

Child custody (*hadanah*) and guardianship (*wilayah*) provisions in Muslim family laws often discriminate against mothers and fail to serve the best interests of children.

Child custody and guardianship provisions in Muslim family laws are primarily derived from *fiqh* rules developed many centuries ago by jurists who had fixed gender stereotypes about parental roles and children's needs. Custody (*hadanah*) is generally shared between parents during marriage, but is decided upon divorce based on the gender and religion of the parents and the age and gender of the child. Guardianship (*wilayah*) almost always rests with the father or another male relative in a continuous manner during marriage and after divorce.

While formulated with the best interests of the child in mind, these *fiqh*-based rules fail to serve the best interests of children in contemporary Muslim contexts. The rules can complicate divorce proceedings and lead to increased acrimony and discord for parents and children. Evidence shows that both men and women are capable of and already actively participate in caring for children and protecting and providing for their families.



Recently, several Muslim-majority states have reintroduced the 'best interests of the child' standard as a principle for deciding custody matters. This is done based on the *fiqh* concept of *maslahah* (best interest and protection from harm), pre-modern juristic arguments and historical practices that took a flexible view of custody and guardianship arrangements, and contemporary international human rights. The 'best interests' standard provides a more just approach that ensures the needs of the child and the rights of both parents. It should be adopted more widely and also used to determine guardianship rights.

Child custody and guardianship laws must be based on the best interests of the child.



OVERVIEW OF THE ISSUE

Classical jurists distinguished between '*wilayah*' (guardianship) and '*hadanah*' (physical care; often translated as 'custody'), and this has been carried over into most contemporary laws in Muslim contexts. *Wilayah* (lit. to protect or to defend) includes the responsibility of managing a child's affairs and property and making legal decisions on his or her behalf. *Hadanah* (lit. to nurture and embrace) includes the responsibility of caring for the child and providing for physical and emotional needs.

Classical fiqh



Classical jurists viewed men and women as having certain 'natural' capabilities and made decisions about how parental care should be divided accordingly. While some jurists took into account different considerations about individual children's welfare, needs, and interests, many of the rulings on custody and guardianship were based on assumptions of what children needed depending on their age and gender. These formulations eventually became fixed into doctrines of the different schools of law.

In all schools, the father or another male holds *wilayah* responsibilities until the child reaches the age of majority. *Hadanah*, on the other hand, remains the right and duty of both parents during marriage. Upon divorce it is generally the mother (or in her absence another female relative) who remains the custodian of very young children. This right transfers to the father after the child reaches the age of seven, though rules differ between the schools as to what age. In *Shi'a fiqh*, a mother holds *hadanah* over sons until the age of two, and daughters until seven. In all schools, divorced mothers may lose *hadanah* rights upon remarriage to a man who is not *mahram* to the children.



Contemporary Muslim family laws and policies

Most current Muslim family laws continue to award parental rights and responsibilities based on the gender of the parents and age and gender of the children. During a marriage, *hadanah* is the shared responsibility of both parents, but mothers generally have priority to care for and nurture the children. Fathers alone generally hold guardianship responsibilities (*wilayah*) both during marriage and after divorce, thus have legal and financial responsibility and are empowered to make decisions related to the children's education, financial affairs, and movements/travel.

After divorce, mothers are generally given physical care and custody (*hadanah*) of both sons and daughters at least until a certain age, depending on what school of *fiqh* was used in drafting the law or is followed in practice. After that age, fathers can claim custody or are automatically granted custody. Some laws provide more flexibility for children to remain with mothers past the set age, or to choose which parent they would like to live with. As in *fiqh* rules, a divorced mother's right to *hadanah* is often restricted or lost in certain circumstances.

Some countries have recently shifted towards awarding custody based on the standard of the 'best interests of the child' (*maslahat al-mahdun, maslahat al-tifl*). Countries sometimes use this as an overriding principle that must be considered (e.g., Tunisia, Pakistan, Algeria); as an exception in selected rules, such as extending age limits for custody (e.g., Qatar, Bahrain, UAE, Lebanon, Malaysia); or as a justification for reforms, even if this is not referenced in regulations (e.g., Egypt, Jordan, Iraq). A number of Muslim-majority countries with uncodified laws or laws based on Western or socialist legal systems (e.g., Cameroon, Central Asian Republics, Senegal, Turkey) give equal rights to both parents after divorce.



In addition, some countries (e.g., Egypt, Tunisia, Algeria) have given custodial mothers some guardianship rights, such as the right to manage the educational affairs of children. Other countries (e.g., Malaysia) have introduced administrative rules to enable mothers to sign documents on behalf of their children in relation to educational, medical, and travel matters. In general, however, guardianship rights have tended to remain with the father and other male relatives.

WHY IT MATTERS

Custody and guardianship must be based on the best interests of the child because:



Many of the gender-based aspects of current custody and guardianship provisions are unfair.

For instance, a divorced mother's right to *hadanah* may be lost for a variety of circumstances, but a father's right to *wilayah* is never lost. Fathers who fail to pay a child's maintenance or maintain regular contact still retain the rights of guardianship. Similarly, in some countries a divorced father may be prevented from caring for his child if the mother refuses. These laws can also complicate divorce proceedings, shifting the focus of custody and guardianship decisions away from the needs of the child and towards the rights and desires of the parents. This can foster acrimony and discord.

Legally dividing *hadanah* and *wilayah* between parents does not make sense or reflect lived realities in all circumstances.

A divorced mother with custodial responsibilities but no guardianship rights is restricted in managing the affairs of her children, such as schooling, medical affairs, and travel. Conversely, a mother's exclusive legal claim to *hadanah* can mean the father is not able to spend time with and co-parent their children.



Automatic award of custody or guardianship based on the gender of the parent does not address the specific needs of a child.

Best interests differ from child to child and change as a child grows. They may include physical, emotional, spiritual, educational, developmental, and social needs. Using gender to determine custody and guardianship rather than the child's specific needs and the abilities, skills, and interests of each parent can mean that children do not necessarily get the care required.



Pursuing gender equality in parenting benefits both children and parents.

Studies show that fathers being involved in parenting helps both boys and girls in terms of school performance, social skills, etc. Moreover, fathers and children are deprived of close relationships with each other when mothers do most of the caregiving.



Taking a holistic view of caregiving and guardianship according to skills and needs can shift perceptions of parental care from obligation to a source of joy.

Viewing *hadanah* as incorporating multiple forms of care – physical, intellectual, psychological, religious, legal – and *wilayah* as protection of the vulnerable can engage multiple family members in the process of raising children, based on their abilities and interests, and strengthen the quality of care and protection.

WHY THE LAWS CAN BE CHANGED

Laws related to custody and guardianship of children must be changed to reflect the best interests of the child, rather than stereotypical gender roles. This can and has been done in accordance with Muslim teachings and historical practices:

1 The Qur'an does not distinguish between fathers and mothers regarding the upbringing of children.



Surah al-Baqarah 2:233, for example, states that 'No mother shall be treated unfairly on account of her child. Nor father on account of his child...' and that parents should exercise 'mutual consent' (*taradi*) and 'due consultation' (*tashawur*) with each other regarding the upbringing of their children. The same verse mentions that the father shall provide financially while the mother is pregnant or breastfeeding, but does not indicate that only the father can make decisions about the child.



2 Several accounts of the Prophet (pbuh) show that he was involved in the caring and nurturing of his children beyond financial maintenance, and that he encouraged others to do the same.

Anas ibn Malik said: 'I never saw anyone who was more compassionate towards children than Allah's Messenger. His son Ibrahim was in the care of a wet nurse in the hills around Al-Madinah. He would go there, and we would go with him, and he would enter the house, pick up his son and kiss him, then come back.' (Sahih Muslim, Hadith 2316)

Usamah ibn Zayd, who was the son of Zayd ibn Harithah (the Prophet's adopted son), narrated: 'The Messenger of Allah used to put me on (one of) his thighs and put Al-Hasan ibn 'Ali on his other thigh, and then embrace us and say: "O Allah! Please be merciful to them, as I am merciful to them"' (Sahih al-Bukhari, Hadith 6003)

3 In various historical periods and contexts, there were alternative juristic discourses and court practices that provided flexibility in awarding custody and guardianship beyond the *hadanah/wilayah* binary to better serve children and parents.

Early jurists recognized children's 'basic interests', but some also developed more nuanced approaches that took into account the children's 'best interests' in determining custody and guardianship (Ibrahim, 2018; Ibrahim, 2015). In sixteenth and seventeenth century Egypt, courts registered private separation agreements that granted women custody rights or the ability to veto the father's exclusive guardianship rights (Ibrahim, 2018).

In eighteenth and nineteenth century Aleppo, Syria, and Palestine, women were often granted testamentary guardianship, even in competition with male relatives, based on the father's wishes or the court's decision (Tucker, 1998; Meriwether, 1996). These historical examples demonstrate that custody and guardianship have not always been awarded based on gender, even if they were codified as such in the 20th century.

4 Lived realities in Muslim contexts demonstrate that fathers are willing to equally share custody over their children.

In a recent multi-country study about attitudes and practice regarding gender norms, household dynamics, and other topics, 80-89 per cent of both men and women in Egypt, Lebanon, Morocco, and Palestine felt that parents should share custody of their children upon divorce (El Feki, et al., 2017).



5 Several Muslim-majority countries have already taken the step of reforming Muslim personal status laws to meet the best interests of children.

This demonstrates that such reform is possible based on Islamic principles.

WHERE REFORM HAS HAPPENED

Several countries have acted to change custody and guardianship rules to better address the needs of children and their mothers and fathers:

Custody of children



Bangladesh, Gambia, India, Indonesia, Iraq, Kenya, Pakistan, Qatar, Senegal, Singapore, Sri Lanka, Tunisia, Turkey:

Child custody is ultimately determined by the courts on the basis of the best interests of the child.



Equal right to guardianship



Indonesia:

Guardianship of children is ultimately determined by the courts on the basis of the best interests of the child.



Custodian's guardianship rights



Algeria:

Upon divorce, a mother can be appointed as guardian of her child if she has been granted custody of the child. A mother may also assume the role of default guardian in urgent legal transactions related to the child if the father is not available.

Brunei:

A court is mandated to grant the custodian the right to decide all questions relating to the welfare, guidance, upbringing and education of the child subject to whatever conditions that the court thinks fit to impose.

Morocco:

A mother may manage urgent affairs of the children in the event the father is prevented from doing so. She may also assume guardianship of her children if: (i) she is over 18; and (ii) the father is not present due to his death, absence, or incapacity.

Saudi Arabia:

Mothers who have custody of their children after divorce can obtain documents and conduct government business for their children. Mothers are thus able to register their children in schools, take them to health centres, and obtain identity documents for them.

Tunisia:

Mothers who have custody of their children also have guardianship rights with regard to travel, schooling, and management of finances. The court may award full guardianship to the mother if the father is deceased or unable to exercise his duties. Regardless, the mother has an equal right to supervise the child's affairs.

Administrative reform to achieve best interests of children

Malaysia:

An administrative directive allows the mother, father, or a guardian to sign any official document that requires the signature of the guardian on matters related to their children. This includes registration for school, application for passports, and permission for surgery.



Some international human rights obligations related to custody and guardianship of children:

- **Convention on the Rights of the Child (CRC) article 3(1) (1990):** 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
- **CRC article 18 (1990):** 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. ... The best interests of the child will be their basic concern.'
- **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 16(1):** 'States Parties ... shall ensure, on a basis of equality of men and women ... (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; ... (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; ...'

HOW TO ENSURE EQUALITY AND JUSTICE

Given the harm that unfair child custody and guardianship laws can cause to children and their mothers and fathers, and given the societal problems they can create, States must take steps to standardize 'best interests of the child' as the principle to determine both *hadanah* (physical care/custody) and *wilayah* (guardianship) responsibilities.

Several countries – Algeria, Tunisia, Turkey, Indonesia, Gambia, and Senegal – provide a model for moving to recognize the best interests of the child in awarding *hadanah* and, to a lesser extent, *wilayah*. This shifts the

focus onto the individual child's rights and needs instead of gendered stereotypes about parental roles, or the rights, needs, and dynamics of the parents.

Once custody is awarded based on the interests of the child, awarding guardianship rights to the primary caregiver makes it easier for this parent to care for the child. These changes will ideally happen through reform of laws, but can also occur through reform of policies or even administrative procedures.

Prioritize the best interests of the child by reforming discriminatory child custody and guardianship laws, policies, and procedures.



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