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CHILD'S CUSTODY IN THE ALGERIAN LEGISLATION

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 here 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.

This paper focuses on the analytical study of child custody and guardianship law in Algeria as a country which recognizes Islam as a religion State, when couples depart due to separation, dissolution of marriage, divorce or *Khul'a*. Cases of custody and guardianship of orphans and foster children. The constitutional status of *Sharia*, customary practices, personal status laws and status of women in Algeria have a resilient impact on the application and adjudication of law while deciding custody and guardianship cases.

IDENTIFICATION

Custody comes into play during and after the divorce of a married couple with children. The rules of custody in the Middle East have been significantly influenced by religious influences, albeit by varying degrees of strength depending on the country. Custody, and by extension guardianship laws, can be found in a country's family code or family laws.

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 '*wilaya*' and custody as '*Hadhana*'. Custody means physical or material possession of the children, whereas its Arabic equivalent *Hadhana* 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 '*wilaya*' literally means to '*protect*' or to defend. Legally the term guardianship is defined in the Guardians and Wards Act 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. Whereas custody 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 *hadhana* 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*, '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'.

LEGAL NATURE OF CUSTODY.

Muslim writers generally define custody as "the education of the child at a time when the female presence is a need for him". The definition does not reveal the legal nature of this institution, that is, it does not indicate whether custody is a right or obligation of the mother or any person likely to exercise it.

The majority of the *Sunni - Maliki - Hanbalite - and Shafi'i* doctrine views the custody as a right for the mother, and they derive the logical consequences of this rule:

- 1 - The mother can renounce her right of "guardian", in particular in case of negotiation of a *khol'a*;
- 2 - The mother can not be forced to "keep" her child, except in the case where no other person can exercise this function;
- 3 - The mother or any other woman "guardian" can claim a remuneration which can not be confused with the maintenance obligation due by the husband to the mother (*nafaka*) and to the child. This opinion is not shared by *the Malikites* who recognize it only a right to housing made necessary by the care of the child.

Moreover, whatever the legal nature of the custody, the interest of the child, more than that of the guardian, is preponderant. Also, the custody is a function tending to the protection of the child.

THE CUSTODY: FUNCTION OF CHILD'S PROTECTION

The custody is a guardianship on the person of the child. It aims to protect the child from birth by meeting his material and moral needs. If "The care and upbringing of the child constitute an indivisible unity", especially in marriage, there are cases where the child needs his mother more than his father. More than that, he needs maternal tenderness.

The custody, which can only imperfectly be translated as guard, actually translates into a state deeper than the mere material guard. The custody of the Arabic verb "*hadana*" means to brood, to surround with his arms, in Muslim right. She is tenderness and affection before being authority and supervision. In these circumstances, it is undeniable that a woman is better able to fulfill such a mission. Given her natural vocation to care for the child and surround her with affection, the woman is granted the favor of being *hadina* in Islamic law. To every other woman, the law prefers the mother; unless it turns out to be unworthy by failing to meet the requirements necessary for the protection of the child.

TYPES OF CUSTODY

There are two main components of custody: *hadana* and *waliya*. These two components are genderized. *Hadana*, which can be translated as 'care' is most often associated with the mother's

duty. *Wilaya*, translated at 'supervision' is the duty of the father. The two are not placed on equal grounds.

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 doesn't 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.

- **HADANA**

Hadana is care allocated to the mother. It is associated with the care of raising a child such as feeding, clothing and bathing, that the child is too young to perform by them self. Boys often leave *hadana* care early, anywhere from the age of two to seven is most common. Girls can stay under the custody of the mother until puberty or until marriage, depending on the local culture. A mother can lose her rights to *hadana* if she remarries. *Hadana* is always given to a female relative. If the mother is unable to do it, it may pass to the maternal grandmother, the paternal grandfather, a sister, aunt or any other viable relative.

- **WILAYA**

Wilaya is the supervision or guardianship of the child, which is associated with the father. If the father is unable to take his responsibilities because of death or **insanity**, then *wilaya* almost always passes to another male relative on the patrilineal side. *Wilaya* often encompasses the child's access to citizen rights such as a passport or **enrolment** in school.

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**, which says that the mother should breast feed their infants for two complete years. Therefore 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* ﷺ 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. 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 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.

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

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* ﷺ 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 under lying 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**. 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.

CUSTODY DISPOSITIONS IN ALGERIA

The woman is almost without exception given custody of the children after divorce. The law clarifies the order of persons to be given custody for children after divorce.

According to article 64 of the family law, custody is given first to the mother. If, for some reason, the mother cannot - or does not wish - custodial rights, the responsibility is transferred to the father. If he also either cannot or will not, the responsibility passes on to the maternal grandmother, thereafter to the paternal grandmother, the mother's sister and finally the father's sister. Those who are awarded daily custody for a child must be physically and mentally fit for the task. Any incapacity must be documented in court.

Algerian legislation doesn't operate with the term "*parental responsibility*", only legal guardianship (*wilaya*) and daily care (*hadana*). Following the modifications in the family law in 2005, the person who has custody and cares for the child will automatically become the child's legal guardian (article 87 family code). The parent who doesn't care for the child is entitled to have access.

If a mother remarries with a person who is not related to the child, she may lose custody. Although this is statutory (article 66), the provision is rarely applied because the court's assessment of the child's best interest is given greater weight. Nevertheless, the provision deters divorced women from getting remarried, as they fear losing custody of their children. Women, therefore, rarely remarry after divorce, unlike men.

A mother has priority right over the custody of her daughter until she reaches a marriageable age and her son until he reaches. A judge may extend the mother's custody over her son until he is 16 if she has not remarried. In any event, any judgement terminating custody must be based on the child's interest. A mother risk losing custody of her children if she marries a man who is not closely related to the child.

A mother also risks losing her right to custody over her children if she unable to take charge of the children's maintenance, schooling in the father's religion and physical and moral health. However, a mother's work cannot constitute a ground for terminating her right to custody. In all instances, the interest of the child must be taken into account.

The presiding magistrate has authority to order, upon request, temporary measures relating to financial support, the custody of children, visiting rights and accommodation.

The Algerian Family Code conforms to the principle of the overriding importance of the child's interests. Accordingly, a mother has priority right over the custody of the children followed by the father; in the great majority of cases, Algerian civil courts have awarded custody of children to their mothers. Where this is the case, the father is required to provide a decent dwelling, or failing that, financial support in an amount adequate to cover the cost of rental accommodation, so that the mother can exercise her custody under acceptable conditions; Lastly, a working mother can no longer be deprived of her right of custody.

The father has an obligation to furnish children under their divorced mother's custody with decent lodging (Art. 72 Family Code). Article 72 also establishes that in case of divorce, where the wife has been granted custody, she is to be maintained in the marital home, until the execution of any judicial decision dealing with housing. This is a major improvement to the 1984 Family Code which provided that the marital home belonged to the husband in case of divorce. This may serve to reduce the number of divorced or repudiated women who are forced to live in the streets with their children in Algeria. However, there are no rights to the matrimonial home for a woman if the marriage did not result in children.

QUESTIONS:

- TRANSLATE THE UNDERLINED TERMS INTO ARABIC.
- GIVE AN ABSTRACT (IN ARABIC) TO THE TOPIC.