

## Islamic Custody Law as a Solution to Child Welfare Problems: Analyzing Usturûshini's\* *Ahkâm al-Sigâr*

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### Özet

Bu makalede çocuklar ile ilgili *Ahkâmü's-Sigâr* adlı eski bir İslâm hukuk eserinin 'el-hadâna' bölümünün tercümesi ve değerlendirmesi yer almaktadır. Makalede de görüleceği üzere bu iki ciltlik eser, İslâm hukukunun derinliğini ve çağdaş zamana uygunluğunu gösteren sonuçlar barındırmaktadır. Özellikle eserin hadâna ile ilgili bölümü, çocuğun vesayeti konusunun yanı sıra, çocuğun yararına olan geniş aile (yakın akrabalar) kurumunun da önemini gözler önüne sermektedir. Bu makalede açıklandığı gibi, kanaatimce geniş aile ve onunla ilgili düzenlemeler, günümüzde Çocuk Esirgeme Kurumları adı altında çalışan modern kurumlarla aynı amaca hizmet etmektedir. İslâm dininde geniş aile, günümüzde sosyal hizmet kurumu tarafından yürütülen hizmetleri sunmaktadır. Ailenin, çekirdek ve geniş aile diye ayrılarak adlandırılması, Batı'nın sosyal gelişimine bağlı olarak ortaya attığı terimlerdir. İslâm dininde ise, aile fertleri mahrem ve namahremlik derecelerine göre tasnif edilir. Mahrem akrabalar ile hukuken evlenilmesi yasak iken, namahrem akrabalarla evliliğe izin verilir. Batı'da çekirdek ve geniş aile arasında boşluklar ortaya çıkmıştır; çekirdek ailede sorunlar meydana geldiğinde ve aile dağıldığında, yardıma Çocuk Esirgeme Kurumları koşmaktadır. Ancak İslâmî geleneğe göre, böyle bir sorunla karşılaşıldığında, onarım geniş ailenin vazifesidir. Bizce, Çocuk Esirgeme Kurumları, çocuğu korumak ve haklarını savunmanın yanı sıra, çocuğu kötü muameleye karşı bir koruma aracı olarak İslâm geleneğindeki geniş aile fikrini dikkate almalı ve bu kurumun yerleşmesi yönünde çaba harcamalıdır.

**Anahtar Kelimeler:** Hadâna, geniş aile, Usturûshini, Çocuk Esirgeme Kurumları (Child Protective Services)

### Abstract

This article presents a translation and analysis of the chapter on the Islamic rules of custody and guardianship, from a classical Islamic law manual of rulings pertaining to minors entitled *Ahkâm al-Sigâr*. This two volume text has implications that I suggest demonstrate the sophistication of Islamic law, along with its relevance to application in the modern world. In particular, the fact that this chapter not only pertains to child custody, but also depicts the importance of the extended family as the institution for the well-being of the child. I suggest that the extended family and laws pertaining to it as explicated in this article serve the same function as the modern institution of Child Protective Services (CPS). In Islam, the extended family takes the place of the social service "agency". The distinction between the nuclear family and the extended family is a Western phenomenon, stemming from social change. In Islam, the distinction is different, family

\* His full name is Muhammad b. Mahmûd b. al-Husain al-Usturûshini, born in the sixth century of the Hijrî year in the village Usturûshini in Eastern Samarra. The era in which he lived is taken from the last sentence of his work in which he clearly states, "I have completed the arrangement of this book in the month of Sha'bân in the year 652". (*Ahkâm al-Sigâr*, ed. Dr. Mustafa Samidah; Beirut: Dâr al-Kutub al-'Ilmiyya, 1997, 381.)

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members being either *mahram* or *non-mahram* relatives. *Mahram* relatives may not legally marry each other, while *non-mahram* relatives may. In the West, there arose a gap between nuclear and extended families. When problems arise and nuclear families breakdown, the CPS agency steps in to aid. In the Islamic tradition however, when such breakdowns occur, it is duty of the extended family to help. I suggest that the function of CPS should be, in addition to protecting children and advocating for child rights, the restoration and utilization of extended families as a prevention tool to child maltreatment, just as in the Islamic tradition.

**Key Words:** Custody, guardianship, extended family, Usturûshinî, Child Protective Services (CPS).

Nearly three million children are referred to American Child Welfare social workers for investigation every year. Nearly two million of these children are actually investigated for suspected abuse or neglect.<sup>1</sup> There are approximately half a million children in foster care, waiting for someone to take custody of them<sup>2</sup>. Child welfare is the term that is used to describe a child's state of well-being, be it well or not. It also is used to describe the group of services provided to and available for the protection of children's rights and well-being. While part of this state of well-being is ensuring the absence of abuse and neglect, the other part of it entails the presence of a parent or a family. Hence, there are two related parts to the field of child welfare: one devoted to securing a child's safety, known as Child Protective Services (CPS), and the other to providing a family or family figure in the absence of one, known as Foster Care or Adoption Services. It is this latter part, albeit from the perspective of the centuries old Islamic legal tradition, that is the topic of discussion here.

In this article, the chapter on the Islamic rules of custody and guardianship (*al-Hadâna*) from the Arabic text *Ahkâm al-Sigâr*, by the scholar Muhammad b. Mahmud b. al-Husayn b. Ahmad al-Usturûshinî (d. 632 CE/1234 AH), is translated into English and analyzed perhaps for the first time. Usturûshinî was a Hanafi scholar born and raised in the region of Samarqand, which is modern day Uzbekistan. One of his teachers was al-Marghinani, author of the celebrated work, *al-Hidâya*, which was the standard legal manual for the Ottoman judges and unrivaled in its place as the authoritative text for the Hanafi Islamic legal school. *Ahkâm al-Sigâr* is perhaps the earliest text that devotes itself solely to a full explication of all the rules pertaining to minors in Islamic law. It is a commentary of our current state of affairs that this text has gone unnoticed. It lists all of the standard chapters in fiqh and then proceeds to explicate all of the relevant *masâ'il* or legal issues in the Hanafi school on the topic. The legal issues are each numbered, the final one being number 726. No chapter of fiqh is omitted. Usturûshinî, like his

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<sup>1</sup> Child Welfare League of America: [http://ndas.cwla.org/data\\_stats/access/predefined/home.asp?MainTopicID=1](http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=1)

<sup>2</sup> Administration for Children and Families: [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm)

teacher al-Marghinani, was considered a *mujtahid*<sup>3</sup>. He painstakingly provides us with various intra-*madhhab* rulings from various scholars, and on occasion, enlightens us with his own view. This is of vital importance in our times if we wish to work to re-open the gate of *ijtihād*. The way to accomplish this is by reading the works of *mujtahids*, which unfortunately is seldom done.

### Usturūshinī Chapter on Legal Custody and Guardianship (*al-Hadāna*): Text, Translation and Analysis

What follows are twenty-eight legal issues translated from the Arabic text. Immediately following the translation is an analysis of each legal issue. The analysis will consist of my attempt to explain the system behind the legal issue so that it may be properly understood. Also, I will endeavor to provide, when necessary an alternative perspective from another school of Islamic law will be provided, thus supplying the reader with different perspectives within the Islamic tradition. In addition, where instrumental, I will compare the legal issue to modern day policies in Child Welfare practice, drawing on my own years of experience in the field.

#### Legal Issue 325: The Person with the Most Right to Legal Custody or Guardianship of a Minor

"The person with the most legal right to custody of a minor, provided they are married, or have been married, is the mother. If the mother is deceased or has remarried, then the maternal grandmother has the legal right. If she is deceased or has remarried, then the paternal grandmother has the legal right. If she is deceased or has remarried, then the full-sister<sup>4</sup> has the legal right. If she is deceased or has remarried, then the maternal half-sister has the legal right. If she is deceased or remarried then the daughter of the full-sister has the legal right. If she is deceased or has remarried then the daughter of the maternal half-sister has the legal right.

None of the narrations<sup>5</sup> have differed on this point. However, from this point onwards, the narrations differ, particularly as to the maternal aunt and the paternal sister having legal custody. This is due in part because the narrations of the chapter on marriage mention that the paternal aunt has more legal right than the maternal aunt, while the narrations on the chapter of divorce mention that the maternal aunt has more right over the paternal aunt, and the daughter(s) of the

<sup>3</sup> al-Laknawī states about him in *al-Fawā'id al-Bahiyya* that, "He was an imam and Hanafī jurist... He reached the level of his father and even surpassed him. He was among the *mujtahids* in his time, who learned from his own father and from his father's teacher, al-Marghinānī, author of *al-Hidāya*". (*Ahkām al-Sigār*, ed. Dr. Mustafa Samidah; Beirut 1997, pg. 3)

<sup>4</sup> Full-sister meaning the sister from the same mother and father of the child.

<sup>5</sup> Narrations of the *madhhab* rulings from Imam Abu Hanifa.

sisters<sup>6</sup> having more legal right over the daughters of the brothers. In addition, the narrations of the chapter of divorce mention that the legal right of the daughters of the paternal aunt is superior to that of the maternal aunt.

The narrations also differ regarding legal right when the daughters of the paternal aunts are present along with the maternal aunts. The correct position is that the maternal aunts have more legal right. The order of custody for them is as follows:

- Full maternal aunt(s).
- Half maternal aunt(s).
- Daughter(s) of the brothers having more legal right over paternal aunts.
- The order of legal right to custody for paternal aunt(s) is the same as that of the maternal aunt(s)."

Analysis: The Islamic rules of custody consider in particular women who are closet in relation to the child. As seen from the translation of the text, the extended family members are also part of the consideration for who gets custody. This is different from the American system of assigning custody and guardianship, which is generally to place the child with whomever is willing and able to care for the child, regardless of paternal or maternal affiliation. In addition, while Islamic law, as seen from above, inclines towards maternal affiliation as opposed to paternal in custody matters, the American legal system views both sides in the same light, making no distinction between the two. What is even more interesting from the above-mentioned legal issue is that the father is not mentioned at all. In fact, no male relatives are mentioned. Male relatives, as will be seen, qualify much later for custody. This is also very different from the Shâfi'i school of Islamic law which gives the father full legal right to custody when the mother and maternal grandmother are not present. Also, in the Shâfi'i school, the full brother may have custody when the full sister is not present. Thus, in a case where both male and female relatives petition the court for custody of a child, in Hanafi fiqh, the male relatives could only receive custody when there are no female relatives existing<sup>7</sup>, while in Shâfi'i fiqh, the father could receive custody prior to aunts, sisters, and other female relatives.<sup>8</sup>

The phrase, "If the mother is deceased or has remarried" from above is indicative of the mother being absent. This is something that must also be given due consideration. In Islamic law, the mother is the first choice for custody by scholarly

<sup>6</sup> i.e. of the child.

<sup>7</sup> Burhan al-Dîn Abul Hasan Ali b. Abi Bakr al-Farghânî al-Marghinânî, *al-Hidâya*, ed. Muhammad Adnan Derwish, Beirut, Dâr al-Arkam, no date, II, 326.

<sup>8</sup> Ahmad b. Naqîb al-Misri, *Reliance of the Traveller (Umdat al-Salik)*, trs. Nuh Ha Mim Keller, Sunna Books, Illinois, 1994, 550.

consensus (*ijma'*)<sup>9</sup>; however, her presence must first be ascertained. When she is not present, then one looks towards other relatives. Her legal absence may mean either that she is gone physically, such as being deceased or no where to be found, or that she is gone figuratively. This figurative absence occurs when she marries another man who is of no relation to the child. In other words, marriage to a new man nullifies her from custody of her own child. All of the four schools of Islamic orthodox law are unanimous in this ruling. Although this topic is introduced in this legal issue, the details are found later in legal issue 329.

### Legal Issue 326: The Slave Girl having no Legal Right to Custody

"The slave girl or slave woman who has given birth has no legal right to custody."

Analysis: References to slaves in fiqh texts should be interpreted in a way that accurately depicts the relationship of a person or an entity as being superior to another person in some way, such as the employer-employee relationship, corporation-employer relationship, the state-citizen relationship, and so forth. In this section, I propose that the aforementioned slave girl or slave woman be interpreted as the female prisoner of the state who has been convicted of a felony and sentenced to prison. Convicted felons sentenced to prison are stripped of their civil liberties and considered in the American Justice System as property of the state. As such, utilizing this interpretation from the fiqh ruling would mean that if a woman delivers a child while in state prison, she has no legal right to that child and thus loses her custody and guardianship over the child. In addition, that child would become a ward of the state.

### Legal Issue 327: The Guardianship of Non-Muslim Citizens of the Islamic State (ahl al-dhimma)

"The legal right of non-Muslim citizens of the Islamic state to custody of a child is the same as that of their Muslim counterparts."

Analysis: In the Shâfi'i school, a non-Muslim has no legal right to raise a Muslim child.<sup>10</sup> This is also the case according to the Hanbali school and a narration of the Mâlîki school.<sup>11</sup> In the Hanafi school however, non-Muslim citizens of the Islamic state may have custody of a Muslim child, "provided that the child does

<sup>9</sup> Kamal ul-Deen Muhammad b. Abdul-Wahid b. Abdul-Hamid Ibn Humâm (d. 861 AH), *Fath al-Qadîr*, Beirut 2003, pg. 330.

<sup>10</sup> Ahmad b. Naqîb al-Misri, *Reliance of the Traveller (Umdat al-Salik)*, trs. Nuh Ha Mim Keller, Sunna Books, Illinois, 1994, 552.

<sup>11</sup> Kamal ul-Dîn Muhammad b. Abdul-Wahid b. Abdul-Hamid Ibn Humâm (d. 861 AH), *Fath al-Qadîr*.

not perceive the differences in religion, and that it is not feared that the effects of disbelief will take root in the child.”<sup>12</sup> It is not clear why Usturûshinî did not mention this condition as well. As such, the condition just quoted from *al-Hidâya* must remain as authoritative on this issue.

The idea of the “effects of disbelief” is very general. I suggest that what is implied are behaviors that the child may adopt that are deemed un-Islamic. I submit that this same condition may be applicable to Muslims who adopt un-Islamic conduct habitually, such as alcohol and smoking, and other Islamically prohibited acts. In such cases, a Muslims’ right to custody would be denied. Furthermore, all of this pertains to religious prohibitions. What about state prohibitions that are non-religious in nature such as drug trafficking, identity theft, abandonment, and the like? I submit that these as well nullify the right to custody, as all of the aforementioned also constitutes non-Islamic behavior, even if done by a Muslim.

Hence, this legal issue, when commented on by *al-Hidâya*, brings to light two things: first, is the rule that non-Muslims are the same as Muslims when it comes to custody rights in the Islamic State. Second, is that there are two conditions for their qualifying for custody, according to *al-Hidâya*. The first condition is that the child is not of the state where they can perceive the differences in religion. The second is that the effects of disbelief, or un-Islamic behavior as I suggest, will not take root in the child. While the former applies to non-Muslims exclusively, the latter applies to both Muslims and non-Muslims.

### Legal Issue 328: The Apostates’ Loss of Legal Right to Custody or Guardianship

“The apostate has no legal right to custody or guardianship.”

Analysis: Being an apostate is viewed in Islam as the ultimate form of corruption. The explanation of this point I suggest is that apostasy is a sign that one neglects the care of one’s self. Abandoning religion is depriving one’s self of God’s blessing, thus removing oneself from the mercy of the Divine. Hence, one remains constantly in the displeasure of God and at every moment is at risk to His wrath. Since this is the ultimate lack of care for oneself, how can one care for another? The Shâfi’i school also includes atheism in this category.<sup>13</sup>

This legal issue supplies us with an added definition of child neglect. The lack of worldly and other-worldly considerations contributes to child neglect in Islam. A person may be a great parent in that they are able to clothe, feed, and house a child, all of which Islam prioritizes. Yet, the abandonment of faith is tantamount to

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<sup>12</sup> *Al-Hidâya*, II, 326.

<sup>13</sup> Ahmad b. Naqîb al-Misri, *Reliance of the Traveller*.

leaving a child with neither nourishment nor shelter, for both the worldly and spiritual aspects of life are viewed by Islam as primal. This is because in Islam the first duty of the parent to the child is to teach the child that there is a divine creator, and that the child must know that divine creator, and will soon return to that divine creator. From a moral aspect, the parent must also teach the child that its creator has spoken to him or her and outlined clear instructions as to how to behave throughout life. From an Islamic psychological perspective, the child has also been given a primordial instinct, called *fitra* in Islam, whereby they are predisposed to shame, and to learning what is good and bad. From this, they learn moral responsibility, in that they will be rewarded for doing good, and punished for doing bad. The Islamic traditions' view of the role of the parent in relation to training a child to be morally responsible is that they must teach the child to live in conformity to their *fitra* and the divine law. The apostate usually rejects that notion completely and assumes their own understanding of the world and how to live in it, determining through their own reasoning or whims what is good and bad, seeing worldly consequences for actions committed, but refusing the spiritual dimension. Consequently, the child under such circumstances may become accustomed to governing itself according to its own whims, and not according to a divine system. Being behavioral learners, they are at risk of rejecting faith as well by following their guardian who apostates. For this reason, this is also deemed neglect.

### Legal Issue 329: Actions that Nullify the Right to Custody or Guardianship

"The act of remarriage of any woman who has a right to custody or guardianship to a non-relative<sup>14</sup> male nullifies her right to custody. A marriage such as that of a grandmother marrying the grandfather of the child that she has custody or guardianship of, or like that of a woman marrying the uncle of a child she has custody or guardianship of, does not nullify her legal right to custody or guardianship."

Analysis: At first glance, it is apparent that this section only pertains to women. However, recall that in the Hanafi school, the rules of custody primarily pertain to women. The remarriage of the mother to another man is thought to preoccupy her from raising the child properly, constituting a figurative absence. In addition, it is also thought that the new husband would not be as tender as the child's biological father or a relative. On the contrary, if a woman marries someone who is related to the child, close enough to serve as a guardian, then he too would ensure that the needs of the child would be met were the mother to be preoccupied from raising him.

<sup>14</sup> Non-relative means non-relative of the child.

The Shâfi'i' school's conditions on this issue shed further interesting light on the topic. In the Shâfi'i' school, the mother's figurative absence includes her abandoning the prayer, or any act for which Islam considers explicit wrong-doing.<sup>15</sup> In addition, the following thirteen characteristics nullify a person's right to custody. It should be stated here that they are general, without mention of these characteristics applying solely to a woman. Thus, these characteristics would nullify anyone's right to custody.

The first is the loss of sanity. However, intermittent periods of insanity are not enough to substantiate a full loss of sanity. Second is freedom, which here I suggest that a lack of incarceration is implied, although traditionally, not being a slave was meant. Third is apostasy. Fourth is a lack of chastity. This means that should a person engage in fornication or prostitution, their right to custody is nullified. Fifth are acts of betrayal<sup>16</sup>. This may include abuse of the child's money, malicious use of the child's identity resulting in the child's credit being ruined, and so forth. Sixth is traveling or relocation to a new city. Seventh is remarriage. This does solely apply to the woman. Eighth is being a minor. This means that a minor may not be given custody of another minor. Ninth is being neglectful and/or absent mindedness to such an extent that the child is placed at risk of abuse or neglect. Tenth is being blind. Eleventh is having a contagious and harmful disease. Twelfth is having a terminal illness. Thirteenth is refusing to nurse or nourish the child<sup>17</sup>.

Returning to the mother's remarriage nullifying her right to custody, some modernist Muslims believe that this rule should be revisited. However, I would like to point out that in no place in Hanafi fiqh is it advocated that once a woman is remarried, someone should go into her home and forcibly remove a child from her care. In fact, the term 'nullifies the right' implies that if she were to petition the court for custody, her petition would be denied on the grounds that she had remarried. In reality, this legal ruling (*hukm*) is not an intrusion into private life, but is instead the state's right to deny custody when a petition is made given the aforementioned circumstance. It does not resemble the practice of licensing a Child Protective Services social worker to enter a home and investigate a family's life, as is the norm in the United States.

Likewise, it should be noted that the father's petition for custody in general would be denied provided the existence of other female relatives, even though the child might be emotionally distant from them.

<sup>15</sup> Ahmad b. Naqib al-Misri, *Reliance of the Traveller (Umdat al-Salik)*, trs. Nuh Ha Mim Keller, Sunna Books, Illinois, 1994, 552.

<sup>16</sup> In Arabic *al-Khiyâna*.

<sup>17</sup> Abu Shujâ' Ahmad al-Husayn b. Ahmad al-Asfahani (d. 593AH), *Matn al-Ghaya wal Taqreeb fi Fiqh al-Shafi'i'*, Dâr Ibn Hazm, Beirut 1999, 266-267.



### Legal Issue 330: The Time when Legal Custody and Guardianship by a Woman Expires

“When a child reaches the developmental stage of autonomy then the automatic legal right of a woman’s custody of him no longer exists. This stage of autonomy is revealed when the child eats and drinks on his own, clothes himself, and according to a narration, performs *istinjā*<sup>18</sup> on his own. At this stage, the father or another male has more legal right to custody of the male child, while the mother or another female has more legal right to custody of the female child, until she begins menstruating. Muhammad<sup>19</sup> says, ‘...Until she reaches the stage where she may be perceived as being desirous.’”

Any woman who is childless has no right to custody or guardianship of a child, be they male or female, after the child reaches the stage of ‘autonomy’.

Analysis: The points for analysis here are the stage of autonomy, the stage of being desirous, and a childless woman’s lack of a right to guardianship or custody after the child reaches the stage of autonomy. It would be too lengthy to provide a full analysis of these topics here, however, I will briefly make mention of a few things.

Firstly, the stage of autonomy transcends being age-determinant and many child psychologists have noted such a developmental stage. This is particularly important for boys because at this stage, the father has more right to him. The wisdom in this, I suggest, is that this is the beginning of the child’s readiness for formal learning and preparation for training in manhood. This training begins at an early age because children are behavioral learners, meaning that they require a model, and young boys certainly need male role models. Yet this legal issue pertains to boys and girls.

The mentioning of the father or another male relative illustrates the vital role the male members of extended family play here. Upon the child reaching adolescence, even before that, the custody of the woman ends and is transferred to the male side of the family. This is something that is relatively non-existent in African-American families, especially in impoverished neighborhoods. There is certainly a lack of male extended family members in the Black community, and unfortunately, that community is the face of the recipients of social services in the United States. I suggest that social services have completely taken the place of the man in African-American communities all over the United States. Blacks are also the largest ethnic group of Muslims in the United States. It makes sense that the road to helping this population and empowering it to positive change is the use of the

<sup>18</sup> An Arabic term meaning to properly clean oneself from filth when relieving oneself, by using water and/or toilet tissue.

<sup>19</sup> Imam Muhammad b. Hasan al-Shaybānī (d. 189 CE/805 AH).

Islamic model of an extended family focus in child welfare cases.

The Shâfi'i' school, however, takes a different approach, stipulating that when children reach the stage of discernment (*tamyeez*), usually around seven years old, they are given a choice between residing with their mother or father. Whomever the child selects has legal right to custody. Should the child choose neither parent and remain silent, the child would by default remain with the mother.<sup>20</sup> The Hanafi school, disagreeing with the Shâfi'i school, rejects the notion that the child knows what is best for itself, viewing the child as having deficient reasoning skills. The children would likely select the parent who is softest towards them and whomever they are closest to. They also reject it because it was not the practice of the Companions of the Prophet.<sup>21</sup>

Regarding the female child, the stage of being desirous is something that, although some would love to criticize, is a reality of life and something to which a blind eye may not be turned. This is a point that should be researched more thoroughly. I propose that the stage of being desirous is a stage that is after the stage of discernment (*tamyeez*) but before puberty. This is because the stage of puberty already entails the presence of the stage of desire, as the pubescent young girl would be normally desirous to adolescent males and perhaps even to some adult men. Also, the stage of puberty would entail that the child would no longer be considered a minor in Islamic law, and therefore not a part of the discussion of custody.

Could the stage of desire in fiqh be the American equivalent of pre-teenagers? More research and inquiry is required into this, as perhaps it is quite post-modern given the era the text was authored and could yield interesting results for researchers in disciplines working with children and adolescents. This could also help chart a more detailed Islamically oriented paradigm of child development, from that of fetus, to infant, to baby (less than 2 years old), to the stage of discernment (*tamyeez*) and autonomy, to the stage of being desirous, to puberty, to adolescence and the teenage years, and finally to young adulthood. This new chart could pose new questions for new situations and shed light into many fields surrounding the care, education, and welfare of children for Muslims and non-Muslims alike.

As to the childless woman's lack of right to custody of a child after the child has reached the stage of autonomy, the question is why? In the United States, where many women are childless, highly educated and work full-time, from a

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<sup>20</sup> Ahmad b. Naqîb al-Misri, *Reliance of the Traveller (Umdat al-Salik)*, Nuh Ha Mim Keller, Sunna Books, Illinois, 1994, 553.

<sup>21</sup> Kamal al-Dîn Muhammad b. Abdul-Wahid b. Abdul-Hamid Ibn Humâm (d. 861 AH), *Fath al-Qadir*.

materialistic point of view, they are better suited for child custody than most men. If the reason behind this ruling is that women of that caliber lack experience in child rearing, then certainly that would be insufficient, as this is the case with married couples as well, and surely two inexperienced people trying to do a task are worse than one, for with one, far less damage may be inflicted. There should be a different explanation, and perhaps this *hukm* is subject to being revisited by scholars for reconsideration or adjustment, for certainly the rise in responsible educated women, along with the rise in orphans and children in state care, would make a perfect match for the solution to the current problem of the low number of adoptions, and fill the void in the lives of both parties involved.

What I also wish to call attention to is that the *hukm* in question applies to childless women, not single women. One woman may be married with no children and be disqualified for custody of her best friends' child, for instance, while her neighbor may be divorced and single with children, and thus fit for custody of that child on the grounds that she is a mother. In other words, only mothers may adopt, and receive custody or guardianship in Islam. Women who are not mothers may not attempt motherhood with someone else's child. This is the point behind the *hukm*. Islam encourages other mothers to be the mothers of orphans and children who need a mother. While childless women may be good hearted and believe themselves fit for the task, Islam prioritizes the needs of the child and deems that there is a quality that is present within mothers which, while absent in yet-to-be mothers, elevates them above all others in the arena of caring for a child.

However, from yet a different angle, the *hukm* stipulates the restriction on childless women as being after the child reaches the state of autonomy. This means that before this stage, a woman who is not a mother does have a right to custody. This aspect opens the door to women who are not mothers adopting the role of motherhood. Although this may seem to be a contradiction, I would suggest that it is not. Before the stage of autonomy, any woman, be they a mother or not, may have the right to custody of a child. However, after the child reaches the stage of autonomy, only mothers retain that right. This indicates that in Islam the quality of motherhood materially changes once a child reaches the stage of autonomy. This is also in line with the narration of the Prophet's statement on how the parental role changes throughout childhood development. The narration states that, "Play with them (children) first the first seven (years), teach them for the (next) seven, and befriend them for the (next) seven."<sup>22</sup> According to this, after the first seven years, which is around the time of the child's autonomy, the role of the mother drastically changes into a more responsible and teaching role. This ruling assumes that a woman who is already a mother is better able to handle the demands of an autonomous child.

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<sup>22</sup> Bayhaqi.

### **Legal Issue 331: The Transfer of Custody or Guardianship to Male Relatives**

“After the male child reaches the stage of autonomy and after the female child reaches the stage of puberty, the male relatives of the child have more legal right to custody and guardianship, and the closer relative is preferred over the distant one.”

Analysis: This ruling, which may apply in cases of divorce or death, is important in that it requires the mother, who would have spent many years raising her child, to now give the child to the father or to another male relative for continued rearing. This also applies to the female child as well, for it is thought that the father will be more vigilant than the mother in teaching the daughter aspects of modesty. In addition, adolescence is the time when young men will begin to notice the daughter, and the father, being mindful of this, is thought to be a better protector of her than the mother. The father would also be able to provide materially for the child.

### **Legal Issue 332: The Female Child may not be given Custody to her Maternal Uncles' Son**

“The female child may not be given custody to her maternal uncles' son.”

Analysis: The reason behind this rule is that a marriageable relative<sup>23</sup>, such as a cousin, may not be given custody or guardianship of another marriageable relative. While the emphasis here is on the male aspect of the guardianship, the same question may be posed about the reverse scenario. May custody of a male child be given to his maternal aunts' daughter? This question is not answered by the text, however, I put forth that the answer is also no, for the same problem arises even if from the opposite angle. In addition, it should be researched whether or not the *hukm* of adoption rules are derived from this issue.

### **Legal Issue 333: When Parents Differ Concerning the Age of the Child**

“If parents differ concerning the age of the child, the mother thus claiming that she has more right to custody because the child is six years old while the father claims that he has more right because the child is seven, then the judge may not take an oath from either of them. Instead, he examines the state of the child. If he sees that the child is at the stage where he is autonomous of his mother's help, thus able to eat by himself, clothe himself, and drink on his own, then custody is given to the father, while if not, the mother retains her custody.”

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<sup>23</sup> i.e. In Islamic terms, a *non-mahram* relative. In modern legal terms, a consanguineous family member.

Analysis: Here lays the importance of understanding and recognizing the state of autonomy. This is seen as the ultimate sign and legal proof that a male child should be in the care of his father. The divine sign is there for this reason in such situations, and even in circumstances when couples are married, for the father's work of developing the dignified characteristics of maturity and manhood is to begin at that point.

### Legal Issue 334: When the Father may remove his Daughter from the Mother's Custody

"When a man is separated from his wife, and they have a daughter that is eleven years of age, the mother takes custody. However, if the mother leaves the house frequently at various times, leaving the child neglected in the home, the father may remove his daughter from the home, because he is her guardian (*wali*). He may take charge of her because she would have reached the stage of being desirous. The reason for adhering to this narration (for this ruling) is because of the corrupt times (we live in). Thus, when the child reaches the age of eleven, she is considered to have reached the stage of being desirous, according to their<sup>24</sup> sayings."

Analysis: According to the scholars of the Transaxonia region, the age of eleven has been determined as the point where a young girl may be perceived as being desirous. As will be seen later, there is disagreement concerning the age factor, and in actuality, the reliable position according to the author, is the age of nine. The need for a standard was obviously important, for in custody cases, who determines if a child is desirous or not? Furthermore, who would want to make such a decision? Eleven is the age also where a female child may begin to flirt, use make-up, notice boys, recognize beauty in others, and discover the notion of attraction. What I am alluding to here is that this is an age where young girls begin to want to assert their womanhood in their own way. In doing so, they model the behavior of others and create their own behavior which they deem appealing to others. There is thus the need for a male figure to explain aspects of modesty to her and curtail certain actions before they exceed the appropriate limits.

In addition, there is the factor which was mentioned of a parent who leaves the house at various times, neglecting the child. The rule is that the other parent is responsible and may even take the child from the home. The other parent thus adopts the form of the Child Protective Services (CPS) social worker. This is radically different from the American system, which utilizes the CPS Agency to assist and intervene when children are neglected and abused. While the agency

<sup>24</sup> The Hanafi scholars of the Transaxonia areas (in Arabic *ma warā' al-nahr*) are meant, including the areas of Bukhāra, Samarkand, and Nasaf.

has done some good and certainly saved lives, the fact is that this may enable family members to become complacent with other family members who neglect their child.

CPS agencies did not exist in traditional Islamic societies. There were the institutions of the family and the court with no other intermediary. The onus was placed on the family, both nuclear and extended, to solve its own problems. The realization of each and every family member to be a guardian of the child in need is real, so much so that another family member has the authority to remove the child from the home, protecting the child and not burdening the court or the police with the family's internal issues. The notion of commanding what is right and forbidding what is wrong also plays an integral role here. Coupled with that is also the religious belief that all guardians will be asked about their ward. Hence, Islam motivates the entire family in not being just onlookers towards the well-being of the child, but in becoming active participants as well. This is something that Western culture lacks to a major extent, which contributes to the workload of CPS agencies all across the United States.

#### Legal Issue 335: The Mother Being Undeserving of Payment or Support Provided that someone is Present who will Provide for her (the Child) Free of Charge

"In the case where a female child has an impoverished father and a wealthy paternal aunt, and the paternal aunt seeks to support the child from her own wealth without seeking anything in return, along with not preventing the child from staying with the mother, and the mother refuses that request, demanding that the father support the child fully from his own money, then they (Hanafi scholars) have differed concerning this. The correct position is that it should be said to the mother, 'Either take custody of the child without asking for support or give up custody to the paternal aunt.' If the mother refuses to support the child and she is single, then they have also differed.

The *faqîhs* Abu Ja'far<sup>25</sup> and Abu Layth<sup>26</sup>, may Allah be pleased with them, have said, 'the mother is (court) ordered to support the child'. Our shaykhs<sup>27</sup> have said, 'The mother should not be ordered (by the court to support the child).'"

Analysis: From this stems the issue of child support. Is state-mandated child support Islamic? Is the mother obliged to consider the financial state of the father when seeking child support? Is the mother obliged to support the child herself?

<sup>25</sup> By Abu Ja'far, al-Tahâwî (d. 321 CE/933 AH) is meant.

<sup>26</sup> By Abu Layth al-Samarqandî, Nasr b. Muhammad Ahmad b. Ibrahim is meant. A Hanafi *faqîh*, who wrote on *fiqh* and *tafsîr*, and died in 393 CE/1007 AH.

<sup>27</sup> The Transxasonian Hanafi scholars.

In the case where the father is impoverished, state-imposed child support should not be sought, for there is no evidence for it, and it amounts to burdening the father with a duty that cannot be bared. On the other hand, in the case where a sponsor offers to support the child in place of the father, then this must be accepted, as to refuse it amounts to depriving the child and illustrates arrogance on the part of the child's guardian. The mother or guardian must not feel as though they do not need the money, for the offering of money for the child's well-being is like offering a gift to the child that the guardian accepts on the child's behalf. Thus, they are obliged not to refuse the gift, but to remit it unto the child, save it for the child, or use it for the child's benefit.

The scholars of the Transaxonia region have stated that the mother must not be obliged to support the child. There is wisdom in this in that normally the mother would ensure that the child is taken care of, so there is no need for enforcement. In addition, returning to the issue of state enforced child support, if the mother may not be compelled to support the child, and she has custody of the child, then how could it be possible for the impoverished father to be ordered to? For if he cannot care for himself willingly, how can he care for another compulsively?

#### Legal Issue 336: When the Father may take charge of the Daughter

"When the female child reaches womanhood, and she is a virgin, the father may take charge of her. However, if she is a non-virgin, then the father may not, unless it is not safe for her to stay on her own."

Analysis: The issue of when the daughter is a non-virgin the father may not take charge of her is an interesting one. The ruling appears to imply that she should reside on her own; however, this is not overtly clear. I understand this to mean that in becoming a non-virgin or perhaps a widow, she is considered a woman and must not be treated as a girl in the sense of having to need a guardian (*wali*) for everything.

#### Legal Issue 337: When the Son may reside Alone

"When the male child matures intellectually and possesses his own state of mind, being independent of his father, then the father should not allow him to live with him unless it is unsafe to do otherwise. In addition, the father is not obliged to financially support his son, and if he does so, it is charity. These matters have been taken from the section of *al-Hadāna* from the *Fatāwā* of al-Qādī al-Imam Fakhr al-Dīn, may Allah have mercy on him."

Analysis: When the young man begins to assert himself, mature, and make decisions on his own, then he should be allowed to flourish and not be sheltered.

This ruling is very post-modern given the time when the author lived, as it advocates responsibility in parenting and maturity in becoming an adult. It displays the fact that the father does not have to provide for the son at this time, for indeed this may stifle his drive to work on his own. This aspect of not having to provide for one's son at this stage is religious and moral. It means that the religious injunction to provide for one's children has been lifted, yet one is free to continue doing so voluntarily. The ruling demonstrates that the son at this stage resembles other men, in that the father giving money for his care is charity, just as the father giving money to a stranger in need of food is also charity.

### Legal Issue 338: The Male Sibling with most Right to take Custody of His Brother

"*Al-Dhakhîra*<sup>28</sup> mentions, 'If a male child has brothers, and no one else, then the most upright of all of them has the most legal right to custody. If all of them are of the same level of righteousness, then the eldest has the most legal right.'"

Analysis: Here, we see the difference in the Islamic system of determining custody which is ethically and morally oriented and the Western system which requires materialistic qualifications. Thus, a wealthy relative who is openly supportive of an immoral lifestyle could be perfect placement for a child in the West, while in Islam they would be disqualified for custody of a child.

### Legal Issue 339: The Right of the Mother to Move with Her Child out of the City

"If the mother is deceased and custody or guardianship has been transferred to the maternal grandmother, then she has no legal right to move out of the city with the child, even if the contract of guardianship occurred there. This legal right (of moving out of the city with the child) is only given to the mother. *Al-Jami' al-Saghîr*<sup>29</sup> also discusses a woman moving to a different city with her child.

In addition, the slave woman who has been freed by her master may not move out of the state that the child's father resides in. This is the portion of what is in *al-Dhukira*.

Analysis: This ruling, I put forth, is to preserve the familial relationship and lineage with the father. It falls under the category in Sharia of preservation of lineage, which is one of the five objectives of the divine law in Islam. The refer-

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<sup>28</sup> *Dhakhîrat al-Fatwa* is meant. Its author is Mahmud b. Ahmad b. Abdul-Aziz al-Bukhari, a Hanafi scholar in fiqh. The text is a summary of his text *al-Muhîr al-Burhanî fil Fiqh al-Nu'manî*.

<sup>29</sup> *Al-Jâmi' al-Saghîr* is one of the six books from which the Hanafi school is transmitted from, and was authored by Imam Muhammad b. Hasan al-Shaybânî (d. 189 CE/805 AH), the pupil of Imam Abu Hanifa.



ence to the slave woman who is freed by her master should be interpreted to mean the convicted felon released from prison, who has been given temporary custody and who therefore may not move out of the state that she is under probation in, particularly if the father of the child is also in that same state.”

### Legal Issue 340: When the Mother is ordered to Support the Child

“Al-Sayyid al-Imam Abul-Qâsim<sup>30</sup> mentions in his text, *Kitâb al-Khulas* that, ‘In the case where a female child has a mother and sister, and they both refuse to care for the child, and none of the other *mahram* relatives desire to care for her, then a trustworthy person is hired, using the child’s money to care for the child.’ Abu Ja’far used to say, ‘If the mother refuses, and she is single, then she is ordered to care and support the child from the child’s own wealth.’ Al-Faqîh says, ‘This is what we adhere to.’”

Analysis: The former ruling is adoption. In such a case, the state or the family who refuses to care for the child, hires a guardian to do so. This would be the child’s god-parent in American legal terms. Yet, the money, used to care for the child would come from the child itself, which is indicative of the fact that children should have their own money. If the child has no money, then the money is taken from the state treasury.

In the Hanafi’ school, the ruling is that if there are extended relatives physically and figuratively present, then the mother is allowed to give custody to one of the relatives, with no prosecution or penalty from the state. However, if no extended relative exists, then the mother is ordered by the court to care for the child, as the right of the child is to be cared for by family members.<sup>31</sup> This is also the case in the Shâfi’i, Hanbali, and a narration of the Mâlîki school<sup>32</sup>. Thus, here, the role of the extended family is identical to that of child protective services. They represent the social services available to the nuclear family. Conversely, the law in many states across the United States allows a mother to leave her newborn child at a fire station, hospital, or social service office, without fear of prosecution, the reason being that these agencies will ensure the well-being of the child.

<sup>30</sup> His full name is Muhammad b. Yûsuf b. Muhammad b. Ali Abul-Qâsim al-Samarqandî. He was a Hanafi faqîh, scholar of tafsîr and hadîth, and he used to give sermons. He was a staunch critic of false scholars. He authored books on fatâwâ and fiqh, and died in 556 AH. (*Jami’ Ahkam al-Sighâr*, I, 153)

<sup>31</sup> Kamal ul-Dîn Muhammad b. Abdul-Wahid b. Abdul-Hamid ibn Humâm (d. 861 AH), *Fath al-Qadîr*, 331.

<sup>32</sup> Kamal ul-Dîn Muhammad b. Abdul-Wahid b. Abdul-Hamid Ibn Humâm (d. 861 AH), *Fath al-Qadîr*, 331.

### Legal Issue 341: The Mother has the most Legal Right to the Female Child until the Child reaches the stage of being desired

"I have seen in a trustworthy source that the mother has the most legal right to the female child until the child reaches the stage of being sexually desirable."

Analysis: This is the authors' testimony on this point. It is odd that the "trustworthy source" is not mentioned when the sources of other rulings are. Also, it is not clear as to why this is not mentioned earlier when the topic was initially presented. I have not been able to locate the "trustworthy source".

### Legal Issue 342: The Stage of Being Desirable

"They differ regarding the stage of being sexually desirable. The most correct view is that it is at nine years old. *Al-Jami' Al-Saghîr* states that, 'This is the right of the mother and two grandmothers. As for the rights of anyone other than them, then they (i.e. the mother and two grandmothers) have more right until the child reaches the autonomous stage.'"

Analysis: Nine years old is the view most agreeable to the author, although he mentioned the disagreement above being the age of eleven. Perhaps nine years old is the precautionary choice.

### Legal Issue 343: Court Ordering of the Maternal Aunt to Custody/Guardianship

"In *al-Multakat*<sup>33</sup>, it states, 'If the maternal aunt is in line for custody and refuses, then she is obliged and ordered (by the court) to accept it.'"

Analysis: This is also a point of difference between the American Juvenile Court system and the Islamic Juvenile Court system. In the American Juvenile Court system, only someone who is willing to accept the child receives custody of a child. The reason for this sensitivity towards individual wishes is that caring for a child is a responsibility with life-altering consequences and the individuals' personal right takes priority over duty or what may be considered by some as morally correct at the moment. This prioritizing of the individual's personal right poses problems in that many children are indeed placed with non-relatives. In addition, this focus on the individual's right emboldens a person towards exerting a self-centered judgment on everything. On the contrary, the Islamic Juvenile system prioritizes duty over individual right and also the child's needs and rights over adults desires. Thus the Islamic court has no problem in ordering a person to comply with what is morally and ethically right in the state's view. In this case,

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<sup>33</sup> The author of this text was Nâsir al-Dîn Muhammad b. Muhammad b. Yûsuf al-Husaynî al-Samarqandî (d. 556 AH).

again, the illustration of the extended family's presence as being vital to the well-being of the child is seen.

#### Legal Issue 344: Neither Parent Having the Right to Prevent the other from Caring for and Supporting the Child

"Also in the aforementioned text, it states that, 'If a male and a female child are in the care of the mother, then she may not prevent the father from caring for them both. If they are placed with the father, then he too may not prevent the mother from caring from them and looking after them.'"

Analysis: This is vital. The hatred or jealousy of one parent towards another, be they married or divorced, may not be used as a barrier impeding what the child deserves and what is good for the child. This should not be limited towards things such as it being wrong to prevent the child to speak to the other parent on the phone, but rather should be extended to more general and life altering circumstances, including taking into consideration visitation rules when moving, informing the other parent which school the child attends, not restricting telephone calls, and the like.

#### Legal Issue 345: When the Mother's Right to Custody Ends

"The *Fatâwâ* of al-Qâdî al-Imâm Fakhr al-Dîn, may Allah be pleased with him, states, "Al-Khasaf, may Allah be pleased with him, mentions that in the *Kitâb al-Nafaqât* that, "The mother has the most legal right to the male child until he reaches seven or eight years old." Abu Bakr al-Râzi<sup>34</sup>, may Allah be pleased with him, mentions that, "The mother has more right until the child<sup>35</sup> is nine years old. As for the young girl, then her (arriving at the) stage of autonomy is known when she menstruates." Muhammad, may Allah have mercy on him, states, "The mother has more right to her until she reaches the age where she is desirable.""

Analysis: Here, the age of autonomous is presented as being at the age of seven, eight, or nine years old. This is the age of formal learning, where the child begins to learn to read, and later reads to learn. From this, the latest age of development of autonomy in the male child is nine, and at such an age, the child should go to live with his father. The girls' state of autonomy is at the time she menstruates, which could be as young as nine and as old as fourteen. Thus, autonomy

<sup>34</sup> His full name is Ahmad b. Ali al-Jassâs, Abu Bakr al-Râzi, one of the prominent Hanafi Imams. He was born in 305 AH. He learned from Ali Abu Sahl al-Zajjaj and Abul-Hasan al-Karkhî and taught in Baghdad. He was equal to al-Karkhî in piety and asceticism. He wrote commentaries on the *Mukhtasar* of al-Karkhî and al-Tahâwî, and authored a work on *uṣūl al-fiqh*. He died in 370 AH.

<sup>35</sup> "Child" here is a reference to a boy, not a girl.

means something different in the female child, for she is able to eat, drink, and perform *istinjâ'* at a much earlier age. Because of this, the mother would conceivably have more legal right to her daughter for a longer period of time than that of her son. This is therefore a qualification of the above section on autonomy.

#### **Legal Issue 346: Who has the Right to Receive Placement of a Young Girl**

“When the young girl reaches puberty, if she is a non-virgin, the father may not have placement of her unless the circumstances (of her residing alone) are unsafe. If it is feared that she is a non-virgin, and she has no father or grandfather, but has a brother or paternal uncle, then they do not have the right of placement.”

Analysis: Placement here means lodging. This means that the non-virgin girl, who reaches puberty should reside with her mother or alone. None of her male relatives may lodge her with them.

#### **Legal Issue 347: The Traveling of a Mother with her Child**

“If a woman wishes to take her child from the city to the village for the sole purpose of marriage there, then she may do that. Al-Baqâli<sup>36</sup>, may Allah have mercy on him, mentions in his *al-Fatâwâ*, that, “She may not take the child from the city to the village at all. Also, she may not take the child to enemy lands, even for the purpose of marriage. She may however take him to the outskirts of the city even if the father does not have the means to travel to see the child during the day and return before nightfall.””

In *al-Muntaqâ*, Ibn Samâ'a narrates from Abu Yûsuf, may Allah have mercy on both of them, that, “In the case where a man marries a woman in Basra and she gives birth to a child there; then the man sends the child to Kûfa to reside and divorces the woman, and they both dispute over the child's placement, with the woman wanting the child to stay with her. If the man sent the child off with the wife's consent, then he is not obliged to request the return of the child and it should be said to the woman, ‘Go and get the child and take him yourself.’ However, if he sent the child without her consent, then he is obliged to go get the child and place it with the mother.”

Also, (it is reported) from Ibn Samâ'a, on the authority of Abu Yûsuf, may Allah have mercy on them both, that “Concerning the case where a man travels with his wife and child from Basra to Kûfa, and later the woman returns to Basra and

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<sup>36</sup> He is Muhammad b. Abu Qâsim al-Khawarizmi, a Hanafi Imâm. He learned from al-Zamakhshari and eventually left his circle. He was an Imam in the sciences of the Arabic language in his time. He died in 576 AH.

the husband divorces her, then it is incumbent on the man to place the child with the woman." This is the sum of what is in the *Fatâwâ* of Qâdî al-Imâm Zâhir al-Dîn, may Allah have mercy on him. In *al-Hidâya*, "If a divorced woman seeks to transport her child from the city, then she may not do that, unless she is returning back to her homeland and it is the same place where the previous marriage took place." In short, there are two factors permitting the transportation of a child in a divorce situation: the homeland and the existence of the previous marriage in that location. All of this is provided that the distance between the two cities in question is considered long. If, however, the distance is considered short, in that it is possible for the father to arrive to where his son lives and return back home to sleep at night, then there is no harm in that. This is also the same answer regarding going from one village to another.

If the child is transported from the rural areas of a city to the city, there is no harm in that because there is some benefit to the child in that it would acquire the habits of city dwellers and this would not harm the father, as opposed to the reverse. In that case, there would be harm to the child in acquiring the habits of rural life. Consequently, this is not allowed.

Analysis: The two conditions for a divorced woman to travel to a city that is far with her child are that it be to her homeland and that the previous marriage from which the child was conceived occurred in her homeland. A close city, is one in which the father could go to visit his child and return home to sleep at night, without having to lodge in another place such as a hotel. If this is not the case, then the woman may travel, but the child should be left with a relative. The restriction on traveling to enemy lands (*dâr al-harb*) is obvious.

What is interesting is the understanding among the Hanafi jurists in this matter that the habits of city dwellers are of benefit to the child, while the habits of rural life are damaging. I put forth that the city life, as understood by the scholars of the Hanafi school on this issue, serve as a form of higher education and high culture for the child. In the city, the child may be better educated, receive better medical care, engage with other children more, receive a better quality of life, and have a better opportunity at earning money than in the village. It is through this lens that the benefit to the child is perceived by Hanafi scholars, and not through any prejudices about villagers or rural life. Likewise, a single woman with a child moving to another city poses dangers and risks that surpass those of her current situation. It is more likely that she has more connections and associates in the city where she is, than in a new town, unless she is traveling to her hometown, in which case, she would conceivably have better resources there.

Currently however, with the effects of urbanization in the last century, modern life has changed the nature of city life. Urban life is not necessarily child friendly, much less a better place for children to live. The presence of severe poverty, the

prevalence of drugs, slums, and other things categorical of city life call the aforementioned point into question. This coupled with the fact that more and more of the populace are taking refuge outside of the city as opposed to in its main centers.

#### **Legal Issue 348: The Factor Determining Long and Short Distance (for a journey)**

“If a separation occurs between two spouses, and mother seeks to relocate with the child from the city back to her village, then she may (legally) do so provided that the father is able to visit with the child, look after its affairs, and return back to his residence in the evening to retire. If however this is not possible, she may not (legally) do so. This is the factor which determines long and short distances.”

Analysis: This short passage seeks to identify the primary principle in the Hanafi school. The following legal issue provides examples from other legal issues which follow the same guidelines.

#### **Legal Issue 349: Examples Related to Long and Short Journeys with Children**

“There are several examples that clarify the factor that determines long and short journeys. Firstly, *Shahâdat al-Muhîr* mentions that, “If a person claims to have witnessed an event and he is in Rustak<sup>37</sup>, is he obliged to be present (in court in the city)? If he is able to attend court and be present before the judge, and return back to his family in the same day, then he must attend. But if not, then he is not obliged.”

Also, the example mentioned in the chapter of Adâb al-Qâdî in *Al-Muhîr* says that, “If the defendant is far from the city, then the judge may not subpoena him. However, if he is close to the city then he may be summoned. The factor that determines long and short journeys is that a short journey is such that if a person were to set out at daybreak, he would be able to be present before the judge for testimony and return home by nightfall for sleep. However, if the journey is such that it requires him to take up lodging elsewhere, then the journey is considered long.”

Also, there is the example of the business partner who, while in the city, must spend from his own money, yet while on a journey, may spend from his partners' money. If the partner travels to a village or rural area, then if he is able to return back home the same day in enough time to eat and sleep with his family, then the journey is considered short and he may not use the money from his partner for any of his provisions. However, if he is not able to return back home in the same day,

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<sup>37</sup> The name of a village.

then he may benefit from the money of his partner for his needs.”<sup>38</sup>

Analysis: The examples here all indicate the criteria for determining long and short journeys, by which the divorced mother may use to determine the lawfulness of traveling with her child. All the scenarios have the same criteria in common: the ability to set out to one's destination and return home in time to be with family and eat, all in the same day, being the criteria for short journeys. Anything beyond that is a long journey, and the woman may not legally have the child accompany her. Such criteria do not exist in American law.

### Legal Issue 350: Transferal of the Right to Accept the Wedding Payment

“In the chapter on marriage in the *Fatâwâ* of al-Dinara<sup>39</sup>, there is a section concerning the situation where a minor girl is prepared for marriage while healthy and the wedding payment is stipulated, then later the would-be groom dies before she is given to him in marriage. In this case, the wedding payment does not become part of the inheritance. She, however, receives the wedding payment (through her father). Were she to be at the age of puberty or older, she would have the right to accept the wedding payment herself, and if she were young, her father would accept it on her behalf.”

Analysis: This ruling indicates the fact that the wedding payment is the property of the bride, unlike in the practice of many other Eastern cultures, where the wedding payment or dowry, resembles a price of the bride in exchange for marriage. The stipulation above pertaining to the bride ready for marriage while she is healthy is puzzling. It is as if it is a condition for the above ruling.

### Legal Issue 351: Hermaphrodite Minors

“If there are two hermaphrodite minors and the father of one of them says to the father of the other while in the presence of witnesses, ‘I have married this daughter of mine to your son’ and the other accepts, and later, if it becomes apparent that the daughter was really a male and the son was really a female, then the marriage remains valid. The similitude of this resembles a man who designates himself as the focal point of the marriage. Also, another similitude applies to the *khula'* situation where a man says (to his wife), ‘I have bought myself (from the marriage)’. And the wife says, ‘I have sold it to you’. According to the majority of people of knowledge, a *khula'* has not occurred, however, the preferred position is that it has occurred.”<sup>40</sup>

<sup>38</sup> From the chapter on testimonies in the text *al-Muhit*.

<sup>39</sup> The author was 'Alâ' al-Dîn Omar b. Uthman al-Dinâra, a Hanafi faqih. He died in 590 AH.

<sup>40</sup> This is mentioned in the first section of the chapter on marriage in *Fatâwâ* of al-Qâdî Zâhir al-Dîn.

Analysis: What is interesting here is that this ruling demonstrates the legal effectiveness, according to the Hanafi school, of considering the meaning behind an utterance. According to the Shâfi'i school, such consideration produces no legal effect. In the examples mentioned above, the marriage of two hermaphrodites who each turn out to be the opposite of what they were is of no relevance. What matters is that a male and female married. This is the meaning behind the utterance.

The analogy of a man making himself the focal point of the marriage is clarified by the fact that usually the converse is the case. The woman is the focal point of the marriage, according to many Islamic scholars. Because of this, she is religiously obliged to submit herself to her husband under reasonable conditions, when he desires intimacy. However, should the husband deny his wife intimacy on an occasion, this is not seen as a breach in religious obligation on his part. The issue of rebelliousness (*nushûz*) also applies more specifically to the woman as well. Hence, she is the focal point of the marriage contract. This may be understood from a contractual point of view, even though marriage is not to be viewed as strictly a contractual relationship, as the woman being the focal point of the contract in return for the man's devoting himself to her maintenance, protection, and guardianship for the duration of her life.

Returning to the analogy, if the man shifts this into making himself the focal point instead, this does not change the nature of the obligations they each have over one another. Here, the utterance is not of importance, but instead what are important are the meanings of the marriage, meaning the obligations that are there which no utterance can remove.

### Legal Issue 352: Concerning (conflicts in) a Marriage Claim

"It is mentioned in *al-Muhîr* that, "If a man claims that the guardian of a woman married her to him when she was a minor, and he puts forth evidence of this claim, and the same woman puts forth the claim along with evidence that her guardian married them *after* she reached the state of puberty, doing so without her consent, then the claim of the man is accepted. If there is no proof submitted, then the woman's word is accepted. It is said<sup>41</sup>, however, that the man's word is accepted. The former is the correct position. Analogical reasoning (*qiyâs*) should be applied from this circumstance to situations involving transactions. Thus, if a male child sold his wealth, and there arises a dispute between the seller and the child, the seller claiming that the transaction occurred after the child reached puberty, while the child denies that, saying that it occurred before puberty, then the child is believed, according to the correct position. The seller is obliged to put forth evi-

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<sup>41</sup> Meaning that there is a weak opinion stating such.



dence of his claim. Many rulings of this nature are mentioned in this text of ours.”

Analysis: This ruling has several dimensions to it. The most important is that of who to believe given the state of affairs when both parties present evidence to their claim. In this case, the important point to remember here is that the aforementioned ruling entails an event that occurred when the person was a minor. In such cases, claims to an event occurring during a persons’ childhood per se are accepted over statements denying that it occurred at that time. This is the *ratio legas (illa)* of the *qiyâs* referred to. This is remarkable and certainly quite useful for court cases involving past abuses, in which an adult musters up the courage to confront their accuser. Or even a teenager for whom a violation occurred when they were just in grade school. Even if an adult, who does not remember being a victim, denies the occurrence of an event, the evidence of its occurrence takes precedence and overrides everything else.

### Legal Issue 353: The Prevention of Marriage due to Confusion

“Shaykh al-Islâm ‘Ata’ ibn Hamza al-Saghdi was asked about someone who says to another, “I have married my daughter so-and-so to your son so-and-so for a wedding payment of such-and-such amount”. The other person says, “I accepted on behalf of my son”, but doesn’t specify which son. Is this valid? He replied that it is not. The upshot is that if they both had one child, then it would be valid due to the lack of confusion (in the answer). If he has two sons, and the one offering the daughter in marriage states the names of the groom, and the other accepts, this too is valid. However, if he does not confine himself to just accepting, saying, “I accept on behalf of my son” and does not specify which son, it is not valid.”<sup>42</sup>

Analysis: Confusion in any matter nullifies it. In the aforementioned example, the rule indicates that confusion amounts to doubt. Consequently, the marriage rendered null and void.

### Conclusion

This paper presents twenty-eight legal issues each of vital importance, worthy of deeper investigation and further analysis of its contents and implications. The role of the extended family members, both male and female members, is vital for at risk children. Their role lies in supporting the child and assuming the role of mother or father in their physical or figurative absence. They are the social service system, not the state, as is the case in the West.

This I suggest would be extremely beneficial for application in America. The

<sup>42</sup> This paragraph is an excerpt from the third section in the chapter of marriage in the *al-Fatâwâ al-Zâhiriyya*.

Islamic system in this case is far less expensive, more beneficial for the child's overall well-being, less bureaucratic, and empowers and supports building families. It entails the construction of nothing new, only the bridging of gaps. The presence of extended family members is already assessed when CPS workers conduct risk assessments. A lack of connection to family is a factor that contributes to a child having a high risk of being abused or neglected. Yet, an active role is not assumed in bringing family members together for the sake of the child's well-being. Speaking from my personal experience, family members are not actively sought for placement by social workers or the court because they simply do not have the time. Others regard the lack of presence of a child's extended family members as only that family's business. Thus, foster care placement remains the best solution for an at risk child. Yet this is inadequate. In the long run, it is simply too costly, contributes to the ruining of families, and above all, does not consider the child's right. To this, a CPS worker could respond saying, that the child's right is considered in the fact that they have the right to be protected against abuse and neglect. Such protection is achieved by removing the child from the home and placing them in foster care. The placement with non-family members is justified when no other family members offer to take the child.

The Muslim jurist on the other hand, would respond, as I would, agreeing with that statement, yet emphasizing that not enough is done to locate and place children with family members. As such, there is not a full consideration of the child's right, but a partial one, for abuses occur in the foster care system as well. The child's right, as expounded in Islamic law literature, is to be with family. Only in cases where there are absolutely no options for placing the child with their family, may a non-family member be sought. Not enough resources are utilized towards this aim. If fathers can be found and forced to pay child support, how can extended relatives remain unfound for guardianship of a child in foster care?

An Islamic model would place the onus on the entire nuclear family and extended family members in CPS cases, obliging the involvement of everyone that is contactable. Their physical and figurative presence would be assessed, then, according to maternal affiliation followed by paternal one, one by one, closest first followed by the more distant ones, they would be sought for guardianship of the child at risk. The maintenance for the care of the child would come either from the child's money or the state, thereby complying with the Quranic principle of not burdening a person with more than they can bear. When the child reaches the stage of autonomy or discernment, the guardianship would shift from a female family member to the father or another male relative. Should the parent who lost custody redeem themselves and demonstrate to the court that they are no longer a risk to the child, then their custody of the child would be reinstated. When the child reaches maturity in intellect and demonstrates responsibility, they may reside on their own provided it is safe for them to do so. Until then, they remain under

the financial care and guardianship of the father or a male relative. This, in sum, is the solution I suggest, based on the text and analysis of the afore-mentioned rules.

In addition, these rules must be placed in their historical context. The author compiled the text and constructed these rules in the thirteenth century. The Ottoman Empire, which reached its height in sophistication, power, influence, and social development, in the 16<sup>th</sup> century, based its' legal system off of the work *al-Hidâya*, which was authored by the teacher of the work this paper analyzes. Indeed our author quotes from *al-Hidâya* frequently. It would be enlightening to compare this section with actual court documents, detailing case by case the description and outcome of custody issues.

Questions posed in such a task could include, but not be limited to: How many children were placed in state custody in a given time span? How many were placed under the custody of an extended relative? What was state custody? Was adoption a major theme from the 13<sup>th</sup> through the 16<sup>th</sup> centuries? What were the primary factors causing a change in custody of children? On what basis did the judges make their decision? Where there any cases of a change in child custody involving potential risk to a child as opposed to actual maltreatment? If so, how was risk assessed?

More importantly, an analysis of court records would reveal how the theory of child custody, as laid out in texts such as *Ahkâm al-Sigâr* and *al-Hidâya*, was implemented. We would learn what points were practiced exactly as the text stipulated, and on what points judges deviated from the text, and why? Also, there might have been some gap between theory and practice, and if this is correct, the question would then be, why and to what extent was there a gap. Would the gap exist only in certain cases or be more prevalent?

Also, as is commonly known, everything is not found in a text. There would be rulings and rationales behind rulings such that could only be documented by a court recorder, present at court, having heard the full circumstances of the case and documenting the judges ruling and rationale at the time. Such information is vital for the archeological work of piecing together historical contexts in order to identify the true theory and practice of Islamic law (*fiqh*). Legal rulings have a context to them. They are not formed in a vacuum. They evolve, becoming more sophisticated, some even susceptible to abrogation.

If we are to begin to work our way towards re-constructing the basics of Islamic child custody laws for Western examination and even supplementation, we must outline the system extremely well, identifying how the rulings were applied, search for areas of potential change as a result of a change in time, and apply new rulings for the present conditions. In my own experience, I have seen that many lawmakers are amicable towards an Islamic custody system, especially given the rise of the

Muslims population in the United States along with America's remarkable acceptance of the use of a culture's own system and resources in solving their own problems, something most other countries in the world have yet to aspire to, let alone practice. I propose that the implementation of Islamic family law is a step in the direction of integrating an acceptable Islamic legal aspect into the American legal system. Such integration would be fruitful to the legal system, and also vital for Muslims. The first in-road to such a proposal is presenting the integration of Islamic child welfare law as a means towards improving the Child Welfare System in the United States. I propose that such integration will prove to be an asset to the system.

It is also interesting to point out that this is a thirteenth century text discussing what is beneficial and what is in the best interest of the child. Classical Islamic scholars emphasized this in their writings on Islamic law. In a time when children are used as soldiers in Africa, abused, neglected, trafficked, and exploited all over the globe for various motives, reviving the Islamic voice of child rights and what is in the best interest of the child could have refreshing affects.

Islamic law is the only tradition that has afforded rights and liberties to children for over 1,400 years. The concept of legal rights for minors existed in Islam at a time when other systems were in the dark about child welfare, let alone rights for women and minorities. In a place such as the United States with its decades old heritage of child rights, the Islamic tradition's centuries old heritage could pave the way for new and improved developments in child welfare laws and practice. In addition, cities all over America are impoverished for volunteer caregivers for neglected children. Adoption of a child is not an overly prevalent practice. The inclusion of Islamic custody and child welfare laws into the already pluralistic Child Welfare Legal System will enhance Muslim interest and participation. It is my hope that this will ignite the type of dialogue and action needed to begin the vital work of reviving the theory and practice of Islamic child welfare laws.