts in Zanzibar have jurisdiction over family and personal status matters. This consists of marriage and divorce disputes, some types of inheritance claims, and child custody cases. Islamic judges, called Kadhis, and Islamic Courts have been present in Zanzibar for centuries,

and they are most recently established as one part of the state legal system by the 1984 constitution.

In 1985, a new Kadhi's Court Act was enacted. It provides for the establishment of Kadhi's Court and its hierarchy such as District Kadhi's Court, Kadhi's Court of Appeal and the High Court. Appeals from District Kadhi's Court are lodged to the Kadhi's Court of Appeal and finally to the High Court where a Judge sits with four Sheikhs to determine appeal. The High Court is the final Court of Appeal for cases originating from Kadhi's Court. The above details show that Kadhis' Court is the oldest court in the history of Zanzibar. The existing Kadhis' courts for Zanzibar were re-established under section 3(1) of the Kadhis' Courts Act no. 3 of 1985. The hierarchy of Kadhi's Courts are District Kadhis' Court, Kadhis' Court of appeal and The High Court manned by a Judge and four Ulamaas who are well conversant in Islamic Law and are appointed by the Judicial service Commission.

Right of paternity in Zanzibar under common law approach

Zanzibar's legal system is based on the English Common Law system. It derived this system from its British colonial legacy, as it does the system of government, which is based to a large degree on the Westminster parliamentary model. In Common Law Paternity is established through presumption. Presumption of paternity in paternity law and common law is the legal determination that a man is "presumed to be" a child's biological father without additional supportive evidence, usually as a result of marriage. *Pater est quem nuptiae demonstrant* – ("the father is he whom the nuptials point out") – is the legal maxim which forms the common law presumption that a child's father is the man married to the child's mother at the time of birth or conception. This presumption is encapsulated within Malaysia Evidence Act 1950 which provides:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Under Zanzibar Common law approach, a child born to a married woman is presumed to be the child of her husband by virtue of a "presumption of paternity" or presumption of legitimacy. Common reasons for paternity disputes usually include determining a potential father's rights and obligations with regard to a child or establishing rights related to inheritance after a death.

Associated right to paternity under common law

Establishing parentage is very important for a child. First, the child gets the emotional benefit of knowing who both of his or her parents are. And, legally, it entitles the child to the same rights and privileges as those of a child whose parents are married. These legal rights and privileges are financial support from both parents, legal documentation identifying both parents, having the names of both parents on the child's birth certificate, access to family medical records and history, health and life insurance coverage from either parent, the right to inherit from either parent and the right to receive social security and veteran's benefits, if available.

Once parentage is established, the court can make orders for child support, health insurance, child custody, visitation (parenting time), name change, and reimbursement of pregnancy and birth expenses. Without establishing parentage, the court cannot make orders regarding these issues. So, if a parent needs child support and the other will not pay voluntarily, the court will not be able to order child support until parentage is established:

“The court may order the alleged parent to submit to a medical test and shall, on the basis of the evidence before it, make such order as it considers appropriate”.

In general, the rights and benefits associated with right of paternity of a child in Common Law include:

Identity: It is good for children to know both of their parents. This gives the child a sense of identity. Family ties: Every child has the right to a relationship with both parents. The child may come to know both sides of the family. This can give the child a sense of belonging.

Financial support: The law requires both parents to support their children. Parents can share the cost of raising their child, even if they don't live together. Children are more likely to have their needs met when both parents give financial support.

Benefits: A child has a right to benefits from both parents. These can include, health and life insurance, social security, pensions, inheritance rights and veterans' benefits. The benefits are very important if a parent dies or becomes disabled.

Problems facing children lacking paternity right

Firstly, Children's diminished self-concept, and compromised physical and emotional security.

In addition to that the children face behavioral problems as fatherless children have more difficulties with social adjustment, and are more likely to report problems with friendships, and manifest behavior problems; many develop a swaggering, intimidating persona in an attempt to disguise their underlying fears, resentments, anxieties and unhappiness.

Moreover, truancy and poor academic performance in schools. Many high school dropouts are fatherless; fatherless children have more trouble academically, scoring poorly on tests of reading, mathematics, and thinking skills; children from father absent homes are more likely to play truant from school.

To a large extent delinquency and youth crime, including violent crime. Most of the youth in prison have an absent father; fatherless children are more likely to offend and go to jail as adults.

Apart from that, promiscuity and teen pregnancy are major problems. Fatherless children are more likely to experience problems with sexual health, including a greater likelihood of having intercourse before marriage.

Findings

1. Existence of Solid Protection of Right to Paternity of a Child Under Islamic Law and Common Law

The researcher has found that both Islamic Law and Common law has placed a paramount importance on the right to paternity. The right to paternity is well protected and its denial require very solid grounds. However, Islamic law has gone far better to make sure this right is protected by

providing stiff punishment for adultery and fornication. According to Islamic laws, for premarital sex, the chastisement is 100 lashes, while for adultery the adulterers are punished by stoning to death which is also known as rajm or severe flogging. Allah S.W says:

“The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.”

2. Lack of Right to Paternity Resulted to Problems in Zanzibar

The researcher has found that lack of child paternity right in Zanzibar has led to problems like loss of inheritance rights, increase of street children, behavioral and emotional instability of children, discrimination, poor performance of children in their studies, loss or poor custody and maintenance of the children and juvenile delinquency.

3. Inadequate Awareness of Kadhi's Court and Children Courts Operations

The researcher has also found that most of the people in Zanzibar are not aware of the operation of Kadhi's courts and Children Courts. It is very important to have awareness of the court's jurisdiction, procedures, and how to access their services, otherwise these courts will be in-active and children rights will continue to be violated without remedies.

4. Ignorance of DNA Requirements in Children Courts and Non-applicability of DNA Cases in Islamic Courts.

On the issue of DNA, ignorance of the requirement of immediate examination, unavailability of fund and high costs of conducting DNA test is another problem which hinders availability of evidence of paternity cases in Zanzibar. The lawyers and magistrates interviewed said that most of the cases fail to continue once the respondents or complainants are required to conduct DNA test in children courts. On the side of Islamic courts, it has been found that D.N.A cases are not adjudicated in Islamic Courts to establish paternity.

5. Abstinance from Islamic Teachings Derived from Qur'an and Sunnah

Abstinance from Islamic teachings derived from Qur'an and Sunnah is the very source of having illegitimate children and/or ignorance in fulfilling the paternity rights by the guardians or parents. As it is understood that 99% percent are Muslims but many of them do not practice Islamic lifestyle one hundred percent.

6. Ineffective Provisions under Zanzibar Children Act on Children Rights Emanating from Paternity Right

The research has found that there are ineffective provisions under Zanzibar Children Act on children rights emanating from paternity right, for example under provision 18 (2) states that this Act shall not affect the jurisdiction of Kadhi's court as set out in section 6 of the Kadhi's court Act no. 3 of 1985 to determine questions of Muslim law relating to personal status and marriage. On this basis, many criminals use these loopholes to avoid punishment under the law and violate children's rights.

7. Similarity of Jurisdiction on Maintenance and Custody of children Between Kadhi's Court and Children Court

The structure of the courts of Zanzibar seems to have contradictions due to the existing dual system, which arises many conflicts of laws. Example the application of the law between Kadhi's Court and the Children's Court, offers a similar jurisdiction on maintenance, custody of children in which the Kadhi's Court already provides. The legitimacy of the child is guaranteed in the Children's Act No. 6, 2011, but it seems that the Act is contrary to Kadhi's Court. Many countries including Malaysia have specific family laws, as comparison, in Zanzibar, there are no specific laws which deals with family matters. This leads to the inadequacy of the application of the law on children's rights protection.

The custody of children in case of divorce is also a contradictory issue in Zanzibar as addressed under section 58 (1) of the Children's Act No. 6, 2011 and section 5 of the Kadhis' Court No 9, 2017. The Children's Act requires the age to be 18 while the Kadhis' Court Act indicates the age 7 for a male child, and if the child is female then the custody will end when she gets married. The Children's Act No. 6, 2011 seems to follow international requirements while the Kadhis' Court follows Islamic principles.

Moreover, Kadhis have discretional power to interpret Islamic law and pronounce judgments on matters brought before the courts. One potential concern on this is that giving Kadhi's significant discretionary power could lead to inconsistencies in legal rulings. Different Kadhis might interpret the same Islamic legal principles differently, leading to varying judgments for similar cases. This could undermine the predictability and uniformity of the legal system and hence affect the paternity rights of a particular child in question. For example, in *Shufaa Salum Ali vs Khatib Juma Mzee* the court held that the defendant should provide TZS100,000/= each month for child maintenance and order the mother to be the custodian of the child while in *Khamis Haji Hassan vs Kurthum Rashid* the father was granted the right to visit his child and provide essential services to the child.

Recommendations

As per the research findings, the following recommendations are proposed:

1. Adherence to Islamic Teachings

An emphasis on Islamic teachings should be placed in Zanzibar educational programs on the importance of paternity right. Awareness programs on the functions of Kadhi's Court and Children Court should also be well regulated.

2. Codification of Family Laws in Zanzibar

The specific law in family law needs to be legislated in Zanzibar in reducing the conflicting laws. Example the application of the law between Kadhi's Court and the Children's Court, examines a similar jurisdiction on maintenance, custody of children in which the Kadhi's Court already provides. The legitimacy of the child is guaranteed in the Children's Act No. 6, 2011, but it seems that the Act is contrary to Kadhi's Court. In addition, emphasis is needed for more making detailed provisions on the issue of shifting the responsibly of the father upon death or disability, this will reduce the likelihood of children to lose some rights like custodian and maintenance.

3. Protection of Marriage Institution and Avoiding Unnecessary Divorces

The married couples should take much efforts in protecting their marriage not to terminate as divorce leads to serious negative consequences especially to the children. This call for the following of the guidance of Islamic teachings. Islam directs the husband to take four steps before he could end the marriage relationship. Allah says:

“Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them ‘first’, ‘if they persist,’ do not share their beds, ‘but if they still persist,’ then discipline them ‘gently’. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great”.

Likewise, the Prophet (P.B.U.H) said

“The most hated lawful thing is divorce” He further said that: “Marry but do not divorce, for divorce shakes the Throne of the Most Gracious”

On the side of the wife, she is required to be among the righteous women. Allah says:

“... And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with.”

The verse implies that the wife should be respectful to her husband. In the Hadith reported on the authority of Thawban (may Allah be pleased with him), the Prophet (peace be upon him) said:

“If any woman asks her husband for divorce without a strong reason, the odor of Paradise will be forbidden to her”.

If the four steps mentioned above fails and divorce is inevitable, then the divorce should adhere to the Islamic teachings. Allah allows for divorce, but under His laws. There are many verses regarding the manners and actions one must take during a divorce to ensure that peace is maintained. Allah says:

“O Prophet! ‘Instruct the believers:’ When you ‘intend to’ divorce women, then divorce them with concern for their waiting period, and count it accurately. And fear Allah, your Lord. Do not force them out of their homes, nor should they leave unless they commit blatant misconduct. These are the limits set by Allah. And whoever transgresses Allah's limits has truly wronged his own soul. You never know, perhaps Allah will bring about a change [of heart] later”.

In this verse, Allah tells men to think about the *Iddah* (waiting period) for women before a divorce. The *iddah* for divorce focuses on the number of menstruations. If the woman isn't menstruating (such as a young girl or older woman), then the waiting period is 3 months. If they

menstruate, then their iddah is 3 menstruations. If the woman is pregnant, then she must wait until she gives birth. During this period women have to stay at home unless it's for an important reason. The reason for the iddah is to make sure that there is no confusion regarding the father of the child. In another verse Allah says:

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

This verse speaks of the duties during the iddah. Specifically, how one should continue to maintain their previous spouse by housing them, feeding them, and acting with grace. As Allah has said that kindness, honor, and graciousness are part of a true believer. It is important during this period to work together so that both families are satisfied. Even providing compensation for nursing is a command from Allah. If they don't want to stay in the house after giving birth, then respect their opinion or work it out with them. Everything should be done civilly as that is what makes Allah happy.

In Suratul Baqarah Allah says

“When you divorce women and they have `almost` reached the end of their waiting period, either retain them honorably or let them go honorably. But do not retain them only to harm them or` to take advantage of them. Whoever does that surely wrong his own soul. Do not take Allah's revelations lightly. Remember Allah's favors upon you as well as the Book and wisdom He has sent down for your guidance. Be mindful of Allah, and know that Allah has `perfect` knowledge of all things”.

In this verse, Allah speaks of the attitude that a man should have when he decides that he will preserve the marriage after a divorce. He should not have an ulterior motive like trying to ruin her life or trying to take advantage of her property and so forth. There should be no ill will or feelings of vengeance between the spouses if preserving the marriage has been decided on. Allah points out that one who does this is just harming himself as they are going against Allah's commands. Thoughts and intentions are known by Allah, so there is no point in bottling up these schemes. It is understandable to be upset during these types of situations, but two wrongs do not make a right. If one knows that they still have ill feelings, then do not retain the marriage. Otherwise, if both spouses want to put in the effort to make amends, then by Allah's will it could make the marriage stronger than it was before the divorce.

Divorces can happen and Muslims must know the proper way of going about it when it happens. Of course, the goal is to avoid divorce if it is not necessary. When it happens, sometimes children will not have both parents with them frequently. It also makes it easier for Shaytwan to cause problems as it is easier for him to attack when the family is divided.

4. The Rare Use of DNA Test in Zanzibar in Determining Lineage and Mixing of Babies

The researcher recommends for the use of DNA test in Zanzibar Courts only in determining paternity of a child of an unknown lineage, new born babies mixed during birth and identification of children who get lost because of accidents, disasters or wars and their families can no longer be found. Traditional methods of ascertaining paternity like marriage, lian (Mutual imprecation), and physiognomy (Qiyafah) and iqrar (Confession) should always be given priority.

5. The Use of Will (Wassiyat)

The researcher recommends the use of a will (wassiyat) to be used to give an opportunity to an illegitimate child to acquire the property of the biological deceased father. A will (wassiyat) is a direction by which a person directs his heirs or personal representatives regarding the distribution of his wealth although it may include expressions or wishes as to other matters. Thus, a will (wassiyat) is the wealth bequeathed which becomes the property of the person in whose name it is made with the death of the person who actually makes it. The Holy Quran has given great importance to the institution of wassiyat:

“It is decreed that when death approaches, those of you who leave behind property shall bequeath equitably to parents and kinsmen. This is an obligation on the God-fearing.”

Again, there is a prophetic tradition which support the idea of making a will, it is reported that, the Prophet has said "It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it."

In traditional Sunni Islamic law, the power of the testator is limited in two ways:

Firstly, he cannot bequest more than 1/3 of his net estate unless the other heirs` consent to the bequest or there are no legal heirs at all or the only legal heir is the spouse who gets his/her legal share and the residue can be bequeathed.

Secondly, the testator cannot make a will in favor of a legal heir. This position was also supported by the Court of Appeal of Tanzania between *Anwar Z. Mohammed v. Saidi Selemani Masuka* where the Court had dismissed a caveat lodged by Anwar Z. Mohammed, the son of a deceased Muslim woman who left behind a will in which she had devised and bequeathed the whole of her estate to one Saidi Selemani Masuka, her husband for the following reasons. First, the testatrix purported, contrary to Islamic law, to bequeath more than one-third of her estate. Secondly, the respondent being one of the heirs to the testatrix, the absence of the consent of the other heirs to the bequest made the will inoperative under the Islamic law.

6. The Use of Inter Vivos Gift (Hiba)

The researcher more over advocates the use of Inter vivos gift (Hiba). Hiba is defined technically as unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter. Under the Islamic Law a gift is a transfer of property or right by one person to another in accordance with the provisions provided under Islamic law. There are of two types Hiba and Aria. Hiba (Tamlik al ain), is an immediate and unconditional transfer

of the ownership of some property or of some right, without any consideration or with some return (ewaz); and Aria (Tamlik al manafe) the grant of some limited interest in respect of the use or usufruct of some property or right. The important element is delivery of possession and an acceptance of the gift by the done. A natural father of illegitimate child may dispose of some of his property to his child in this way. Since, the inter vivos gifts may be made to anyone, including illegitimate child. A far-sighted natural father who wanting to ensure sufficient resources for the future of his illegitimate child could begin transmitting property to him or her. In this way, an individual may, if he or she desired or felt it necessary, convey inter vivos gifts to illegitimate child. It is by doing this we can do better to the life of innocent child who were born out of wedlock.

7. The Practice of Kafalah (Foster care) as a Way of Protecting Children Right to Paternity

The researcher advises the regular use of Kafalah in Zanzibar to provide care and protection for orphaned, abandoned, or otherwise vulnerable individuals, such as children who have lost their parents. It offers a legal framework for ensuring that these individuals are provided with the necessary support, care, and upbringing.

Kafalah (legal guardianship, sponsorship, or foster care) aligns with Islamic teachings of compassion, generosity, and helping those in need. It reflects the responsibility of the community and individuals to care for the less fortunate, particularly children who have lost their parents. Kafalah aims to maintain family and community bonds even in situations where a child has lost their biological parents. It provides a mechanism for the child to be integrated into the family and community structure, preventing isolation and ensuring a sense of belonging. Overall, Kafalah reflects the values of compassion, responsibility, and community care that are central to Islamic teachings. It serves as a means to uphold the welfare and dignity of vulnerable children while nurturing a sense of social responsibility within the broader community.

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