

## Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)

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### Abstract

*This article attempts to deliberate on the child custody laws in classical Islamic texts and the contemporary Muslim World with special focus on development of child custody laws in Pakistan. For classical Islamic law, the article refers to the laws as stated in the compendiums of fiqh of sunni and shi' i schools of thought as well as decisions of Prophet Mohammad (PBUH) his companions and leading Muslim jurists. For the purpose of this study, contemporary Muslim world is divided into Muslim majority regions of Central Asia and Caucasus, South Asia, Southeast Asia, North Africa, South Africa, West Africa, Horn of Africa and Middle East. A thorough analysis of customary practices, personal status laws and trends of courts in these Muslim majority regions is carried out. Effort is made to bring out similarities, differences and developments in child custody laws in contemporary Muslim world. The article is delimited to the discussion on child custody in cases of divorce, judicial separation or dissolution of marriage only. In the end it is suggested that uniform laws can be formulated for the entire Muslim world, in the light of Islamic principles and contemporary practices of the Muslim world.*

**Keywords:** child custody, Islamic law, *fiqh*, *shariah*, contemporary laws, divorce.

### 1. Introduction

Cases of child custody fall under *muamlat* in compendiums of Islamic *Fiqh*. *Muamlat* unlike *Ibadat* are subject to change with respect to time and place. The very purpose of this research is to note the changes and developments in child custody laws from classical to contemporary era. Islam lays down general principles as a directive for deciding child custody cases. It will be seen if these principles are still upheld by the contemporary courts and legislative authorities of the modern Muslim world.

It is pertinent to note here that in various Muslim dominated countries today, religion-state relation is different from the religion-state relation in the classical era of Islam. During the first century of Islam, wherever Sharia was implemented, Islam was the state religion. In the Muslim dominated countries today, three models of religion-state relations determine the legal status of Islam and its law. In the first model Islam is legally recognized as the State religion and the Sharia is generally given a special place in legislation and administration of justice. In the second model Islam is not formally recognized as the official religion but the private law applicable to Muslims is generally drawn from Sharia. In the last model there is no legally recognized religion and no religion based law including Sharia is applicable to any community.

The first model includes both Arab and non- Arab countries such as Algeria, Bahrain, Egypt, Iraq, Jordon, Kuwait, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Tunisia, UAE, Yemen, Bangladesh, Brunei, Iran, Malaysia, Maldives, Pakistan, Afghanistan and Somalia. Constitutional documents of these countries scattered from North and West Africa to South and South-East Asia declare Islam to be their State religion. Most of the Arab countries – including Egypt, Libya, Oman, Saudi Arabia, and even Syria proclaim the Shari'a to be the "principal source of legislation."

Outside the Arab world the leading Islamic countries which recognize Islam as their State religion are Malaysia, Pakistan and Bangladesh.

In the second model, where Islam is not formally recognized as the official religion, yet the State supervises religious affairs of the Muslims and the private law applicable to Muslims is generally drawn from the Sharia. Most prominent Muslim country that falls under this model is Indonesia. There is an official establishment for Islamic religious affairs in Indonesia. Islamic law mixed with the local customary law known as the *adapt* is applied by the State courts in all parts of Indonesia. Nigeria also falls under this model.

In the last model there is no legally recognized religion and the State cannot, or does not, have a role in the affairs of religion of any community including the Muslims; nor does religion based law, including Sharia is applicable to any community. Prominent Muslim-dominated countries practicing this model – which has no place for Islam or its law in its constitutional and legal systems are the Central Asian states of Bosnia-Herzegovina, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Turkmenistan and Uzbekistan, Albania and Azerbaijan.

This article focuses on the analytical study of child custody and guardianship laws in the Muslim-dominated countries when couples depart due to separation, dissolution of marriage, divorce or *Khul'a*. Cases of custody and guardianship of orphans and foster children and surrogate mothers are not covered by this article. The constitutional status of Sharia, customary practices, personal status laws and status of women in these countries have a resilient impact on the application and adjudication of law while deciding custody and guardianship cases.

### ***Custody and Guardianship Defined***

Before we proceed with the detailed study of the subject it is important to distinguish between the terms 'Custody' and 'Guardianship'. Though these terms are used interchangeably, both have different implications in law.

In Arabic language guardianship is termed as '*Wilayat*' and custody as '*Hidhanat*'. Custody means physical or material possession of the children, whereas its Arabic equivalent *Hidhanat* literally means 'training' or 'upbringing of the child'. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its Arabic equivalent '*Wilayat*' literally means to 'protect' or to defend. Legally the term guardianship is defined in the Guardians and Wards Act<sup>1</sup> of Pakistan as '*A person having the care of person of minor or of his property or of both his person and property*'. The terms custody and guardianship seems to have similar connotations, but it is often argued that guardianship is a superior right.

According to the principles of established Muslim jurisprudence, father is the natural guardian (*Wali*) of the person and property of the minor child<sup>2</sup>. Whereas custody (*hidhanat*) 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. Rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man's job to earn livelihood and provide sustenance to the family, the wife's duty is to give birth to the children, to bring them up and to groom them. She is not required to work for her family or earn a living.

Law of *hidhanat* in *Sharia* has been framed keeping in view the roles of both parents. That is why mothers are given preference while deciding custody of the children born out of the wedlock during child's initial years (till 7 years). There is a consensus of all *sunni* schools of thought on this. Schools of *fiqh* differ in custody laws for boys and girls after 7 years of age. It has been observed in the recorded cases of classical Islamic era that the judges took into consideration the wishes and welfare of the minors while deciding their custody. It must be remembered here that wish of the ward is subject to the following two considerations:

- Welfare of the child
- Reasons of disqualifications of the mother and father to seek further custody.

According to Ibn Qayyam<sup>3</sup>, 'There are two types of guardianships. In one, father prevails over the mother and that is in matters of money and marriage. In the other one the mother prevails over the father and that is in matters of nourishing and upbringing'<sup>4</sup>.

<sup>1</sup> Guardians and Wards Act 1890, section 4 (2)

<sup>2</sup> PLD 1963 Lah.534

<sup>3</sup> Ibn Qayyam (1292-1350CE / 691 AH- 751 AH) was a Sunni Islamic jurist and commentator of Quran. His scholarship was focused on *Hadith* and *fiqh*.

<sup>4</sup> Ibn Qayyam, *Zad al Ma'ad*, translated by Syed Rais Ahmad Jaferi (Karachi: Nafees Academy) Vol 4, p.289

Under Islamic law even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially. However it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibility and in most cases is the main contributor to the financial needs of the family then the privilege of 'guardianship of person and property' should vest in her as well.

### **Child Custody in Quran, Sunnah and Fiqh**

An in depth study of Islamic law reveals that there is no verse in Quran on custody of minors but the classical Muslim jurists have referred to the verse of fosterage<sup>5</sup> (*Ayat al Radha'at*) which says that the mother should breast feed their infants for two complete years. Therefore through *Iqtada al Nass* it is inferred that in the years of infancy the right of upbringing and fostering the child remains with mother.

In the light of hadith literature available and the decisions of Prophet Mohammad (pbuh) on the cases brought before him on child custody, three principles have been laid down while deciding the custody of a child. Firstly, the mother possesses priority right of child custody so long as she does not remarry<sup>6</sup>. Secondly in a situation where both parents profess different religions, custody of the child should go to that parent who follows the religion of Islam<sup>7</sup> and lastly when the child has gone past the years of minority (7 years) he will be given an option to choose between both parents<sup>8</sup>.

An analysis of the opinions/ decisions of the Companions of the Prophet (pbuh) seem to be in complete harmony with the decisions of Prophet Mohammad (pbuh). Decisions of the companions of the Prophet show that priority right of the child custody in the years of infancy goes to the mother<sup>9</sup>. When the child reaches the age when he is in a position to decide right from wrong, his wish is taken into consideration<sup>10</sup> and mother has a superior right of custody as long as she does not remarry<sup>11</sup>. In addition when the child is in mother's custody, the father is responsible for his *nafaqah*.<sup>12</sup>

Up till the era of companions we do not find much discrepancy on the principles laid down while deciding child custody between the decisions of Prophet Mohammad (pbuh) and those of the companions, neither do we find a decision in which child custody gets automatically transferred to the father when child attains certain age. The underlying principles while deciding the child custody cases remain that the child in his early years must not be deprived of the warmth, affection and full time attention that he needs in his growing years, which he/she can experience with his/her mother better than his/her father. Once a child reaches a mature age, three considerations have to be kept in mind, the religion of the parents, the choice of the child and welfare of the child.

A deviation from the above principles is observed during the time when *fiqh* was codified and we come across the rulings of the masters of five leading schools of thought. According to Abu Hanifa, custody transfers to the father when the boy reaches the age of 7 years and the girl when she attains puberty.<sup>13</sup> In Imam Malik's opinion, mother has the right to her son's custody till he is able to speak clearly and the daughter till her marriage.

<sup>5</sup> Al-Quran 2:233

<sup>6</sup> Al Bahaiqi, *Sunan al Kubra*, Dakkan, Vol8, p.4

<sup>7</sup> Al Bahaiqi, op. cit., vol 8, p.3 ; Sunan Abu Dawood (Karachi: Karkhana e Tijarat) vol 1, p. 305

<sup>8</sup> Al- Bahaiqi op.,cit., vol 8, p.3

<sup>9</sup> Zaid bin Ishaq bin Jariya narrated that once a child custody case was brought to Abu Bakr who decided in favor of the mother and then said I have heard from Holy Prophet (pbuh) that 'Do not separate the mother from her child.

<sup>10</sup> Narrated by Ibn e Abbas when Hazrat Umar divorced his wife Jamila they disputed on the custody of their son Asim and the dispute was brought before Abu Bakr. Abu Bakr decided in favor of the mother till the child reached such an age when he was in a position to decide right from wrong.

<sup>11</sup> Ibn Qayyam, *Za'ad al Ma'ad*, Translated by Syed Rrais Ahmad Jafri (Karachi:Nafees Academy) vol. 4, p.289. In another narration of the above mentioned case it is written that Abu Bakr told Umar that mother is more caring and gentle towards her children so she has a superior right of custody till she does not marry.

<sup>12</sup> Al Bahaiqi, *Sunan al Kubra* (Beirut:Dar al Kotob Al- Ilmiyah) vol.8, p. 8

In the same case of dispute over Umar's son Asim, Umar was directed by Abu Bakr to pay *nafaqa* of Asim and he did not argue.

<sup>13</sup> Ibn e Hammam, *Fath al Qadeer*, Egypt 1356H, Vol. 3, p.316; Al Kasani, *Bidaya al Sina'a*, Egypt 1328H, vol.4, p.42

According to *Shafi'i* and Imam Hanbal, mother has the right of custody or upbringing till 7 years of age for both son and daughter. After this age the option will be granted to the children to choose with whom they wish to live.<sup>14</sup>

In Shi'a *fiqh*, mother has the right to keep her son in her custody till he is two years old and daughter till she is seven. After this, the right of custody is transferred to the father.<sup>15</sup>

According to the principles of established Muslim Jurisprudence, father is considered to be the child's natural and legal guardian because upon him is the responsibility of *nafaqa* of his child. Mothers are the custodians till a particular age after which the custody either reverts to the father or the child is given option by the court to choose between both parents, though no such age limit is stated in the texts.

An interesting case has been recorded in *Nail al Autar*<sup>16</sup> which was brought before Ibn e Taiymiya<sup>17</sup>. In this case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. On it the mother asked the court to inquire from the child why he has preferred the father. On court's inquiry the child said, mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like. On hearing this court gave the custody to the mother.<sup>18</sup> This clearly shows that wishes of the minor while deciding his or her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal tradition. Classical scholars have added that when it is detrimental for the child to live with his or her mother due to her remarriage, profession or religion then the custody will transfer to the father. This further reinforces the principle of welfare of the child. In *Nayl al Autar* it is stated that, '*It is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about any one of them that he or she would be more beneficial to the children from the point of view of their education and training then there is no need of qur'a or choice of the children.*'<sup>19</sup>

This view was upheld by Allama Ibn Qayyam also.

Another important aspect while deciding child custody is that, who is responsible for providing *nafaqa* of the child in case of dissolution of marriage or divorce? Classical Muslim Scholars agree that subsistence of the child is incumbent upon the father even when he is in mother's custody. Under Islamic law it is not the responsibility of the mother to provide sustenance and protection of progeny.

Al Murghanani further adds that if mother refuses to keep the child then there is no constraint upon her as a variety of causes may operate to render her incapable of charge.<sup>20</sup>

Islamic law lays down that as a general rule in initial years child should remain with the mother and a thorough study of Islamic legal literature shows that even if the child custody is contested by the father in the initial years when the child is unable to make a sound judgment, custody has been granted to the mother in majority of the cases. When the child reaches the age whereby he can tell right from wrong, his wish is taken into consideration by the courts which is subject to the welfare of the child.

### ***Child Custody Laws in Pakistan***

Council of Islamic Ideology assists the state in carrying out its mandate as stated in the constitution of Pakistan. The constitution of Pakistan states that 'all existing laws shall be brought in conformity with the injunctions of Islam as laid down in Holy Quran and Sunnah. There are Sharia courts, including an apex body called the Federal Sharia Court, to adjudicate on Islamic matters and enforce the Sharia law.

Eight years after the birth of Pakistan on August 4, 1956 the government of Pakistan announced the formation of a Commission on Marriage and Family Laws. The question of custody of the child was raised in the questioner drafted by the Marriage and Family Laws Commission.

<sup>14</sup> Ibn Qaddama, Al Mughni, Egypt: 1367, vol. 7, p. 614-16 (Hanbali scholar, 541-573 AH)

<sup>15</sup> Najm ud din Jafar, *Shara'i al Islam*, Tehran, vol. 2, p. 1-2

<sup>16</sup> Hadith Book, by Imam Mohammad ibn Ali Shaukani

<sup>17</sup> Taqi ad din Ahmad ibn Taymiyya (1263-1328 CE), born in Harran what is Turkey today near Syrian border, was a Hanbali theologian of 7<sup>th</sup> century AH.

<sup>18</sup> Imam Shaukani, *Nayl al Autar*, Syria:Dar al Fikr, vol. 7, p.142

<sup>19</sup> Ibid.

<sup>20</sup> Hedaya, p. 138

The question was that, 'At present the mother is entitled to the custody of her minor child only up to certain age i.e. the male child up to seven years and female child till she attains puberty. These limits have no authority either in Quran or Hadith but have been fixed as a result of opinions of some Muslim Jurists. Do you consider it admissible to propose some modifications?'

In answer to this question Commission stated in its report that; 'In the opinion of the Commission it is admissible to propose changes in matter of custody of minor children as the Quran and Sunnah have not fixed any age limit and some of great Mujtahid Imams have expressed the view that the matters of age limit in this respect is an open question.'<sup>21</sup>

Maulana Amin Ahsan Islahi (1904-1997)<sup>22</sup> commenting on the reply of the Commission said that, 'It is correct that there is no explicit implication of Quran and Sunnah which prescribe the age limit. But it does not mean that legists have fixed the limit just out of fancy and had no sound reasons for these deductions..... a careful study of the verdicts of Holy Prophet (pbuh) in the cases that were brought before him reveals that a very basic consideration has been the welfare and wellbeing, education and training, protection and interests of the minor. If they could be achieved well when the children are under the custody of the mother, this was done and when the case was otherwise they were given under the custody of the father.....'

Five years later in March 1961 many of the recommendations of the Commission on Marriage and Family Laws were embodied in Muslim Family Laws Ordinance of 1961 but it remained silent on the issue of custody of minors. All Pakistan Women's Association (APWA) continued to agitate and finally proposed a reform on child custody as an amendment to the MFLO 1961. It proposed that, 'Family Laws Ordinance is silent on the issue of custody of minors. The law should provide that whilst deciding about the custody of the children of broken homes the court should keep in view not only the welfare of the minors but also wishes of such children.'

Maulana Maududi (1903-1979)<sup>23</sup> an eminent Pakistani religious scholar states;

'The right thing in this regard is that the interest of the child should be kept above everything else. In every particular case preference should be given either to the father or mother after giving full consideration to the prospects of education and training in their respective custodies..... also under whom so ever's custody they might be no restrictions should be placed on children meeting the other party.'<sup>24</sup>

Justice Tanzil ur Rehman<sup>25</sup> states;

In granting the right of upbringing, the child's security and betterment should be kept in mind, and as long as there is no ma'ani (hindrance/hurdle) the mother's custody will be preferred. In certain situations, child has to be given the option to choose between the two. Sometimes such circumstances may arise in which it would be appropriate to give the child to maternal grandmother or maternal uncle even in the presence of the parents. If it is not appropriate to hand over the child to the mother due to her religion or profession then the court will decide by itself to whom the custody may be granted.'<sup>26</sup>

A general view which prevails in Pakistani society is that in cases of marital breakup, divorce or dissolution of marriage child custody is given to father when the child is seven years of age (as stated in Hanafi *fiqh*) and that this is supported by Islamic law as well as Pakistani law. In reality Muslim Family Laws Ordinance of 1961 of Pakistan is silent on the issue of child custody therefore there is a need to see the trend of courts in Pakistan while deciding child custody cases.

<sup>21</sup> Marriage Commission Report X-Rayed by Prof. Khurshid Ahmad (Karachi:Chiragh e Rah Publications 1959) p. 218

<sup>22</sup> Pakistani Muslim scholar famous for his Quranic commentary 'Tadabbur i Qura'n', also served as a member of Muslim Marriage and Family Law Commission set up by Government of Pakistan in 1956. He was one of the founder members of Jamaat e Islami but abandoned the party in 1958.

<sup>23</sup> Founder of *Jamaat e Islami*, Pakistani journalist, theologian Muslim revivalist and a controversial 20<sup>th</sup> century Islamic thinker.

<sup>24</sup> Marriage Commission Report, op., cit., p. 887

<sup>25</sup> Justice (R) Dr Tanzil ur Rehman, Prominent Pakistani Jurist and scholar of Islamic Studies, former Chief Justice, Fedral Shariat court, Member CII and author of many books.

<sup>26</sup> Tanzil ur Rehman, (1991) *Majmua Qawaneen e Islmi*, Islamabad: IRI, vol. 2, p. 886-887

### ***Trends of Courts in Pakistan***

Cassandra Balchin<sup>27</sup> after a careful study of the trends of courts in Pakistan with respect to family laws states that, ‘*Studies of Pakistani case law shows that courts have preferred a case by case consideration of the fact rather than rigidly applying the principles of established Muslim Jurisprudence.*’<sup>28</sup> In one of the cases a minor having attained age of 17 years had been living with his mother since his birth. Minor who was present in court stated that he was a student of a college and was being well looked after by his mother. Keeping in view age of the minor his desire could not be ignored. Order of the court below dismissing father’s application of custody of minor and mother’s custody being valid and proper was affirmed in these circumstances.<sup>29</sup>

Welfare of the minors is the guiding factor in the matter of deciding the custody and personal law is subordinate to such consideration. Father although a natural guardian yet his right was also subordinate to the welfare of the minor. Overriding, fundamental and paramount consideration is always the welfare of minors, rather is the sole criteria which must prevail.<sup>30</sup>

Cassandra Balchin adds that an analysis of reported case law of Pakistan, in the area of custody and guardianship reveals that there are four basic influencing factors.

1. Firstly like all other individuals and institutions, the judiciary cannot remain above societal norms and political pressures.
2. Secondly a combination of Muslim personal law and a variety of statutory law is applied by courts in adjudicating such cases.
3. Third factor is the colonial impact in statutory laws as well as in molding the general trends of the courts in pre- partitioned India.
4. Fourthly the Roman concept of Justice, Equity and good conscience as it was introduced by the then Indian judiciary.

Balchin has made no reference to the religious norms, Prophetic traditions and custody cases decided by the companions of the Prophet and those decided by the Muslim jurists of 4<sup>th</sup> and 5<sup>th</sup> centuries, nor has she made any reference to the impact of these precedents on the trends of Pakistani courts today. Influencing factors on the trends of Pakistani courts according to Balchin are the societal norms, political pressures, personal laws, colonial impact and Roman concept of justice, equity and good conscience.

Cassandra Balchin further states that, ‘*Courts in Pakistan have succeeded in making inroads into established Muslim Jurisprudence and have at times over ridden express provisions of law.*’ We have seen above that the broad principle of ‘*the welfare of the minor is of paramount consideration*’ was upheld by classical Muslim jurists and courts in Pakistan today have reverted towards this principle. Not only this, a careful study of the verdicts of Prophet Mohammad (pbuh) in cases brought before him reveal that the very basic consideration has been the welfare and wellbeing, education and training and protection and interest of the children.

### ***Child Custody Laws in the Muslim World***

Let us deliberate and compare child custody laws in the rest of the Muslim world. Below is a survey of child custody laws in the three regions with Muslim majority population Middle East, Africa and Asia.

#### ***Middle East***

Middle East lies at the junction of Africa, Asia and Europe having the world’s oldest civilization. Being a Muslim majority region, Islamic values permeate every aspect of the people of Middle Eastern countries.

In the Kingdom of Saudi Arabia classic *Hanbali fiqh* is applied in cases of personal status.

<sup>27</sup> Cassandra Balchin, formerly a journalist based in Pakistan, has been linked with the network ‘Women Living Under Muslim Laws’ since the early 1990s. Her research and writing has focused on Muslim family laws and law-reform processes, and more recently on critiques of international development policy and practice regarding religion.

<sup>28</sup> Cassandra Balchin, *A Handbook on Family Laws in Pakistan* (Lahore:Shirkatgah, 1994) p.164

<sup>29</sup> 1994 MLD 1950

<sup>30</sup> PLD 1994 SC(AJK) 1

In case of divorce, Saudi boys remain with their mothers until the age of seven or nine and girls until the time of marriage (unless the mother remarries in which case she forfeits custody of her children). Usually divorced Saudi women will bring her children with her to her father's house.<sup>31</sup>

Ja'fari school is the predominant *madhab* in Iran. Under a 1933 law relating to the rights of non-Shi'i Iranians, courts apply the personal status laws applicable to the litigants. Iran's Islamic Republic first gave guardianship of girls over the age of seven and boys over the age of two to fathers and in case of their death to their male kin. During Iran – Iraq war however war widows were granted the right to raise their children and keep their husband's salary, pension or other living expenses without the interference of their male kin. Subsequently other women gained the same rights.<sup>32</sup>

*Hanafi fiqh* is the predominant *madhab* in Syria. If a divorced Syrian woman has a home and she does not marry she will be allowed to retain her boys till the age of nine and girls till the age of eleven. Trends of the courts show that *Qadhi* may extend the mother's custody over girls until marriage or over boys and girls until they attain *rushd*, if the court finds that father is not to be trusted with the children.<sup>33</sup>

Under Iraqi law where the predominant schools are the *Ja'fari* and *Hanafi fiqh*, a divorcee is entitled to custody of boys and girls until the age of ten, extendable to 15 years if it appears to be in the minor's best interest. Upon attaining 15 years, the ward may choose which parent to live with, or choose to live with any other relative if such a choice appears reasonable to the court.<sup>34</sup>

Maliki school is the official *madhab* in Kuwait. The divorced mother's right to custody ceases at puberty for boys and at the age of marriage for daughters<sup>35</sup>

Hanafi *madhab* being dominant school in Jordanian law, a divorced mother is entitled to custody of her children until they reach puberty subject to classical conditions.<sup>36</sup>

Child custody laws in Saudi Arabia, Iran, Syria, Iraq, Kuwait and Jordan show that no matter which school of *Fiqh* is pre dominant, no fixed age of custody is uniformly followed in these countries and majority of the laws and trends of courts show that courts have the power to extend child custody to mothers beyond the age stated in texts, depending upon the circumstances of the case. This clearly shows that courts are not blind to justice and Islamic *fiqh* provides for many other considerations to be looked into while deciding child custody. Muslim jurists have stated an age till which child must remain with the mother but it does not imply that the mother cannot retain her children beyond that age. The courts do not rigidly apply laws of any specific school of thought but also takes into consideration sources of other schools of thought and customary practices of that region. In Syria, Sheikh al Tantawi has drafted a comprehensive treatise on personal law based on *takhayyur* according to principles most suitable to changing social conditions. In UAE, personal status law remains uncodified but constitution declares Islamic Sharia to be principle source of legislation. Judgment no. 8/97: in 1997 Dubai court of cassation ruled that a divorced mother who had remarried retained custody rights over children due to a written agreement between the parents whereby father agreed not to claim custody even if his former wife remarried. Similarly in Kuwait although Maliki school is the official *madhab* divorced mother has a right to son's custody till puberty and daughters till marriage. Hanafi *madhab* is the dominant school in Jordanian law. Jordanian Law of Personal Status (JLPS) refers to classical Hanafi rules in the absence of specific reference in the text but the law also provides that divorced mother can retain child custody till puberty, subject to classical conditions.

## Africa

For the purpose of systematic study, continent of Africa is divided into five regions, North Africa, Horn of Africa, East Africa, West Africa and South Africa. Islam reached North Africa as early as 658 CE when Arab conquerors established Egypt's first Muslim seat of government at Fustat, just south of modern Cairo. Arab traders began pushing south from Egypt into northern Sudan in the seventh century.

<sup>31</sup> Altorki, S. (1986) *Women in Saudi Arabia: Ideology and Behavior among the Elite*, New York: Columbia University Press, p. 81

<sup>32</sup> Poya, M. (1999) *Women, Work and Islamism*, London: Zed Books, p.101

<sup>33</sup> Abdullahi A Al Na'im (2002) *Islamic Family Law in a Changing World*, London: Zed Books Ltd, p. 140

<sup>34</sup> *Ibid.*, p. 114

<sup>35</sup> *Ibid.*, p. 125

<sup>36</sup> *Ibid.*, p.121

It reached the rest of Horn of Africa from across the red sea and towards west from Egypt in eighth century CE.<sup>37</sup> Islam was an integral part of East African coastal culture by as early as 1000CE through contact with religious teachers, merchants and slave traders.<sup>38</sup> West Africa became home for Muslims in late tenth and early eleventh century when traders from North Africa and Middle East settled in this area. Most of the people who live in southern Africa do not follow Islam. With this demography/ history of the region, Muslim culture and Islamic law have deep roots in the continent of Africa.

In North Africa, Egypt is the regional giant and home of oldest Muslim civilization in the continent of Africa. Its legal system is based on Islamic law and civil law (particularly French Codes). *Hanafi* school is the predominant school of *fiqh*. In Egypt, a divorced mother is entitled to the custody of boys until the age of ten and girls until the age of twelve. Custody may be extended till the age of fifteen for boys and till marriage for girls if the judge deems such an extension to be in the best interest of the ward<sup>39</sup>.

In Algeria, Maliki School is the pre dominant *madhab* with an *Ibadi* minority. Divorced wife is granted custody of children till 16 years for boys and 18 years for girls, so long as the mother does not remarry or marries someone within the prohibited degree to her daughter, with the proviso that courts can terminate custody in the best interest of the ward. Guardianship rests with the father.<sup>40</sup>

Maliki School is the dominant *madhab* in Libya and Morocco. In both these countries, the divorced mother's custody ends at the age of marriage for girls and puberty for boys.<sup>41</sup> Maliki *madhab* is predominant school of *fiqh* in Tunisia also, Islam is the state religion but Sharia courts were abolished in 1956. Custody laws are progressive in Tunisia. If the marriage ends in a divorce, the judge is required to take interest of the ward into account in assigning custody either to one of the parents or to a third party. If mother is awarded custody, she is authorized to exercise the prerogatives of guardian in matters related to the ward's travel, education and financial affairs: she may be granted full powers of guardianship if the guardian is unable or unfit to exercise them.<sup>42</sup>

Thus as a general principle, mother possesses a preferential right to child custody till the puberty of male child and marriage of the female child. Laws of Tunisia seem progressive in this regard and the courts also vest the right of guardianship to the mother if it feels that father or any other guardian is not suitable to exercise them.

Nearly all Muslims in the Horn of Africa are Sunni but they belong to hundreds of different ethnic groups and speak many different languages. As they adopted Islam they did not shed their attachment to the traditions and beliefs of their earlier religions.<sup>43</sup> Among the Somali, husband is considered to hold all rights over children born within the marriage. It is his decision as to with whom the children would reside. Usually young children remain with the ex-wife until they are old enough to go to their father's house, while older children remain with father immediately upon divorce. In Sudan, the male children remain with their mother until the age of seven while female children remain until approximately the age of nine.<sup>44</sup>

Majority of Muslims are *Shafi'* in Ethiopia. In Ethiopia, wards are to remain with their mother till the age of five in the absence of any 'serious reason'. Civil Code provides that child custody and maintenance arrangements are to be made only with consideration for the interests of the ward. However in Somalia, mother is entitled to custody of male children until the age of ten and female children until the age of fifteen, with the court empowered to extend custody until 18 years for male or female ward. Maintenance of children is the duty of both parents until the age of majority for sons and until marriage or until she is able to support herself through gainful employment for the daughter.

In Sudan, Maliki school was the pre dominant *madhab* but the dominant school now is *Hanafi* due to Egyptian and Ottoman influence. In Sudan, a divorced mother is entitled to custody of her male children till they are seven and female children till they are nine.

<sup>37</sup> Martin, B. G. (1986) 'The Spread of Islam', in P. M. Martin and P.O'Meara(eds), *Africa*, Bloomington: Indiana University Press, pp.87-88

<sup>38</sup> Ibid., p.87-102

<sup>39</sup> Abdullah al naimi 2002, op., cit., p. 172

<sup>40</sup> Ibid., p. 177

<sup>41</sup> Ibid., p. 180

<sup>42</sup> Ibid., p.183

<sup>43</sup> Abbink, J.(1999) '*Ethiopian Islam and the Challenge of Diversity*', *ISIM Newsletter*,4, December, p.24.

<sup>44</sup> Abdullahi A An Naimi, op., cit., p.74.



Court may extend these periods if proven to be in the interests of the wards until sons reach puberty and daughters consummate marriage. The father or other male guardian is to maintain scrutiny of all matters related to the raising of the children in the custody of their mother. The custody of a woman of different religion from the father ends when the child is five or earlier if there is a fear of faith being affected. Child support is the responsibility of the father until the daughter is married and son is of an age when he is able to earn his own living.<sup>45</sup>

In Somalia and Sudan although an age has been fixed till which custody must remain with the mother but courts are empowered to extend custody till age of puberty. Since child support is the responsibility of the father therefore he has the guardianship rights in all matters related to the upbringing of the child while in mother's custody.

Legal codes within East Africa vary, although all give some form of recognition to Islam. These legal recognitions date back to the colonial era, such as the British government and Sultan of Zanzibar reached an agreement to recognize and preserve the Islamic way of life.<sup>46</sup> Zanzibar still maintains separate judicial administration for Muslims.

In Kenya, British implemented the familiar triple court system: common law, customary and *Shari'a* courts. Tanzania has a dual legal system consisting of statutory laws and religious and customary laws. In Uganda, father has custody rights for any child no longer breast feeding.<sup>47</sup> When women do retain custody, Ugandan civil law entitles women to 2000 shillings per month per child in maintenance but women are rarely able to collect this fee.<sup>48</sup>

Kenya has a very diverse Muslim population due to Arab and south Asian settlements. Dominant *madhab* is the *Shafi'i* school of *fiqh* with sizable *Hanafi* communities. Islamic law is applied by *Qadhis'* courts where all the parties profess the religion Islam in suits relating to personal status. In Kenya at the age of 7 for boys and 14 for girls, custody reverts to the father. The statutory legislation directs that courts must adjudicate with interests of the ward as primary consideration and an increasing number of women are applying to regular court system where custody over boys and girls under 16 is generally awarded to the mothers<sup>49</sup>.

Majority Tanzanian Muslims are *Shafi'i*, Tanzanian courts consider welfare of the minor to be of paramount importance while deciding cases of child custody. There is a rebuttable presumption that children should remain with the mother till the age of seven. Courts also take into consideration three factors while deciding the custody cases;

The economic circumstances of both parents,

2. The housing that both parents can provide.
3. The behavior of the mother whether she is considered to have contributed to the marital breakdown.<sup>50</sup>

In South African countries of Malawi, Zambia, Mozambique and Lesotho, mothers are the preferred guardians and children are included in mother's lineages. Fathers have little authority and decision making power concerning their children; instead the eldest maternal uncle is the primary authority in a child's life.<sup>51</sup> South Africa's courts have authority to grant custody to either the mother or the father in the best interest of the child.<sup>52</sup> Most of West African countries maintain legal systems that are to some degree confluences of customary, colonial and Islamic law. The degree to which one type of law predominates differs not only between countries but also among regions and ethnic groups. Africa's two largest Muslim ethnic groups, the Hausa and Fulani are located in this region. Almost all of the region's Muslims are *Sunni* who follow the *Maliki* school of Jurisprudence.

<sup>45</sup> Ibid., p.85.

<sup>46</sup> Oded, A.(2000) *Islam and Politics in Kenya*, Boulder,CO: Lynne Rienner Publishers.

<sup>47</sup> Tamale,S. and J. Okumu-Wengi (1995), 'The legal status of women in Uganda', in J.W. Kabebere-Macharia (ed.), *Women Laws, Customs and Practices in East Africa: Lying the Foundation*, Nairobi: Women and Law in East Africa, pp.24-45

<sup>48</sup> Fiedler, A. A. (1998) 'Women-Uganda: Uganda debates marital rights... and wrongs', *Interpress News Service*, 8 December.

<sup>49</sup> Abdullahi A. An Naimi, op., cit., p. 56

<sup>50</sup> Ibid., p. 60

<sup>51</sup> Mvula, P. M and P. Kakhongwa (1997), *Beyond Inequalities: Women in Malawi*, Harare: Southern African Research and Documentation Centre.

<sup>52</sup> Abdullah A. An Naimi, op., cit., p.196

According to Hausa custom with regard to child custody, Hausa children remain with their mother only until the age of seven.<sup>53</sup>

### **Asia**

In Caucasus and the Central Asian region, majority Muslims are *Sunni Hanafi*. The Republic of Georgia pays women a family allowance for each child under 16 and maternal custody of children is codified, recognized and funded by the state.

In Turkey, *Sharia* law was formally abolished in 1926. In case of divorce, women are generally awarded custody both by custom and when courts decide.<sup>54</sup>

In the South Asian region, predominant *madhab* in Pakistan, India, Bangladesh, Sri Lanka is *Hanafi fiqh*. In Maldives, *Maliki* school predominated till the 16<sup>th</sup> century but now it follows *Shafi'i madhab* and there is a *Ja'fari* minority as well. In Bangladesh, India and Pakistan, custody is governed by the Guardians and Wards Act 1890. The Act stipulates that the courts are to be guided by the personal law to which the minor is subject. Courts are also directed to consider the age, gender and religion of the minor and the character and capacity of the proposed guardians, as well as the minor's own opinion if he is old enough to form an intelligent preference. For Muslims as a general rule, classical *Hanfi* position is taken with respect to custody of children that is male up to seven years and female till puberty.

In Sri Lanka, there is very limited legislation relating to Muslim personal status laws. The legislation that does apply is largely of an administrative nature and does not alter or reinterpret many of the substantive classical provisions of Islamic law.

In Maldives, children less than seven years of age live primarily with their mothers. In case of mother's remarriage, custody may be offered to maternal grandmother, paternal grandmother or father. Children over the age of seven can choose in whose custody they wish to live.

In Southeast Asia, mother child relationship is given priority, often at the expense of father's religious and legal rights. Children always remain close to their mothers and in the event of divorce, children usually remain with their mothers. In matrilineal communities, marriage does not establish a man's right over his children. Fathers are generally seen as peripheral which shows a clear distinction between actual practice and injunctions of Islamic law. Almost all countries of the region of Southeast Asia are predominantly *sunni shafi'i* Muslims.

In Indonesia, in child custody disputes, courts shall render its judgment. The father shall have responsibility for maintenance expenses, unless he is unable to bear such responsibility in which case court shall order the mother to share such expenses.

In Malaysia, divorced mother is entitled to custody over boys until seven and girls until nine years subject to classical conditions. Courts may extend custody to nine and eleven years respectively upon *hadinah's* (mother's) application. After the expiry of *Hadinah's* (mother) custody, father becomes the custodian with a proviso that wards having reached the age of discernment may choose with which parent to live, unless the court directs otherwise.

In Philippines, the divorced mother has the right to custody over sons and daughters until seven years after which age the ward may choose to live with either parent. The custody of an unmarried female ward who has reached puberty reverts to the father and the son resides with the mother.

In Singapore, custody is governed by Guardians of Infants Act 1961. The courts are directed to consider the religious and customary practices of the community to which the parties belong, but the best interest of the ward is of paramount consideration. The regular court system has jurisdiction over all custody cases.<sup>55</sup>

### **Conclusion**

After a deliberate study of child custody in customary laws, laws of personal status and trends of courts spanned over the classical Muslim era till today's Muslim World. It is established that the custody of male or female children does not automatically transfer to the father after seven years.

<sup>53</sup> Ibid., p.288

<sup>54</sup> Arin, C.(1997), 'The legal status of Women in Turkey', *Women's International Network News*, 23:62.

<sup>55</sup> Abdullah A. An Naimi, op., cit., pp. 256-279

The view that the father has a preferential right to boys custody after seven years of age is only upheld by Abu Hanifa. Other leading jurists disagree with this view and give the boy the option to choose between both parents when he is seven years old and the Qadhi / courts must see the welfare of the minor while deciding custody cases. In case of girls, mother has a preferential right of custody till her marriage and this is upheld by all sunni schools of thought. The stance of various *shi'i* or *sunni* schools of *fiqh* on fixing an age till which mother can have custody rights does not imply that custody must automatically transfer to the father after this age and that mothers cannot retain their children beyond the stated age. Rather it asserts that in the absence of any impediment to mother's right of child custody such as her remarriage, religion or profession, her right to child custody must not be contested by the father in the initial years. This age is roughly from birth till seven years.

In the second phase of the child's life that is from seven years till puberty, when he is able to look after himself/herself and is able to speak and express himself, fathers can now contest child custody and it is the responsibility of the courts to take into consideration the wishes of the ward and must decide keeping in view the best interests of the ward. Also wishes of the minor must remain subject to the welfare of the minor.

Another important point is that the courts have recognized the need for minors to have access to both parents. So fathers are granted regular access to their children when in mother's custody and an intimate mellowing influence of the mother is made available to the minor when he is in father's custody by virtue of their visitation rights.

In contemporary Muslim world we find that fixation of age is rigidly applied where society is patriarchal where people have not shed their attachments to beliefs and traditions of earlier religions, such as horn of Africa and people belonging to Hausa and Fulani ethnic groups in West Africa. In contrast to this in Southeast Asia in the event of divorce, children usually remain with their mothers. Fathers are generally seen as peripheral which shows a clear distinction between actual practice and injunctions of Islamic law.

In Kuwait, Jordan, Libya, Morocco and Algeria divorced women are entitled to her children's custody till puberty without fixing any age at which custody reverts to father. Tunisian laws are very progressive in this regard. If mother is awarded custody in Tunisia, she is authorized to exercise the prerogatives of guardianship as well. Completely different pattern is observed in South African countries of Malawi, Zambia, Mozambique and Lesotho, mothers are the preferred guardians and children are included in mother's lineages. Fathers have little authority and decision making power concerning their children; instead the eldest maternal uncle is the primary authority in a child's life.

Uniform law can be drafted for deciding custody cases for Muslim dominated regions which cater for the progressive laws of the modern world and spirit of Sharia. It is suggested that when custody of children is granted to the divorced women, she should also be vested with guardian ship rights with respect to travel, education and financial matters of the child. The primary objective while deciding custody should be preservation of religion and welfare of the minor. Visitation rights of both parents should be respected and child be allowed access to both parents. It should be a rebuttable presumption that mother should retain child custody till the child is in his growing years and is attending pre-school. This age is normally 6 years. Mother's remarriage and religion should be taken into consideration after this age and fathers should not contest custody in these delicate years of child's life.

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