

THE CONCEPT OF CUSTODY IN ISLAMIC LAW

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INTRODUCTION

Litigants in custody disputes try their best to prove that they have the right or the better right to become entrusted with the custody of the child(ren) in question. However, if one reads the legal provisions on custody one will soon be astonished to learn that the major part of such provisions consists of a set of duties and responsibilities and only a few provisions deal with the question of entitlement. This was the very reason why some legal systems such as the English¹ and Scottish² have deliberately and explicitly placed extra emphasis on the responsibilities of custodians rather than on their rights. The question here therefore, is what is the legal nature of the concept of custody in Islamic Law? Is it a right or a responsibility? As custody involves delicate, weak and vulnerable individuals – children – its concept is highly sensitive and requires extraordinary prudence and care, especially concerning the choice of the right custodian. The question of custody entitlement therefore raises another controversial issue. Women are the natural and exclusive begetters and breast-feeders of children. The role of women in the custody process, therefore, should be assessed accordingly. The question here is, what is the role of women in the Islamic institution of custody? This article will examine these issues based on the views of classical jurists as well as contemporary scholars.

Definition of custody (*hadanah*)

According to Lisan Al-Arab *hadanah* comes from the root verb *hadana*. Literally, *hadana* means to clasp in one's arm, to embrace, or to hug someone, but it has also

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¹ The Law Commission, Law Com. No. 172, Family Law Review of *Child Law Guardianship and Custody*, HMSO, London, July 1988, para. 2; See also Children Act 1989, Section 3; *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

² Scottish Law Commission, *Report on Family Law*, Scot. Law Com. No. 135, HMSO, Edinburgh, 1992, para. 2; Children (Scotland) Act 1995, Section 1.

been used to imply to nurse, to bring up, or to raise a child.³ *Hadanah*, therefore, means raising, bringing up, or nursing a child.⁴ It has also been further defined as "the office, or occupation, of carrying and rearing or fostering a child".⁵ *Hadanah* is also interchangeably known as *Kafalah* which also means bringing up and looking after a child.⁶ Terminologically, *hadanah* means the protection given to those who cannot act for themselves, such as the child or the insane person, and the care given to them such as in looking after their food, drinks, and such like, in order to promote whatever brings benefit to them.⁷ As this term seems to denote an emotional and physical connotation, the jurists found it to be most suitable to the legal system of custody in Islamic Law.

Custody as a type of guardianship

Guardianship (*Wilayah*) is a power in accordance with which a person will be able to establish contracts and other legal conducts, execute them and bear the consequences thereof.⁸ It denotes two types. Guardianship regarding one's self is concerned with the authority to conduct one's affairs by one's self, whereas guardianship regarding others means "the carrying through of a decision affecting a third person whether the latter's wishes are taken into consideration or not."⁹ The latter type of guardianship, which is our concern here, can be divided into two categories:

³ *Lisan Al-'Arab Al-Muheet*, edited by Yusif Khaiyyatt and Nadean Mar'ashi, Beirut, Vol. 1, pp. 661-662; see also, Hans Wehr, *A Dictionary of Modern Written Arabic*, edited by J. Milton Cowan, MacDonald & Evans Ltd, London, 1980, p. 185.

⁴ Hans Wehr, *ibid.*, p. 185; see also Al-Jarjani, Ali bin Muhammad, *Kitab al-Ta'rifat*, Dar al-Kutub al-'Ilmiyyah, Beirut, 1995, p. 88.

⁵ Lane, E.W., *Arabic-English Lexicon*, Vol. 1, The Islamic Texts Society, Cambridge, England, 1984, p. 591.

⁶ In the Qur'an, Allah says: "This is part of the news of the Ghaib (unseen, i.e., the news of the past nations of which you have no knowledge) which we inspire you with (O Muhammad s.a.w.). You were not with them, when they cast lots with their pens as to which of them should be charged with the care [*yakfulu*] of Mary; nor were you with them when they disputed". Engl. trans. Muhammad Taquid Din Al-Hilali, Muhammad Muhsin Khan, Maktabah Dar Al-Salam, Riyadh, 1994, Surat Al'Imran, Verse 44. The word *kafalah* is also mentioned in Surat Taha Verse 40 which translates: "When your sister went and said 'Shall I show you one who will nurse [*yakfulu*] him?' So we restored you to your mother, that she might cool her eyes and she should not grieve".

⁷ Al-Khatib, *Mughni al-Muhtaj*, p. 452. See also Al-Nawawi, Muhyee Al-Din Abu Zakariyya Yahya ibn Sharaf, *Minhaj al-Talibeen*, Engl. trans., E.C. Howard, Law Publishing Company, Lahore, Pakistan, n.d., p. 391; Al-Sayyid Sabiq defines *hadanah* as the caring or protection of children or insane persons who are still dependent, by undertaking whatever makes them better, protecting them from harm and developing their body, soul and mind in order to promote their future life and enable them to be responsible for themselves later, Al-Sayyid Sabiq, *Fiqh al-Sunnah*, Vol. 2, Dar al-Kitab Al-'Arabi, pp. 301-302.

⁸ Al-Zuhayli, W., *Al-Fiqh Al-Islami Wa Adillatuhu*, Dar Al-Fikr, Damascus, 1989, Vol. 4, p. 139; Al-Siba'i, Mustafa and Al-Sabouni, 'Abd al-Rahman, *Al-Ahwal Al-Sakhssiyyah Fi Al-Ahliyya Wal-Wassiyah wal-Tarakat*, Al-Mattba'ah Al-Jadidah, Damascus, 1978, 5th edn, p. 40.

⁹ Al-Siba'i, Mustafa and Al-Sabouni, *ibid.*, pp. 40-41; Al-Jarjani, *op. cit.*, p. 254.

- (1) Guardianship of Person; and
- (2) Guardianship of Property.¹⁰

Guardianship of Person is the power and conduct of taking care of the ward's personal affairs such as marriage, education, discipline, medical care, career prospects, and the like.¹¹ Guardianship of Property, on the other hand, is the power to conduct, administer and conclude contracts and other legal conduct relating to the property of the ward. All the jurists agree that if the father is alive, he will be the natural guardian of both the person and property of his small children.¹² In the absence of the father, the guardianship of person and that of property will go, jointly or separately, either to the appointed guardian or to the male agnate ('*asabah*) according to the order of priority.¹³

The relationship between *hadanah* and guardianship (*wilayah*) can be seen as a complex structure of rights and duties distributed between the entitled person(s). The main distinction between the two concepts is that *hadanah* is more related to the emotional taking care of and nursing of the infant, whereas *wilayah* is more concerned with decisions that in some way or another affect the child's present and future welfare. The exercise of *hadanah*, therefore, cannot be effectively undertaken without physically living with the child, whereas the exercise of *wilayah* can be performed from a remote distance, whether or not the guardian is living with the child. According to Islamic Law, *wilayah*, generally speaking, is a male-oriented function.¹⁴ *Hadanah*, on the other hand, is a more female-oriented function.¹⁵ That is of course not to say that women are restricted only to being providers of emotional support and men to rational support. The distinction between the two concepts is intended to bring about a practical distribution of roles in the best interest of the children.¹⁶ In fact, Islamic Law urges both women and men to nourish and cherish their rational inclinations to the best of their abilities. What Islamic Law has recognised in the distribution of roles mentioned is the degree of special ability and capability of women to be providers of emotional support, the close relationship between women and their small children, and the natural inclination of small children towards their mothers. That is why when the child attains a certain degree of independence the distinction between female-oriented and male-oriented custody roles ceases to exist.

¹⁰ *Supra*, n. 9.

¹¹ Al-Zuhayli, W., *op. cit.*, Vol. 4, pp. 140-141.

¹² *Ibid.*, p. 41.

¹³ Al-Asbahi, Malik b. Anas, *Mudawwanah al-Kubra*, published together with Ibn Rushd, Muhammad b. Ahmad, *Kitab Al-Muqaddimat al-Mumahhidat*, Vol. 2, 1st edn, Al-Matba'ah Al-Khairiyyah, 1324H, p. 246; see also, Al-Siba'i and Al-Sabouni, *op. cit.*, p. 41.

¹⁴ Al-Zuhayli, W., *op. cit.*, Vol. 4, pp. 140-41.

¹⁵ *Ibid.*, Vol. 7, pp. 717-719.

¹⁶ *Ibid.*, pp. 719-720.

Is *hadanah* a duty or a right?

Taking into account that small children are usually weak and in need of proper protection *hadanah* stands as a duty similar to the obligation to maintain them.¹⁷ Islamic jurists consider *hadanah* as a collective obligation (*fardh kifayah*) upon all the Muslim community.¹⁸ However, according to the Malikis, *hadanah* becomes a personal obligation (*fardh 'ain*) upon the father¹⁹ if other people neglect it. It is also a personal obligation upon the mothers to have the *hadanah* of the child during the first two years of suckling if there is no father or the father has no financial means to pay a hired milk-giver (wet-nurse) for the child.²⁰ If the child does not accept milk other than the mother's,²¹ or if there is no other qualified person except the mother, she can be forced to be the custodian.²² Once the *hadanah* is entrusted to a particular person, it becomes a duty on that person to ensure that the child is well cared for by him or her.²³

As far as its performance is concerned, *hadanah* is a set of responsibilities and duties.²⁴ During her office in custody the female custodian is responsible for the upbringing, taking care of, protecting, cleaning, feeding and clothing of the child.²⁵ The father as the natural guardian of the child has the duty and responsibility to determine major decisions relating to the child's life, such as discipline, education, religious upbringing, medical consent, consent to marriage and future career.²⁶ All the expenses which relate to the upbringing of the child such as maintenance, accommodation, education and other expenses also lie with the father.²⁷ The father must also give services to his children such as sending them to school whenever necessary.²⁸ In addition to this, the father also has the responsibility to supervise the general upbringing of the child while it is staying with the mother or other female custodians.

¹⁷ Ibn Qudamah, *op. cit.*, p. 133.

¹⁸ This obligation is addressed to the community as a whole denoting that everybody is responsible for carrying out the duty. However, if only some members of the community perform it, the law is satisfied and the rest of the community is absolved from it. This is in contrast with a personal obligation where everybody must personally carry out the duty. See Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Revised Edition, Islamic Texts Society, Cambridge, 1991, p. 325.

¹⁹ Ibn Rushd, *op. cit.*, p. 259.

²⁰ *Ibid.*; Regarding this, the Qur'an says: "The mothers shall give suck to their offspring for two whole years (that is) for those (parents) who desire to complete the term of suckling", Surat Al-Baqarah, Verse 233.

²¹ Ibn Rushd, *op. cit.*, p. 259.

²² Al-Sayyid Sabiq, *op. cit.*, p. 302; Al-Zuhayli, W., *op. cit.*, Vol. 7, p. 719.

²³ Al-Zuhayli, W., *ibid.*

²⁴ The prophet (Pbuh) said, "Everyone of you is a guardian and everyone of you is responsible (for his wards). A ruler is a guardian and is responsible (for his subjects); a man is a guardian of his family and responsible (for them); a wife is a guardian of her husband's house and she is responsible (for it); a slave is a guardian of his master's property and is responsible (for that). Beware! All of you are guardians and are responsible (for your wards)", Al-Bukhari, *Sahih Al-Bukhari*, Engl. trans. Dr Muhammad Muhsin Khan, Vol. 7, Kazi Publications, Lahore, 1986, p. 82; so whoever is entrusted with custody of the child will be responsible for ensuring that the child is well protected and looked after.

²⁵ Al-Zuhayli, W., *op. cit.*, Vol. 7, pp. 717-718.

²⁶ Al-Khatib, *Mughni al-Muhtaj*, p. 458.

²⁷ Al-Asbahi, *Mudawwanah*, p. 247.

²⁸ *Ibid.*, p. 246.

However, when discussing the question of entitlement, *hadanah* seems to be considered as a right to be vested upon a certain properly qualified relative of the child such as the mother, father and other relatives. In fact, it is a shared right between the ward and the entitled custodian(s) and the father or his replacement, giving the ward's share a prevailing status in case of conflict.²⁹ This is because the ward's share stems from the fact that it is weak and unable to take care of itself and therefore will incur serious damage if no proper care is given to it. The custodian share of this right, on the other hand, stems from the particular reason that can be used as a basis for proving his/her entitlement to the office of custody. Therefore, the reader of those huge volumes of classical Islamic jurisprudence would not be surprised to read that a good deal of their discussion had been devoted to the question of entitlement, which in turn considered *hadanah* as a right. The father's (or his replacement guardian's) share stems from the need to enable him to perform his guardianship duties and responsibilities.

Pertinent to the concept of custody as a right, custody is also considered as an authority or power³⁰ that is obviously meant to enable the custodian to perform his/her duties and responsibilities. However, this authority or power is qualified by its terms and conditions with particular emphasis on giving the utmost priority to the protection of the ward's welfare and interest. That is, the protection of the interest of the child is more important than to satisfy the claim of the *ahl al-hadanah*. It has been observed that, "Both the person who has the right to *hadanah* and the person over whom the *hadanah* is exercised have their rights but the right of the person over whom *hadanah* is exercised is stronger than the right of the person who has the *hadanah*".³¹

The persons entitled to *hadanah*

The mother

Jurists unanimously agree that so long as she is qualified, the mother will have the first claim to the *hadanah* of her child.³² This is based on a Prophetic tradition that:

Amr b. Shu'aib, on his father's authority, said that his grandfather Abd Allah b. 'Amr reported that: A woman said: "Messenger of Allah, my womb is a vessel to this son of mine, my breast, a water skin for him, and my lap a guard for him, yet his father has divorced me, and wants to take him away from me". The Messenger of Allah (may peace be upon him) said: "You have more right to him as long as you do not marry".³³

²⁹ Al-Zuhayli, W., *op. cit.*, Vol. 7, pp. 718-719. 'Awwad states that it is a shared right between Allah and the concerned persons, see his book *Huquq Al-Tifl Fi Al-Islam*, Dar A-Fadhileh, Cairo, p. 32.

³⁰ Al-Zuhayli, W., *ibid.*, p. 718.

³¹ Al-Sayyid Sabiq, *op. cit.*, p. 302.

³² Ibn Qudamah, *op. cit.*, p. 133; see also Al-Shafi'ie, Muhammad Idris, *Al-Umm*, Vol. 5, Dar al-Ma'rifah, Beirut, p. 92; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, Burhan Al-Din, *Hedaya*, Engl. Trans. Charles Hamilton, Premier Book House, Lahore, 1982, p. 138; Ibn Rushd, *op. cit.*, p. 259.

³³ Abu Dawood, *op. cit.*, p. 616.

This *hadith* shows that due to the high degree of attachment between a child and a mother as described by the woman, the mother is given a priority right in the case of *hadanah*. Abu Bakr (the first Caliph), made a decision between 'Umar (the second Caliph), and his wife, that the child – 'Asim – should be given to the mother. Abu Bakr said to Umar: "Her smell and her kindness are better to it [the child] than you."³⁴ In another version, he was reported to have said, "The spittle of the mother is better for thy child than honey, O 'Umar!"³⁵ This also shows that the mother with her qualities and characteristics such as love, kindness, gentleness and tenderness is the best person to take care of the small child, even compared with the father.³⁶

Another reason to give priority to the mother, especially for the small infant, is due to the fact that only the mother, and not the father, is physically able to breast-feed her baby.³⁷ This is important for the interest of the child as it is scientifically proven that a mother's milk is the best milk for a child. Furthermore, the fact that the mother has more right to the kind treatment of her child above all other people, including the father, might also be an analogy to the prior right of the mother in the case of *hadanah*.³⁸

Maternal grandmother

When the mother is dead or disqualified, the majority of jurists hold that the right will go to maternal grandmothers.³⁹ This is also confirmed by practice of Abu Bakr.⁴⁰ Among the justification for this is that the maternal grandmother is the one

³⁴ Ibn Qudamah, *op. cit.*, p. 133; Al-Asbahi, *Mudawwanah*, p. 247.

³⁵ Al-Marghinani, *op. cit.*, p. 138.

³⁶ Regarding this, Ibn Qudamah says, "The mother is more loving and closer to the child. Nobody else except the father can be a partner in this closeness. The fact is that even the father does not have love like that of the mother and (if he is given the *hadanah*) he does not take care of the child himself but puts it under the care of his wife. In this case, the mother has priority over the father's wife", Ibn Qudamah, *op. cit.*, p. 133; "... a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child", Al-Marghinani, *op. cit.*, p. 138; "The mother knows better how to take care of a child and has more ability to do that and she is also more patient to carry out this duty compared to the men", Al-Sayyid Sabiq, *op. cit.*, p. 303.

³⁷ Regarding this, Al-Qur'an states: "The mothers shall give suck to their children for two whole years (that is) for those (parents) who desire to complete the term of suckling", Surat Al-Baqarah, Verse 233.

³⁸ "Narrated Abu Huraira (r.a.): A man came to Allah's Messenger (peace be upon him) and said, 'O Allah Messenger! Who is more entitled to be treated with the best companionship by me?' The Prophet (peace be upon him) said, 'Your mother'. The man said: 'Who is next?' The Prophet (peace be upon him) said, 'Your mother'. The man further said, 'Who is next?' The Prophet (peace be upon him) said, 'Your mother! The man asked (for the fourth time), 'Who is next?' The Prophet (peace be upon him) said: 'Your father'", Al-Bukhari, *summarised Sahih*, *op. cit.*, p. 952.

³⁹ Ibn Qudamah, *op. cit.*, p. 133; see also Al-Shaf'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, *op. cit.*, p. 138; Al-Asbahi, *Mudawwanah*, *op. cit.*, p. 245.

⁴⁰ It is reported by Qasim bin Muhammad that 'Umar Ibn Al-Khattab had married a woman from the Ansar. She gave birth to a son whose name was 'Asim bin 'Umar. 'Umar later divorced the woman. One day when 'Umar was proceeding on horseback towards Qa'ba, he found his son was playing in front of the mosque. He caught hold of him and placed him on the horse's back. 'Asim's maternal grandmother caught up with them. A quarrel arose between the maternal grandmother and 'Umar

who gave birth to the mother, who subsequently gave birth to the child, and that relationship between the maternal grandmother and the child through a direct birth-link is very strong, and on this basis she has more right to the child.⁴¹

The father

Although Imam Ahmad in one of his opinions gave priority to the father directly after the mother,⁴² the Hanbalis are of the opinion that the father has third priority; that is, after the mother and maternal grandmothers.⁴³ The Shafi'is also put the position of the father in third place if the claims to *hadanah* are made by male and female relatives.⁴⁴ The Hanafis, however, are of the opinion that the right of *hadanah* will only pass to the father and other male guardians if female relatives of the child are not available.⁴⁵ According to Imam Malik, the father will have the right of *hadanah* in the absence of the mother, maternal grandmother, maternal aunt and the paternal grandmother.⁴⁶

Paternal grandmother

Although jurists differ on the position of the paternal grandmother, the prevalent view is that the paternal grandmother comes after the maternal grandmother and not before.⁴⁷ However, according to Imam Ahmad, the paternal grandmother has priority over the maternal grandmother because she is connected to the male agnate (*'asabah*), that is to the father.⁴⁸ He also argues that the position of the maternal and paternal grandmother are the same in the case of a direct birth-link (*wiladah*), because the paternal grandmother gave birth to the father, and from the father came the child.⁴⁹ Imam Malik, however, gives priority to the maternal aunt

contd.

about the *hadanah* of the boy. Both of them came to Abu Bakr who was the Caliph. 'Umar said: "He is my son". The grandmother said: "He is my son". Abu Bakr said: "Leave this woman and the child". 'Umar said nothing in reply [he raised no objection to this decision], Al-Bayhaqi, Ahmad b. Al-Husayn, *Al-Sunan al-Kubra*, Vol. 8, Dar al-Fikr, Beirut, n.d., p. 5.

⁴¹ Ibn Qudamah, *op. cit.*, p. 133; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, *op. cit.*, p. 138.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Al-Nawawi, *op. cit.*, p. 391; see also Al-Shafi'ie, *Al-Umm*, Vol. 5, pp. 92-93. The Shafi'is divide the eligible *ahl al-hadanah* into three groups: male relatives, female relatives, female and male relatives. Basically, female relatives will be given priority over the male relatives. However, if the father disputed his right of custody over the child, his right will be just after the mother and maternal grandmothers.

⁴⁵ Al-Marghinani, *op. cit.*, p. 138.

⁴⁶ Al-Asbahi, *Mudawwanah*, p. 245.

⁴⁷ Al-Mughni provides: "If the maternal grandmother and the paternal grandmother are both alive, the maternal grandmother howsoever has more right because they give birth (*wiladah*). The maternal grandmother has more right than the paternal as the mother has more right than the father", Ibn Qudamah, *op. cit.*, p. 140; Al-Shafi'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, *op. cit.*, p. 138.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

after the maternal grandmother and not to the paternal grandmother.⁵⁰ The paternal grandmother comes next after the maternal aunt.

The sister

If the mother and her mother and the father and his mother as mentioned above do not exist or are disqualified, the right of *hadanah* will devolve to the sisters who will have priority over the maternal and paternal aunts and all other relatives. This priority is based on their strong kinship with the child (as they come from the same father and/or mother) and their inheritance rights are stronger than those of other relatives.⁵¹

The jurists, however, differ in opinion in the case of priority between the sanguine sister and uterine sister. According to the Shafi'is and the Hanbalis, the sanguine sister should be given priority⁵² as she has prior right in the case of inheritance.⁵³ Moreover, from the lineage point of view, the sanguine sister has a male agnate link with the child as she comes from the same father.⁵⁴ Abu Hanifah, Shurayh and another opinion of Imam Ahmad, however, gives preference to the maternal relation (uterine sister) rather than the paternal.⁵⁵

The maternal aunt

The majority of jurists agree that the position of the maternal aunt comes after sisters.⁵⁶ However, most jurists agree that the paternal grandmother has more right to *hadanah* than the maternal aunt.⁵⁷ The Hanbalis, who agree with the majority, support their view with two arguments: the relationship through a direct birth-link,⁵⁸ and the priority right of inheritance.⁵⁹ They further commented that the Prophetic tradition which says that "the maternal aunt is like a mother",⁶⁰ is true in the sense that a maternal aunt may generally take the place of a mother, but it

⁵⁰ Al-Asbahi, *op. cit.*, p. 244.

⁵¹ Ibn Qudamah, *op. cit.*, p. 134; see also Al-Shafi'ie, *op. cit.*, p. 92; Al-Marghinani, *op. cit.*, p. 138.

⁵² Al-Shafi'ie, *op. cit.*, p. 92; Ibn Qudamah, *op. cit.*, p. 134.

⁵³ See Ibn Qudamah, *op. cit.*, p. 134; see also Al-Asbahi, Malik b. Anas, *Al-Muwatta*, Engl. trans. 'Aisha 'Abdurahman Al-Tarjumana and 'Ya'qub Johnson, Diwan Press, London, 1982, pp. 237-238; 'Abdur Rahman I. Doi, *Shari'ah: The Islamic Law*, Ta Ha Publishers, London, 1984, pp. 308-309.

⁵⁴ Ibn Qudamah, *op. cit.*, p. 134.

⁵⁵ *Ibid.*, p. 134; Al-Marghinani, *op. cit.*, p. 138.

⁵⁶ Ibn Qudamah, *op. cit.*, p. 134; Al-Shafi'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, p. 138. However, Imam Malik and the Malikis give priority to the maternal aunt. Thus, the sister comes after the maternal aunt and not before as ruled by the majority. See Al-Asbahi, *Al-Mudawwanah*, p. 244; Ibn Rushd, *op. cit.*, p. 259.

⁵⁷ Ibn Qudamah, *op. cit.*, p. 139; see also Al-Shafi'ie, *op. cit.*, p. 92; Al-Marghinani, *op. cit.*, p. 138; however, Imam Al-Shafi'ie in his first period gave priority to the maternal aunt over the paternal grandmother and in fact over all female ancestors on the father's side, see Al-Nawawi, *op. cit.*, p. 391.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p. 140.

⁶⁰ Abu Dawood, *op. cit.*, p. 617.

does not mean that in the case of a dispute of *hadanah*, the position of the maternal aunt is just after the mother.⁶¹

Paternal aunt

According to the majority of the jurists, in default of the maternal aunt the right of *hadanah* will pass to the paternal aunt.⁶² It is further explained that those who are doubly related will be given priority over those who are singly related to the child.⁶³ However, Al-Kharqi is of the view that the paternal aunt should be given priority.⁶⁴ The father's relatives have priority over the mother's relatives because they (the father's relatives) are connected to the male agnate.⁶⁵

Niece

The Shafi'is placed the niece in quite a high position in the priority order, i.e., just after the maternal aunt and before the paternal aunt.⁶⁶ The Hanafis, however, distinguish between the daughter of the sister and the daughter of the brother; the daughter of the sister comes after the sister in the priority order.⁶⁷ The daughter of a brother, on the other hand, comes after the maternal aunt but before the paternal aunt.⁶⁸ The reason for this is that the daughter of the brother comes after the maternal aunt because her right of *hadanah* comes through the brother who has no right of *hadanah* (in the existence of other female relatives), whereas the maternal aunt's right of *hadanah* comes through her relationship with the mother.⁶⁹

Male agnates (al-'asabah))

Except for what has been stipulated above, according to the Hanafis,⁷⁰ Hanbalis,⁷¹

⁶¹ Ibn Qudamah, *op. cit.*, p. 139.

⁶² See Ibn Qudamah, *op. cit.*, p. 135; Al-Shafi'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, *op. cit.*, p. 138. Imam Malik's view is that the paternal aunt comes after the sister, see Al-Asbahi, *Al-Mudawwanah*, p. 244.

⁶³ The *Hedaya* states: "The maternal aunt has preference to the paternal, because precedence is given, in this point, to the maternal relation. The same distinction also prevails among the aunt as among the sisters; that is, she who is doubly related has a preference to her who is singly related; thus the maternal aunt, who is full sister to the mother precedes a paternal sister; and so also of the paternal aunts", Al-Marghinani, *op. cit.*, p. 138.

⁶⁴ Ibn Qudamah, *op. cit.*, p. 135.

⁶⁵ *Ibid.*

⁶⁶ Minhaj Al-Talibeen provides: "In any case a sister has priority over a maternal aunt, and the latter over a niece. A niece has priority over a paternal aunt", Al-Nawawi, *op. cit.*, p. 391.

⁶⁷ Al-Sarkhasi, Shams Al-Din Muhammad, *Al-Mabsoot*, Vol. 5, Dar Al-Ma'rifah, Beirut, 1993, p. 211.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Al-Marghinani, *op. cit.*, pp. 138-139.

⁷¹ Ibn Qudamah, *op. cit.*, p. 135.

Shafi'is⁷² and Malikis⁷³ if all the female relatives are absent or disqualified, then entitlement devolves to the male agnate ('*asabah*'), whose priority is as follows:

- (1) Paternal grandfathers;
- (2) Full brothers;
- (3) Sanguine brothers;
- (4) Sons of the full brothers;
- (5) Sons of the consanguine brothers;
- (6) Their descendants;
- (7) Paternal uncles; and
- (8) Sons of paternal uncles.⁷⁴

The Hanafis further provide that if there is more than one male agnate of the same degree (such as full brothers), who dispute the right of *hadanah*, the one who is more righteous will have priority. If all of them are similarly righteous, then the one who is older will be given priority.⁷⁵

Almost all the jurists caution that a girl cannot be entrusted under the *hadanah* of the paternal uncle's son (cousin) because he is not within the prohibited degrees of marriage (*muhram*) to the girl,⁷⁶ as in Islam they are not prohibited from marrying each other. The Shafi'is, however, suggest that if there is no other person to take care of the girl, except the son of the paternal uncle, he must find a reliable woman and put the girl under her care.⁷⁷

The male relatives from maternal lines (zawi al-arham)

The male relatives from maternal lines, such as the maternal uncle, maternal grandfather, or the sister's son, have no right to *hadanah*. However, if no one else is available, the jurists differ in opinion. Some of them, rightly, give the maternal male relatives the right to *hadanah*,⁷⁸ whereas others do not.⁷⁹

The meaning of child and duration of hadanah

The jurists seem to discuss *hadanah* in the context of legitimate children as illegitimate children are considered as belonging exclusively to the mother and

⁷² Al-Nawawi, *op. cit.*, p. 391.

⁷³ Ibn Rushd, *op. cit.*, pp. 260-261.

⁷⁴ Ibn Qudamah, *op. cit.*, p. 135.

⁷⁵ Al-Sarkhasi, *op. cit.*, p. 212.

⁷⁶ Ibn Qudamah, *op. cit.*, p. 126; see also, Al-Nawawi, *op. cit.*, p. 391; Al-Marghinani, *op. cit.*, p. 139.

⁷⁷ Al-Nawawi, *op. cit.*, p. 391.

⁷⁸ Ibn Qudamah, *op. cit.*, p. 136.

⁷⁹ *Ibid.*, p. 137.

would not be attributed to their father.⁸⁰ There are four conditions for a child to be considered as legitimate.⁸¹ They are:

- (1) The child must have been conceived during the marriage;
- (2) The father does not deny his parentage of the child;⁸²
- (3) The child is not a result of a void marriage;⁸³ and
- (4) The child is born at least six months⁸⁴ after the marriage and within four years after the dissolution of the marriage.

As has been seen above when a child (male or female) is under the age of seven custody is given to the mother. However, once the child attains the age of seven, which is the age of discernment,⁸⁵ the opinion of jurists varies. According to the Shafi'is both male and female children are given the choice as to whom they would prefer to stay with.⁸⁶ The Hanbalis, however, give this right of choice only to the male child.⁸⁷ They support their views based on Prophetic traditions.⁸⁸

⁸⁰ See Abu Dawood, *Sunan Abu Dawood*, Engl. trans. Prof. Ahmad Hasan, Kitab al-Talaq, Vol. 2, Sh. Muhammad Ashraf Publishers & Booksellers, Lahore, 1984, p. 609. In another *hadith*, Ibn 'Umar reported that: "A man invoked curses on his wife (charging her with adultery) during the time of the Messenger of Allah (may peace be upon him) and he disowned the child. The Messenger of Allah (may peace be upon him), therefore, separated them and attributed the child to the woman", Abu Dawood, *op. cit.*, p. 610.

⁸¹ Cf. Ahmad, K. N., *Muslim Law of Divorce*, Kitab Bhavan, New Delhi, 1978, pp. 865-873.

⁸² Disowning children, however, is a discouraged practice if it is without any valid reason and proof. The Prophet has been reported to say: "Any woman who brings to her family one who does not belong to it has nothing to do with Allah (i.e. expects no mercy from Allah), and Allah will not bring her into His paradise; and Allah, the Exalted, will veil Himself from any man who disowns his child when he looks at him, and disgrace him in the presence of all creatures, first and last", Abu Dawood, *op. cit.*, p. 611.

⁸³ "A marriage is void when the spouses are within prohibited degrees whether on account of birth, fosterage, or when the wife is the wife of another person, or is the fifth wife when marriage with the other four wives are subsisting or the wife is an adulteress, etc.", Ahmad, *op. cit.*, p. 873. Nevertheless, some jurists are of the opinion that the child of a void marriage is still legitimate. This is actually in the interest of the child who is born under such circumstances, see Ahmad, *op. cit.*, p. 869.

⁸⁴ The period of six months is inferred from two verses of the Qur'an whereby in one verse (Al-Ahqaf: 15), Allah mentioned that the combined period of bearing and weaning a child is 30 months. In another verse (Al-Baqarah: 233), Allah mentioned that the period of suckling is 24 months. Thus, the jurists arrived at the conclusion that the minimum period of bearing or gestation is six months.

⁸⁵ The choice of the age of seven is because this is the age where the *Shari'a* demands that the parents ask their children to perform the obligatory prayer. Besides, this is the age at which the child will be capable of distinguishing between good and bad things, Ibn Qudamah, *op. cit.*, p. 143; The Prophet (Pbuh) is reported to have said, "Command a boy to pray when he reaches the age of seven years. When he becomes ten years old, then beat him for prayer [if he persisted not to obey]", Abu Dawood, *op. cit.*, Kitab Al-Salah, p. 130, Nos. 494 and 495.

⁸⁶ Al-Shafi'ie, *Al-Umm*, *op. cit.*, p. 92, however, mentions that the age of the child is seven or eight years; Al-Nawawi, *op. cit.*, p. 392: *Minhaj Al-Talibeen* does not state exactly what is the age of choice of a child, instead it uses the phrase "when the child has attained the age of discernment".

⁸⁷ This is also the opinion of 'Umar, 'Ali and Shurayh, see Ibn Qudamah, *op. cit.*, p. 142; The Hanbalis argue that the girl is not given the right to choose because the *Shari'a* does not explicitly mention it as all the parties to the *hadiths* of the Prophet and the practice of the companions regarding the right to choose were boys and not girls.

⁸⁸ "It is reported from Abu Hurairah that The Prophet said: 'A boy is given the right to choose between his father and his mother'", as quoted by Ibn Qudamah, *op. cit.*, p. 142; Al-Shafi'ie, *op. cit.*, p. 92.

It is ... reported from Abu Hurairah that a woman came to the Prophet and asked: "O Messenger of Allah my husband wishes to go away with my son while he provides me with some water from the well of Abi 'Utbah and it is useful to me". Then the Prophet said to the boy: "This is your father and this is your mother. Take the hand of either of them whom you like". Afterwards the boy caught the hand of his mother and she went away with him.⁸⁹

The right of choice is also based on the practice of the companions.⁹⁰ Ibn Qudamah further commented that when the child is still small, its need of the services of the mother or female custodian is greater as she is better able to serve its needs during this time. The situation is different when the child becomes older and, therefore, in this case it is appropriate to give the child the right to choose.⁹¹ Another reason behind the principle of choice is based on the fact that the child will naturally incline towards the parent who is more kind and loving to it.⁹²

Nevertheless, the right to make a choice must be balanced with the interest and welfare of the child. In one case, in which Ibn Taimiyyah was the judge, the child was given the right to choose between its parents and it chose to stay with the father, stating his reason that his mother "... sends him everyday to school and the teacher applies firm disciplinary procedures, whereas his father allows him to play with his friends".⁹³ The child was then given to the mother, contrary to his choice. This incident shows that the choice which is given to the child is not absolute but is subject to the protection of the interest and welfare of the child as to which parent it feels more comfortable with. However, in the case of a conflict between the real interest of the child and its choice the former prevails.⁹⁴

Once the choice is made the child will be handed over to the chosen parent.⁹⁵ If after some time the child changes his decision and wishes to stay with the other parent, it will be allowed to do so.⁹⁶ And again if it decides to return to the other parent it will be handed over to that person⁹⁷ as many times as the child pleases.⁹⁸ The emotional feelings of the child are, of course, upheld as long as they are compatible with its interest.

If the child seems not to prefer either parent or he prefers both of them together, the matter will be decided by lot.⁹⁹ According to the Shafi'is, if the child refuses to choose, the mother will be given preference as in the case of an undiscerned

⁸⁹ Abu Dawood, *op. cit.*, p. 617.

⁹⁰ "It is reported from 'Umar that he had made a boy choose between his father and his mother; it is also reported from 'Ammarah Al-Jarmi, he said 'Ali asked me to choose between my paternal uncle and my mother and at that time I was a child of seven or eight years'", see Ibn Qudamah, *op. cit.*, p. 142; see also Al-Shafi'ie, *op. cit.*, p. 92.

⁹¹ Ibn Qudamah, *op. cit.*, p. 143.

⁹² *Ibid.*, pp. 142-143.

⁹³ Al-Sayyid Sabiq, *op. cit.*, p. 313.

⁹⁴ *Ibid.*

⁹⁵ Ibn Qudamah, *op. cit.*, p. 143.

⁹⁶ *Ibid.*; Al-Shafi'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 392.

⁹⁷ Ibn Qudamah, p. 143.

⁹⁸ The child might want to maintain good relations with both of the parents by doing this, *ibid.*

⁹⁹ *Ibid.*; This seems to originate from the case of Mary, the mother of Jesus, where Allah asked Zacariyyah to cast lots in order to determine who should have more right to take care of her, see the Qur'an Surat Al-'Imran, Verse 44. See also Ibn Rushd, *op. cit.*, p. 258.

child.¹⁰⁰ However, if the child opts to choose afterwards, it is still given the right to do so.¹⁰¹

According to Hanbalis and Shafi'is, the right of choice can be practised not only between the parents but also between one of the parents and another person, or even between other persons entitled to custody.¹⁰² As a result, a child may choose between his mother and his paternal uncle,¹⁰³ or between the maternal grandmother and the father.¹⁰⁴ This principle is important and practical as it is not always the case that the choice will be between the parents only.

In order for the right of choice to be exercised, three conditions must be fulfilled. On the one hand, the persons subject to choice must fulfil two conditions. These are: (i) they must be eligible to custody;¹⁰⁵ and (ii) they must not be disqualified.¹⁰⁶ The child, on the other hand, must not have a mental defect of such a degree as to make its ability of choice invalid, such as being insane or mentally deranged.¹⁰⁷ If the child has such a mental defect, it will have more right to stay with its mother as in the case of a child who is under the age of discernment.

The Hanafis and Imam Malik, however, do not agree with such a right of choice. According to Imam Malik, the mother has more right to a boy until he attains the age of puberty.¹⁰⁸ The Hanafis, on the other hand, feel that once a boy achieves a degree of independence; that is, being able to feed, clothe and clean himself, then the father has more right to the boy.¹⁰⁹ The reason why a child should not be given the right to choose according to them is because as a young person, the boy will naturally wish to stay with the parent who keeps him under the least restraint. Thus, giving him a choice in this case would not be in accordance with his true interest.¹¹⁰ Commenting on the *hadith* mentioned above as an authority for the right of choice the Hanafis stated that in that case the choice was practised under the auspices of the special spiritual power of the Prophet which nobody else can enjoy.¹¹¹

The jurists have paid special attention to the female child and also differ in opinion with regard to the duration of her custody. As has been said above, the Shafi'is do not differentiate between a boy and a girl in this matter. The Hanafis, however, are of the opinion that a girl should be with her mother until she attains

¹⁰⁰ Al-Nawawi, *op. cit.*, p. 393.

¹⁰¹ Ibn Qudamah, *op. cit.*, p. 144.

¹⁰² *Ibid.*, Al-Shafi'ie, *op. cit.*, p. 92; Al-Nawawi, *op. cit.*, p. 392.

¹⁰³ This is based on the incident where 'Ali(r.a) asked 'Ammarah Al-Jarmi to choose between his mother and his paternal uncle cited above.

¹⁰⁴ Ibn Qudamah, *op. cit.*, p. 144; Al-Nawawi, *op. cit.*, p. 392.

¹⁰⁵ Ibn Qudamah, *op. cit.*, p. 144.

¹⁰⁶ Al-Nawawi, *op. cit.*, p. 392; see also Al-Shafi'ie, *op. cit.*, p. 92.

¹⁰⁷ Ibn Qudamah, *op. cit.*, p. 144; Al-Shafi'ie, *op. cit.*, p. 92.

¹⁰⁸ Al-Asbahi, *Mudawwanah*, *op. cit.*, p. 244.

¹⁰⁹ The *Hedaya* states: "... it then becomes necessary to attend to his education in all branches of useful and ornamental science and to initiate him into a knowledge of men and manners, to which effect the father or paternal relations are best qualified", Al-Marghinani, *op. cit.*, p. 139.

¹¹⁰ Al-Sarkhasi, *op. cit.*, p. 208.

¹¹¹ *Id.*

puberty.¹¹² When a girl attains puberty she is considered as ready to get married and at this time she needs her father more than her mother because the father is her guardian in marriage.¹¹³ Imam Malik also seems to incline to a similar opinion of the Hanafis' views that a girl should stay with her mother until she gets married.¹¹⁴

The Hanbalis differ from the other schools in this case. They argue that it is in the interest of the girl to be with her father when she attains the age of seven as the father is the one who can protect her.¹¹⁵ Furthermore, the father is very important because as a guardian he has the capacity to supervise the girl's marriage and other aspects of her life, i.e., the need for the father is greater.¹¹⁶

Conditions of custodianship (ahl al-hadanah)

According to Islamic Law, both female and male custodians have to satisfy certain basic conditions to be eligible for *hadanah*. They are as follows:

- (1) Legal capacity;
- (2) Trustworthiness;
- (3) Ability to bring up the child;
- (4) Muslim;
- (5) Residence; and
- (6) Marriage restrictions.

Each requirement will now be considered in turn.

Legal capacity

In order to qualify for custody the custodian must enjoy full legal capacity, i.e., must have attained the age of puberty according to some jurists, and puberty and maturity according to others.¹¹⁷ The custodian must also be sane.¹¹⁸ A minor and an insane person, therefore, cannot be an *ahl al-hadanah* as they themselves need somebody to look after them.¹¹⁹ However, in the case of the insane, if the insanity is periodical and lasts for a very short time (e.g., only one day in a year), such a person would not be disqualified.¹²⁰

¹¹² Ibn Qudamah, *op. cit.*, p. 145; The *Hedaya* provides that, "... because a girl has occasion to learn such manners and accomplishments as are proper to women to the teaching of which the female relations are most competent", Al-Marghinani, *op. cit.*, p. 139.

¹¹³ Al-Sarkhasi, *op. cit.*, p. 208.

¹¹⁴ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 245.

¹¹⁵ Al-Mughni states that, "The purpose of *hadanah* is for the welfare of the child and the welfare of a girl after the age of seven is to be with her father because she needs protection and the father is in a better position to give such protection, as for the mother she herself needs somebody to protect her", Ibn Qudamah, *op. cit.*, p. 145.

¹¹⁶ Ibn Qudamah, *op. cit.*, p. 145.

¹¹⁷ Al-Zuhayli, *op. cit.*, Vol. 7, p. 726.

¹¹⁸ *Ibid.*

¹¹⁹ Ibn Qudamah, *op. cit.*, p. 137; Al-Nawawi, *op. cit.*, p. 392; Al-Sayyid Sabiq, *op. cit.*, p. 305.

¹²⁰ Al-Khatib, Muhammad A., *Al-Iqna' fi Hal Alfaz Abi Shuja'*, Vol. 1, Dar al-Haya' Al-Kutb al-'Arabiyyah, Egypt, p. 195; Ibn Qudamah, *op. cit.*, p. 137.

Trustworthiness

In order to qualify for custody the custodian must have a reasonable standard of moral character. A person who commits one or more of the major sins or who persists in committing minor sins (e.g., one who drinks alcohol or commits adultery or one who persists on not performing obligatory prayers), cannot qualify for custody.¹²¹ This condition perhaps tries to ensure that one who is entrusted with the duty of custody is one who possesses good qualities and character as the child may, and very often will, follow his/her way of life. Thus, it is for the welfare of the child to be with a person of good character.¹²² The test of whether a person is trustworthy or not is usually based on his/her apparent conduct.¹²³ However, if there is a dispute regarding his/her trustworthiness, the matter will be decided by the court.¹²⁴

Islamic Law emphasises that a child should be brought up not only as a good human being; but more importantly as a good Muslim and it is believed that this is the real interest of the child. Thus, if one of the persons who is entitled to *hadanah* is more concerned with the religion of the child, whereas the other is more concerned with his worldly life, the preference should be given to the former.¹²⁵ However, if all the persons who are entitled to *hadanah* are equally concerned with the religious upbringing of the child, the one who is more concerned with the child's worldly life as well as religious life will have more right.¹²⁶

Ability to bring up the child

The inability to look after a child can be due to several reasons, among which is the presence of a physical defect of a nature which disables the person from conducting custodial duties and responsibilities, as well as serious disease, old age, or negligence. Thus, in order to uphold the welfare of the child, a blind person,¹²⁷ or an old person who needs somebody to look after him or her, or one who is really busy with his or her work and may neglect the child,¹²⁸ or a person who suffers from a serious communicable disease, such as leprosy, cannot be entrusted with the care of a child.¹²⁹ However, in the latter case, if the duty can be carried out by somebody else who is readily available in the same place, such a person will not lose his/her eligibility.¹³⁰

¹²¹ Ibn Qudamah, *op. cit.*, p. 137; see also, Al-Nawawi, *op. cit.*, p. 392.

¹²² Haskafi, Muhammad Alauddin, *The Durr-ul-Mukhtar*, Engl. trans. B. M. Dayal, Kitab Bhavan, New Delhi, Reprinted 1992, p. 303.

¹²³ Al-Khatib, *Al-Iqna'*, *op. cit.*, p. 196.

¹²⁴ *Ibid.*, p. 196.

¹²⁵ Ibn Hazm, A., Muhammad 'Ali b. Ahmad, *Al-Muhalla Bil-'Athaar*, Vol. 10, Dar al-Kutub al-'Ilmiyyah, Beirut, 1988, p. 145.

¹²⁶ *Ibid.*

¹²⁷ Al-Khatib, *Al-Iqna'*, *op. cit.*, p. 196; Al-Sayyid Sabiq, *op. cit.*, p. 305.

¹²⁸ Al-Sayyid Sabiq, *op. cit.*, p. 305.

¹²⁹ Al-Khatib, *Al-Iqna'*, *op. cit.*, p. 196.

¹³⁰ *Ibid.*, p. 196.

Muslim

The jurists are of the opinion that a non-Muslim cannot be an *ahl al-hadanah*.¹³¹ This is based on the verse which says, "... and never will Allah grant to the disbelievers a way (to triumph) over the believers".¹³² This verse explicitly denies non-Muslims any authority over Muslims. The danger here is that the child under the *hadanah* of non-Muslims might be brought up following their way of life. The Prophet said:

Every child is born on *Al-Fitrah* [true faith of Islamic Monotheism (i.e., to worship none but Allah alone)] but his parents convert him to Judaism, Christianity or Magianism, as an animal delivers a perfect baby animal. Do you find it mutilated?¹³³

Based on this prophetic tradition, the Hanbalis require the custodian to be a Muslim.¹³⁴ However, with regard to the mother, Imam Malik,¹³⁵ the Hanafis¹³⁶ and Zahiris¹³⁷ maintain that a non-Muslim mother who is *kitabiyah*¹³⁸ or a *majusiyyah*¹³⁹ may have the right to *hadanah* provided that the child will not be exposed to any harm both religiously or physically. They based their opinion on a Prophetic tradition regarding the case of Rafi b. Sinan who embraced Islam but whose wife kept her religion. They disputed the custody of their daughter.¹⁴⁰ The Prophet (Pbuh) gave the girl the right of choice, which may have implied that a non-Muslim mother can have custody of her children. The Hanafis also provide that an apostate mother will lose all her rights to custody. However, if she reverts to Islam her custodial rights will be restored.

However, the child may stay with a non-Muslim provided that it is still under the age of forming any judgement with respect to religion and there is no

¹³¹ Ibn Qudamah, *op. cit.*, p. 137; see also, Al-Nawawi, *op. cit.*, p. 392.

¹³² The Qur'an, Surat Al-Nisa', Verse 141.

¹³³ Al-Bukhari, *Summarised Sahih Al-Bukhari*, Engl. trans. Dr Muhammad Muhsin Khan, *The Book of Funerals*, Maktabah Dar-us-Salam, Riyadh, 1994, p. 338.

¹³⁴ Regarding this point, Al-Mughni provides further: "If [the duty of *hadanah*] cannot be entrusted to a *fasiq* then it definitely cannot be entrusted to a non-Muslim, as the harm to which the child might be exposed by the non-Muslim is more than that by a *fasiq*. There is a danger that the non-Muslim may lead the child to denounce Islam by his/her teachings, attractions and upbringings and this is a great detriment in Islam. *Hadanah* is established for the welfare of the child and it is wrong to do something which will harm the child or its religion", see Ibn Qudamah, *op. cit.*, p. 613.

¹³⁵ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, pp. 245-246.

¹³⁶ Al-Marghinani, *op. cit.*, p. 139; Al-Sarakhsi, *op. cit.*, p. 210.

¹³⁷ Ibn Hazm, *op. cit.*, p. 143.

¹³⁸ A *kitabiyah* is a woman from the people of the book such as a Christian and a Jew.

¹³⁹ A Muslim man is not permitted to marry a non-Muslim other than a *kitabiyah*. Thus, the case of a *majusiyyah* (magian) only applies where a husband upon embracing Islam has to separate with his wife because she refuses to become Muslim.

¹⁴⁰ 'Abd al-Hamid bin Ja'far reported from his father on the authority of his grandfather Rafi' bin Sinan that he (Rafi b. Sinan) embraced Islam and his wife refused to embrace Islam. She came to the Prophet (may peace be upon him) and said: "My daughter; and she is weaned or about to wean". Rafi said: "My daughter. The Prophet (may peace be upon him) said to him: 'Be seated on a side'. And he said to her: 'Be seated on a side'. He then seated the girl between them, and said to them: 'Call her'. The girl inclined to her mother. The Prophet (may peace be upon him) said: 'O Allah! guide her'. The daughter inclined to her father, and he took her", Abu Dawood, Sunan, *op. cit.*, p. 605.

indication that the child will incline to infidelity.¹⁴¹ It is very likely that at the age of seven a child can be considered as old enough to understand religions.¹⁴² However, if it is feared that the child has started to embrace a way of life which is not Islamic, he/she should be removed from such an environment even before the child starts to understand religion.¹⁴³ The Malikis maintain that the child may still be under the care of the non-Muslim mother provided that the child is under good care.¹⁴⁴ If it is feared that the mother may bring up the child in a way which deviates from the teachings of Islam she should be forced to live in a place where they are surrounded and influenced by the Muslim community in order to prevent her from doing so.¹⁴⁵

Ibn Qudamah, however, commented that the *hadith* cited above actually carries a different implication and should not be taken as an authority. Moreover, the chain of narrators of the *hadith* is also being disputed.¹⁴⁶ It is further argued that the *hadith* above does not apply to Muslims in general because the incident is specific to the Prophet only as his exceptional spiritual power enabled him to know beforehand that the child would go to the father who was a Muslim instead of the mother.¹⁴⁷ It is further argued that if the non-Muslim mother has the right to the *hadanah* of the child, the Prophet should have given the child to the mother when the child inclined towards her the first time. Instead, the Prophet prayed that she should choose her father who was a Muslim.¹⁴⁸

Residence

Although the mother or other female custodians will normally have the *hadanah* of the child, the father or other guardians still have the duty and responsibility, and hence the right to supervise and control the upbringing of the child. On this basis, the mother and the child are usually supposed to stay quite near to the father in order for him to have easy access to supervise the child. Thus, if the mother wants to travel or move to another place this may affect her right to *hadanah*.

According to the Malikis,¹⁴⁹ Hanbalis¹⁵⁰ and Shafi'is¹⁵¹ if one of the parents wishes to travel to a far safe place, the child stays with the father whether he was the one who is moving or not unless he is moving to or staying in an unsafe place or travelling to a place that is not safe. If one of them wishes to move to another country and the journey is dangerous¹⁵² or the country is unsafe, the one who stays

¹⁴¹ Al-Marghinani, *op. cit.*, p. 139; Al-Sarkhasi, *op. cit.*, p. 210; Ibn Hazm, *op. cit.*, p. 143.

¹⁴² Haskafi, *op. cit.*, p. 308.

¹⁴³ *Ibid.*, p. 308.

¹⁴⁴ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 246.

¹⁴⁵ *Ibid.*

¹⁴⁶ Ibn Qudamah, *op. cit.*, p. 138.

¹⁴⁷ *Ibid.*

¹⁴⁸ Al-Khatib, *Mughni al-Muhtaj*, p. 455.

¹⁴⁹ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 245.

¹⁵⁰ Ibn Qudamah, *op. cit.*, p. 141.

¹⁵¹ Al-Nawawi, *op. cit.*, p. 393; Al-Khatib, *Al-Iqna'*, *op. cit.*, p. 196.

¹⁵² *Ibid.*, p. 141; Al-Nawawi, *op. cit.*, p. 393; Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 245.

behind has priority to the *hadanah*,¹⁵³ even if the child chooses to travel.¹⁵⁴ The reason for this is that travelling might be dangerous or harmful or cause hardship to the child and this is certainly not in the best interest of the child.¹⁵⁵ However, if travelling is for a short time or for a short distance,¹⁵⁶ within which the father is still capable of seeing the child everyday, or if news about the child can still reach the father,¹⁵⁷ the child should stay with the custodian.¹⁵⁸ This means that, for example, the custodian mother has the right to retain the child if she or the guardian travels only for a short distance.¹⁵⁹ Thus, the important principle here is that the father, in his capacity as the guardian, is able to see, control, discipline, and have general supervision over the child.

The People of Opinion¹⁶⁰ agree with the previous view and add that the mother is also allowed to move from a village to a city or from a city to another but not from a city to a village.¹⁶¹ The reason behind this is that, unlike villages, cities have a higher standard of services where there is a better possibility to teach and educate the child.¹⁶² The rule is that the mother is allowed to move the child to a place where there is a higher standard of services but not the reverse.

The Hanafis allow the mother to move into the native place where her contract of marriage was originally concluded, even if the place is far from the father's place of residence.¹⁶³ However, only the mother is allowed to take her child away from the father or other guardian and no other custodian except with permission from the father.¹⁶⁴ If she is not native in the place where the contract of marriage was originally concluded, the Hanafis' prevailing view is that she is not allowed to do so.¹⁶⁵

Marriage restrictions

According to the majority of jurists¹⁶⁶ a female custodian should also fulfil one other requirement; that is, she shall not marry during the period of custody. Once she marries during this time she will lose her eligibility regardless of whether the

¹⁵³ *Ibid.*, Al-Khatib, *Al-Iqna'*, *op. cit.*, p. 196.

¹⁵⁴ Ibn Qudamah, *op. cit.*, p. 141.

¹⁵⁵ *Ibid.*, p. 141.

¹⁵⁶ The criterion here is that the distance must be less than *masafat al-qasr* which is the minimum distance of a journey during which a person is allowed to shorten his/her prayer. Dr Muhammad Muhsin Khan commented in his translation of *Mukhtasar Sahih Al-Bukhari* that Ibn 'Umar and Ibn 'Abbas used to shorten the prayer in a journey of approximately 48 miles. See Al-Bukhari, *Summarised Sahih*, *op. cit.*, p. 297. See also Al-Asbahi, *Al-Muwatta'*, p. 66.

¹⁵⁷ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 245.

¹⁵⁸ Ibn Qudamah, *op. cit.*, p. 141.

¹⁵⁹ *Ibid.*

¹⁶⁰ Al-Marghinani, *op. cit.*, pp. 139-140.

¹⁶¹ *Ibid.*, p. 140.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, p. 139.

¹⁶⁴ See Haskafi, *op. cit.*, p. 314.

¹⁶⁵ *Ibid.*, p. 140.

¹⁶⁶ Ibn Qudamah, *op. cit.*, p. 138; Al-Shafi'ie, *op. cit.*, p. 92; Al-Marghinani, *op. cit.*, p. 138; Ibn Rushd, *op. cit.*, p. 261.

child under her custody is a girl or a boy. This is based on the Prophetic tradition cited above which translates: "You have more right to him as long as you do not marry". This is due to the fact that once the woman gets married, she will be busy with her new married life at the expense of her duty as a custodian, and hence this would not be in the best interest of the child.¹⁶⁷

However, if the female custodian marries one of the relatives of the child, her right will not lapse. The jurists again differ as to the meaning of relatives. According to the Shafi'is¹⁶⁸ and Hanbalis,¹⁶⁹ if the mother marries an *ahl al-hadanah*, the right will not lapse. This is based on the Prophetic tradition regarding the case of the daughter of Hamzah. In this *hadith*, the Prophet (Pbuh) gave the judgement to Ja'far because his wife was the maternal aunt of the girl and therefore she would be the custodian and he himself, as the cousin of the girl, is an *ahl al-hadanah*.¹⁷⁰

The Hanafis, however, allow the female custodian to retain her eligibility if the husband is within the marriage prohibited degrees (*muhram*) of the child.¹⁷¹ The difference between *muhram* of the child and *ahl al-hadanah* is that *ahl al-hadanah* may include a wider category of persons. The Malikis seem to extend this category of relative to include both *muhram* of the child and *ahl al-hadanah*.¹⁷² The rationale for this exception is that relatives have a close relationship with and feelings of love for the child even before the marriage takes place.¹⁷³ This is beside the fact that both the female custodian and her husband will have a shared responsibility toward the child as the husband's share stems from him being a relative of the child. This is different in the case where the husband is a total stranger to the child as feelings of love and responsibility cannot be expected from him.¹⁷⁴

The presumption that a stranger husband will treat the child unkindly might not be true in all cases. However, the precaution taken by Islamic Law might be considered in the light of the concept of *Sadd Al-Dharai'* which means "blocking the means to evil".¹⁷⁵ As the primary aim of custody is the welfare and protection of the child, the mere possibility that a stranger husband might cause harm to the child is sufficient to make it an impediment to the eligibility to custody.

Another issue which arises here is whether the right to custody will be

¹⁶⁷ Ibn Qudamah, *op. cit.*, p. 139; Al-Sarkhasi, *op. cit.*, p. 210.

¹⁶⁸ Al-Nawawi, *op. cit.*, p. 392.

¹⁶⁹ Ibn Qudamah, *op. cit.*, p. 139.

¹⁷⁰ "It is reported that Ali, Ja'far and Zaid bin Harithah disputed on the *hadanah* of the daughter of Hamzah. Ali said, 'She is my uncle's daughter. I am more entitled to take her'. Zaid said, 'She is the daughter of my brother because the Messenger of Allah made a brotherhood between Zaid and Hamzah'. Then Ja'far said, 'She is my uncle's daughter and her maternal aunt is my wife'. The Prophet said, 'The maternal aunt is like a mother', and he gave the girl to Ja'far", see Abu Dawood, *op. cit.*, p. 616; see also Ibn Qudamah, *op. cit.*, p. 138.

¹⁷¹ Al-Sarkhasi, *op. cit.*, p. 210.

¹⁷² Ibn Rushd, *op. cit.*, p. 261.

¹⁷³ Ibn Qudamah, *op. cit.*, p. 139.

¹⁷⁴ Al-Marghinani, *op. cit.*, p. 138.

¹⁷⁵ Kamali, *op. cit.*, pp. 310-311.

suspended immediately after the marriage takes place, or is it postponed until the marriage is consummated? Imam Malik is of the opinion that the right will not lapse unless the marriage is consummated.¹⁷⁶ The Hanbalis' prevailing opinion, however, is that the right of *hadanah* will lapse upon the conclusion of the contract of marriage whether the marriage is consummated or not.¹⁷⁷ This is because the contract of marriage itself gives the spouses all the rights and duties of marriage before and after consummation takes place.¹⁷⁸

Some of the jurists, however, maintain that the right of the female custodian does not lapse with marriage. According to Imam Ahmad, in one of his opinions, if the child is a girl, the right will not lapse until the girl attains the age of seven years, or until the girl attains the age of puberty according to another narration.¹⁷⁹ Hassan Al-Basri¹⁸⁰ and Ibn Hazm,¹⁸¹ believe that the right will not lapse even though the mother remarries. Ibn Hazm in his *Al-Muhalla* argues that the *hadith* used by the majority of the jurists cannot be accepted as an authentic *hadith*,¹⁸² and thus its ruling cannot be taken as an authority. Dr Sulaiman who has verified *Al-Muhalla*, however, comments that the *hadith* in dispute is actually an authentic one.¹⁸³

Revival of the right of *hadanah*

When all the impediments for the right of *hadanah* are removed the right of *hadanah* will revive.¹⁸⁴ That is to say, the presence of impediments to the right of custody causes it to be temporarily suspended but not absolutely taken away. Thus, according to the Hanbalis, once the marriage of the female custodian is dissolved, her right will revive.¹⁸⁵ However, Imam Malik does not allow such a revival because it is not practical to hand the child back to her when she is divorced as it is feared that if she gets married again she loses her right and the child should be handed back to the father or other entitled persons.¹⁸⁶ It seems here that the reason behind this is that it is not in the interest of the child to move from one place to another so many times. In modern terminology, this perhaps refers to the importance of preserving the status quo of the child.

¹⁷⁶ Al-Asbahi, *Al-Mudawwanah*, p. 244.

¹⁷⁷ This is based on Al-Kharqi' opinion, see Ibn Qudamah, *op. cit.*, p. 139.

¹⁷⁸ Ibn Qudamah, *ibid.*

¹⁷⁹ Ibn Qayyim al-Jawziyyah, *Zad al-Ma'ad fi Hadyie Khair al-'Ibad*, Vols. 3-4, Dar al-Furqan, Jordan, p. 130.

¹⁸⁰ Ibn Qudamah, *op. cit.*, p. 138.

¹⁸¹ Ibn Hazm, *op. cit.*, p. 147.

¹⁸² *Ibid.*, p. 147.

¹⁸³ *Ibid.*, see n. 2.

¹⁸⁴ Ibn Qudamah, *op. cit.*, p. 140.

¹⁸⁵ *Ibid.*

¹⁸⁶ Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 244. Some Malikis, however, are of the opinion that the right shall revive. See Ibn Rushd, *op. cit.*, p. 261.

Right of access

According to the Hanbalis¹⁸⁷ and the Shafi'is,¹⁸⁸ if a boy chooses his father, he will be with the father during the day and night time but he will not be prevented from visiting his mother whenever he wants.¹⁸⁹ If he is sick, he will have the right to stay with his mother so that she can take care of him in her house because he needs her to nurse him, and therefore the mother will have priority to custody in this case.¹⁹⁰ If, on the other hand, the boy chooses his mother, he will usually stay with his mother during night time and with his father during day time as the father has to send him to school, form his character, and enable him to learn a profession or trade.¹⁹¹ These arrangements are considered to be in the best interest of the child.¹⁹²

In the case of a girl, if custody is given to the mother, the father will have the right to visit her regularly.¹⁹³ Likewise, if custody is given to the father, the same right of access is given to the mother.¹⁹⁴ As in the case of a boy, if the girl is sick, the mother has more right to take care of her in her own house.¹⁹⁵ This right of access also applies to small children who have not attained the age of discernment and who are usually staying with the mother. In this case, the father has the right to visit his child regularly.¹⁹⁶

With regard to the frequency of access, the jurists provide that it depends on local custom.¹⁹⁷ Some of the Shafi'is suggest that visits should be reasonably regular but not too frequent, such as everyday.¹⁹⁸ Al-Mawardi, however, is of the opinion that if the houses of the separated parents are close to each other, such a practice is allowed.¹⁹⁹ Thus it seems that the jurists do not stipulate a strict rule regarding the frequency of access. The basic principle here is that access should be permitted so long as it does not contravene the interests of the child.

¹⁸⁷ Ibn Qudamah, *op. cit.*, p. 143.

¹⁸⁸ Al-Nawawi, *op. cit.*, p. 392.

¹⁸⁹ This is because to do so will tempt him to be ungrateful and sever the relationship with his mother which is a great sin in Islam. Narrated by Jubair bin Mut'im that he heard the Prophet (peace be upon him) saying, "Al-Qati' (the person who severs the bond of kinship) will not enter Paradise". See Al-Bukhari, *Mukhtasar Sahih, The Book of Al-Adab, op. cit.*, p. 952.

¹⁹⁰ *Ibid.*, Ibn Qudamah, *op. cit.*, p. 143.

¹⁹¹ *Ibid.*

¹⁹² Ibn Qudamah, *op. cit.*, p. 152.

¹⁹³ *Ibid.*, p. 145; Al-Nawawi, p. 392.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ Al-Khatib, *Mughni al-Muhtaj*, p. 458.

¹⁹⁷ Al-Nawawi, *op. cit.*, p. 392; Al-Khatib, *Mughni Al-Muhtaj, op. cit.*, p. 457.

¹⁹⁸ The main purpose here is to protect the privacy of the female custodian, see Al-Khatib, *Mughni Al-Muhtaj, op. cit.*, p. 457.

¹⁹⁹ *Ibid.*

Termination of the period of *hadanah*

According to the Hanbalis,²⁰⁰ Shafi'is²⁰¹ and Hanafis²⁰² once a boy attains the age of puberty and maturity (*rushd*) the period of *hadanah* comes to an end. The Malikis, however, base the end of custody on the attainment of puberty only.²⁰³ In this case, the young man becomes of full legal capacity and hence does what he pleases including separating from or staying with his family. Islamic Law, however, strongly discourages any inclination to separate from the family as it is a sign of ungratefulness. Rather, the young man is encouraged to stay with his parents and to continue to provide assistance to them.²⁰⁴

Although the institution of custody ends upon a girl attaining puberty (and maturity according to some jurists), certain aspects of the guardianship institution will continue. These aspects are concerned with residency and marriage arrangements. As far as residence is concerned, the Hanbalis and Shafi'is hold that the female ward cannot live alone and the father or other guardians have the right to stop her from doing so.²⁰⁵ According to the Malikis the young woman can stay with her mother if the latter lives in a safe environment, otherwise she has to move to her father or guardian.²⁰⁶ The Hanafis differentiate between a girl who has attained puberty but has not had a marriage experience (*bikr*) and a woman who has previous marriage experience (*thayyeb*). In the former case, she has to stay with the father or guardian in the absence of the father,²⁰⁷ whereas in the latter she may stay wherever she pleases.²⁰⁸ The reason for this is that an unmarried girl does not have enough experience and that there is a danger that she may easily be seduced by men, unlike the previously married woman who has more experience and knowledge of the possible tricks and deceits of men.²⁰⁹ However, if it is not safe for her to live alone, she will have to stay with her father or guardian.²¹⁰ Regarding marriage arrangements, although the consent of women to the marriage contract is an indispensable condition, in the case of a *bikr* woman this consent has to be combined with her father's or testamentary guardian's consent as they both share the right of consent in this respect.²¹¹

²⁰⁰ Ibn Qudamah, *op. cit.*, pp. 140-141.

²⁰¹ Al-Khatib, *Mughni Al-Muhtaj*, *op. cit.*, p. 459.

²⁰² Al-Sarkhasi, *op. cit.*, p. 212.

²⁰³ Ibn Rushd, *op. cit.*, p. 262; Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 244.

²⁰⁴ Ibn Qudamah, *op. cit.*, p. 614; Al-Khatib, *Mughni Al-Muhtaj*, *op. cit.*, p. 459.

²⁰⁵ Ibn Qudamah, *op. cit.*, pp. 141 and 614; Al-Khatib, *Mughni Al-Muhtaj*, *op. cit.*, p. 459.

²⁰⁶ Ibn Rushd, *op. cit.*, p. 262; Al-Asbahi, *Al-Mudawwanah*, *op. cit.*, p. 244.

²⁰⁷ Al-Sarkhasi, *op. cit.*, p. 212.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Al-Zuhayli, W., *op. cit.*, Vol. 7, pp. 186-195; see also Zahraa, M., "The Legal Capacity of Women in Islamic Law" [1996] ALQ 245 at 257-261.

CONCLUSION

It is obvious that Islamic Law has provided comprehensive rules relating to the law governing *hadanah*. Although custody is seen as a collective obligation, it becomes a personal obligation incumbent upon the father or the mother in certain circumstances. Once custody is entrusted to a particular person, it becomes a duty upon him or her to ensure that the child is well looked after physically, mentally, emotionally, as well as religiously. The father as the natural guardian of the child has the right and duty to determine major decisions, such as education, religious upbringing, career prospects and consent to marriage, and to provide adequate maintenance for this purpose. The right to custody of the child is only limited to its relatives, where an absolute priority was given to the mother, then to other female relatives, and, finally, to the male-agnate relatives according to their order of priority. The father occupies a second, or according to some views, a third priority.

Once again, Islamic Law demonstrates its highly objective nature by devising the rules and principles as well as the criteria for the selection of the right custodian. The interest and welfare of the child occupy an absolute paramount consideration in the Islamic Law of Custody and carry more weight than those of the person entitled to the *hadanah* of the child. Secondary criteria have also been used, such as the direct birth-link with the child, close kinship to the child, and the order of priority in the case of inheritance. The views of the child who has attained the age of discernment are also among the elements which can be taken into consideration. In order to ensure that the duties and responsibilities of the *hadanah* office are carried out at their very best, the custodians are required to satisfy certain conditions and enjoy certain qualities, such as having full legal capacity, good physical abilities, and possessing good moral qualities and character.