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The Custody in Islamic Jurisprudence and Afghan Civil Law (A Comparative Study)

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Abstract

It is an undeniable fact that society originates from the family, and the family is formed through the union of a husband and wife. From this union, children are born, who will later become the future leaders of society. Therefore, Islamic law and the Afghan Personal Status Law have defined the rights of children, among which is the right to custody. Based on this, I have chosen the topic "The Right of Custody for Children in Islamic Law and the Afghan Personal Status Law" as the subject of my research.

This research is a desk-based study, and I will rely on libraries and research resources to complete it. The goal of this study is to address the problems related to the right of custody in society, and it will clarify how both Islamic law and the Afghan Personal Status Law have addressed the child's right to custody in detail.

The study of this topic is crucial, as in Afghan society, when a father dies or when divorce occurs between the parents, the child is often deprived of the mother's custody. This results in improper upbringing and a lack of proper care for the child. At the conclusion of this research, it will be confirmed that Islamic law has provided a detailed treatment of the right to custody, though there are differences between the Islamic schools of thought (*madhahib*) on certain matters. Since the *Hanafi* school is the official school of thought in Afghanistan, the provisions of custody in the Afghan Personal Status Law align with Hanafi jurisprudence. The research will also clarify that the right to custody in Islamic law primarily belongs to the mother, followed by close female relatives, and this will be explained in detail throughout the study.

Key Words: *Afghanistan , Islamic Jurisprudence (Fiqh) , Afghan Civil Law , Custody*

Introduction

Islamic Sharia has established the right of custody for the child, making it one of their fundamental rights in life. This right is also considered a natural aspect of the marital relationship between husband and wife, where the bond is formed with the consent of both parties, without external interference in its regulation. There is no doubt that living under the custody of both father and mother offers numerous benefits and advantages for the child, as the parents provide full attention to raising them in an environment filled with love and care.

Many researchers in the field of child care have emphasized that a child's life with their family is far superior to living in institutions that provide collective care for children. Even if the family's financial situation is less than ideal, living within the family remains far better than life in such institutions, where children often face poor treatment, and their upbringing is not given adequate attention¹.

Therefore, Islamic Sharia has paid significant attention to the foundation of the family and outlined some rules and principles to organize family life, with the aim of ensuring love and cooperation among family members, so that the child can live a peaceful and healthy life with their parents. However, when separation occurs between the spouses for any reason, intervention becomes necessary to ensure the best interest of the child and affirm their right to custody. Both Islamic Sharia and civil laws have addressed this issue comprehensively. This is what we will study in this research:

1. Definition of Custody

In this section, we will study the definition of custody, which has the right to custody, and the conditions of custody from the perspective of Islamic Sharia:

1.1. Definition of Custody

Custody in the Arabic language is derived from the root "*ḥa-da-na*," meaning to gather or place something in a safe and protected environment, implying care and nurturing. In Arabic, it is said, "*ḥaḍan al-ṭā'ir bayḍah*" when a bird gathers its eggs under its wings,

protecting them. Similarly, it is said, "*ḥadānat al-mar'ah 'āṭifataha al-ṭifl'*" when a woman embraces her child, or takes care of its upbringing².

Thus, custody refers to the care and upbringing of the child by the mother or one of the relatives who is entitled to custody, as the child cannot take care of themselves³.

Al-Jurjani, may God have mercy on him, simply defined custody as "the upbringing of the child."⁴

1.2. Who Has the Right to Custody?

Islamic law grants the right of custody to the mother, in a clear indication of God's mercy and justice, as the mother is the source of compassion, affection, and tenderness toward the child. *Ibn al-Qayyim*, may God have mercy on him, stated that women are more capable of raising children due to their love, patience, and care for the well-being of the child, which makes the mother more entitled to custody than other relatives. This is one of the virtues of Islamic Sharia, highlighting the importance of the child's care and protection.⁵

One of the evidences supporting the mother's right to custody is the famous Hadith narrated by Amr ibn Shu'ayb, where a woman said: "*O Messenger of Allah, this son of mine was a container for him in my womb, my breast was his drink, and my lap was his support. His father divorced me and now he wants to take him away from me.*" The Messenger of Allah (peace be upon him) replied: "*You have more right to him as long as you do not remarry.*"⁶

In this Hadith, the Prophet (peace be upon him) emphasizes the mother's right to custody of her child as long as she has not remarried after the divorce. This is one of the clear evidences in Islamic law that affirms the mother's right to care for and nurture her child.

1.3. Conditions for the Custodian:

Since custody and child care are of great importance and play a positive role in nurturing and preparing the child for the future, scholars have outlined certain conditions that must be met by the person who assumes custody. These include⁷:

1. The custodian must be of legal age, sane, and trustworthy.
2. The custodian must be capable of caring for and serving the child.
3. If the mother is the custodian, she must not be remarried to another man.
4. The custodian must not be a non-Muslim.
5. The custodian must not suffer from a contagious disease that could be transmitted to the child, such as leprosy or other similar diseases.⁸

If the mother is unavailable (due to death or inability to meet the conditions for custody), the right of custody is transferred to the female relatives of the child who meet these

conditions. The right of custody is established for women because they are more compassionate and merciful toward children and better able to raise them.

1.4. Custody Fees:

Scholars have differing opinions on this issue, which are summarized as follows:

- **Shafi'is and Hanbalis:** They say that a woman who assumes custody is entitled to compensation and financial payment. She can claim this from the father of the child, whether the custodian is the mother or another woman, because custody and upbringing are not obligatory for the mother by default. In other words, if the mother refuses to take custody, no one can force her. Based on this, the custody fee is paid from the child's property, and if the child has no property, the responsibility to pay lies with the person obligated to provide for the child⁹.
- **Hanafis:** They state that if the custodian is the mother and she is married to the father or in a waiting period (iddah) after a revocable divorce, she is not entitled to payment because custody and raising the child are an obligation upon her by Islamic law. However, if the mother is absent or the divorce is final (irrevocable), the cost of custody falls on the child if the child has property, or if the child does not have property, the father is responsible for paying the fee.¹⁰
- **Malikis:** They assert that if the woman is wealthy, she is not entitled to payment for custody. However, if she is poor or indigent, she will bear the expenses due to her financial incapacity, not because of the custody itself.¹¹

The Preferred Opinion:

In my opinion, the preferred view is that of the Hanafi scholars, for the following reasons:

1. The prophetic hadith: "*The woman is a guardian over the house of her husband, and she is responsible for it.*"¹²
2. Since the child has a right to his father, he also has a right to his mother in terms of upbringing and care.
3. In our society, when the mother is under the guardianship of the father, all her expenses are borne by the family (the husband), and thus, the Hanafi opinion aligns with the customs and traditions in our communities.

1.5. Duration of Custody:

In Islamic jurisprudence, there is a difference of opinion among scholars regarding the duration of custody when the parents have separated. This difference arises from varying views on the purpose and goal of custody:

- **Hanafi Scholars:** They believe the purpose of custody is to care for the child, as the child cannot manage affairs on their own. Therefore, when the child becomes capable of taking care of themselves and handling personal matters, the custody period ends. As a result, they set the custody period for boys at seven years and for girls at nine years.¹³
- **Maliki Scholars:** They view the goal of custody as protecting the child until the child is capable of protecting themselves. Therefore, they set the custody period for boys until they reach puberty, and for girls until they get married.¹⁴
- **Shafi'i Scholars:** They believe the purpose of custody is to teach the child to distinguish between right and wrong. Thus, they set the duration of custody until the child reaches the age of discernment, which usually occurs between the seventh and eighth years. After this period, the child is given the option to choose between staying with the father or the mother. If the child does not choose, the mother remains the custodian¹⁵.
- **Hanbali Scholars:** They state that the custody period for boys is seven years, after which the child is given the choice to stay with the father or the mother. For girls, custody continues until the age of seven, but after this age, custody is transferred to the father. This is because they believe the goal of custody is to protect the child, and the father is better able to protect and care for his daughter beyond this age, particularly as issues concerning the daughter may be more challenging for the mother to handle.¹⁶

The Preferred Opinion:

In my opinion, the preferred view is that of the Hanafi scholars, for several reasons:

1. There is no specific duration for custody mentioned in the Quran or the authentic hadiths. Therefore, the matter is left to the discretion of the court, which will

assess the child's situation and decide what is most suitable. Additionally, Afghan civil law sets the custody period for boys at seven years and for girls at nine years.

2. In our society, parents usually live together, and separation between them is rare. When separation does occur, setting the custody period at seven years for boys and nine years for girls is considered appropriate. After this period, the child should be raised under the supervision of the father or one of his relatives. The father or mother are generally better suited to care for and protect the child compared to other relatives.¹⁷

2. The Right of Custody of the Child from the Perspective of Afghan Civil Law

2.1. Definition of Custody

Article 236:

1. Custody is the right that pertains to the care and upbringing of a child during a specific period, which is the time when the child needs the mother's care.
2. Custody is a right granted to the person organized according to the provisions of this law.¹⁸

Article 237: The mother enjoys the right of custody first, whether during the marriage or after divorce, provided that she is capable of meeting the conditions for custody.

2.2. Conditions for a Woman to Have Custody

Article 238: The woman who assumes custody of the child must be of sound mind, of legal age, and trustworthy, such that it is unlikely the child will be neglected due to her lack of attention. She must also be capable of providing the child with proper care and upbringing.

2.3. Those Who Have the Right to Custody and Those Who Are Eligible for It

Article 239: Women have the right to custody in the following order of priority:

1. The mother, the maternal grandmother, or any higher maternal relatives.
2. The paternal grandmother.
3. The eldest sister (full sister).
4. The half-sister (from the mother's side).
5. The paternal half-sister.
6. The daughter of the eldest full sister.

7. The daughter of the half-sister (from the mother's side).
8. The daughter of the paternal half-sister.
9. The maternal aunt.
10. The paternal aunt (from the father's side).
11. The paternal aunt (from the mother's side).
12. The maternal aunt.
13. The maternal aunt from the mother's side.
14. The paternal aunt.

Article 240: If none of the individuals mentioned in Article 239 are available, or if they do not meet the conditions for custody, the right of custody will transfer to other relatives in accordance with the inheritance order.

Article 241: If the individuals mentioned in Articles 239 and 240 are not available or do not meet the conditions for custody, the child shall be entrusted to the closest paternal or maternal guardians, in the following order of priority:

1. The mother's parents.
2. The half-brother (non-blood sibling).
3. The half-nephew (non-blood nephew).
4. The half-uncle (non-blood uncle).
5. The maternal uncle (a`ayani).
6. The paternal uncle (al`alati).
7. The maternal uncle (akhyafi).

Male relatives, such as a cousin or maternal uncle, have no right to custody of children of the opposite sex (females). However, male relatives can only be guardians if the child is of the same sex.

Article 242: If more than one person has custody rights, the judge may select the person who will be in the child's best interest.

Article 243: If the right of custody is revoked for any legal reason, it shall return once the cause of the revocation ceases.

2.4. Custody Fees

Article 244: The custody fee is the responsibility of the father and is considered separate from maintenance or breastfeeding costs. If the child has personal funds, the

custody fee will be paid from the child's assets unless the father voluntarily chooses to pay it.

Article 245:

1. The mother has no right to a custody fee while she remains in the custody of her husband or during the period of her waiting for reconciliation after divorce (iddah).
2. If the mother is in the period of waiting after a final divorce (bain), or if she marries someone who is a mahram (non-marriageable kin) of the child, or if she is in a waiting period (iddah), she is entitled to a custody fee.

Article 246: If the person responsible for paying the custody fee is poor and one of the child's female relatives voluntarily assumes custody without any charge, the person with the right to custody may take custody without a fee or delegate it to someone who does not require compensation.

Article 247: If the person responsible for paying the custody fee is wealthy and the child also has wealth, the child may be handed over to the mother for an appropriate fee, which is to be paid from the child's assets, even if the fee is paid from the child's own wealth.

Article 248: If the woman is rebellious (nashiz) and the child is over five years old, the court may decide to place the child with either of the parents according to what is in the child's best interest.

2.5. Duration of Custody

Article 249: The custody of a boy ends when he reaches the age of seven, and the custody of a girl ends when she reaches the age of nine.

Article 250: The court may extend the custody period mentioned in Article 249, but the extension shall not exceed two years.

Article 251: If it is proven that the person who is taking custody is not in the best interest of the child, even if it is the father, the court may decide to grant custody to the second-degree custodians.

Article 252: The mother, while in the custody of the husband or during her waiting period (iddah), cannot travel with the child without the father's permission.

Article 253: If the custodian is someone other than the mother, she cannot travel with the child without the permission of the child's guardian.

Article 254: The father cannot travel with the child during the custody period without the custodian's permission.

Article 255: If the woman does not have inheritance rights or the ability to provide maintenance, her maintenance will be paid by her mahram (guardian).

3. The Right of Custody in Civil Law Compared to Islamic Law

In this section, we will compare the right of custody in civil law to Islamic law, focusing on areas of agreement and differences in two main sections:

3.1. Areas of Agreement Between Islamic Law and Civil Law

Since the Hanafi school of thought is the official school in Afghanistan, and Afghan civil law is largely based on Hanafi jurisprudence, the rulings regarding custody in Hanafi jurisprudence and civil law are quite similar. However, there are some minor differences explained in Section 2. Here, we will mention two examples of agreement:

1. **Definition:** In Islamic law, custody is clearly defined, which matches the definition found in Afghan civil law. This means the definition of custody in Islamic law aligns with its definition in civil law.
2. **Custody Rights:** Just as in Islamic law, the primary right of custody is given to the mother, followed by other female relatives. The same applies in civil law, where the right is first granted to the mother and then extended to other female relatives, with the only difference being the order of names according to Hanafi jurisprudence, which is the official school in Afghanistan.

3.2. Areas of Disagreement Between Islamic Law and Civil Law

There are some differences between Islamic law and Afghan civil law on issues of custody:

1. **Conditions for Custody:** In Islamic jurisprudence, the focus of custody conditions is primarily on the parents. In contrast, in civil law, general conditions related to the prevailing social and economic circumstances are also considered, such as taking into account the socio-economic status of the mother and father.

Duration of Custody: In Islamic jurisprudence, the duration of custody varies between the four schools of thought, as the purpose of custody differs in each school, leading to different determinations of the duration. In civil law, the specified duration aligns only with the Hanafi school.

3.3. Custody Rights After the Parents: In Islamic jurisprudence, the right of custody after the parents is granted to the grandparents (either paternal or maternal). However, in civil law, this right is granted only to the parents (mother and father).

3.4. Custody Fee: There is a difference among scholars regarding the custody fee in Islamic law. In the Shafi'i and Hanbali schools, the mother is allowed to take a fee for custody, while the Hanafi and Maliki schools do not permit the mother to take a fee for the custody of her children. In Afghan civil law, the mother is not allowed to take a fee for custody, which aligns with the view of the Hanafi and Maliki schools on this matter.

In summary, there is significant agreement between Islamic law and Afghan civil law in some aspects related to the right of custody, especially on fundamental points like the definition of custody and the mother's right to custody. However, there are some differences in certain details such as the conditions for custody, duration of custody, and custody fees, which differ according to Islamic jurisprudence and social and economic circumstances.

4. Results of the Study

After completing this research, we reached the following conclusions:

1. **Custody** refers to the care and protection of a child by the mother or a relative who has the right of custody, for a child who cannot manage his or her own affairs.
2. **Right of Custody:** The right of custody is primarily given to the mother, followed by female relatives. If the mother is absent or does not meet the conditions of custody, the right is transferred to the maternal or paternal relatives.

3. **Conditions for Custody:** The custodian must be an adult, sane, trustworthy, capable of caring for the child, free from infectious diseases, and must not be an unbeliever.
4. **Duration of Custody:** Scholars differ on the duration of custody, but the dominant view among Hanafi scholars is that the custody duration for a boy is seven years and for a girl, it is nine years.
5. **Custody Fee:** The mother is not entitled to a fee for custody if she is married to the father. However, if the custodian is someone else or the mother is divorced, she is entitled to a fee from the child's wealth. If the child has no wealth, the father is obligated to pay the fee.
6. **Afghan Civil Law:** Most of the rulings on custody in Afghan civil law are derived from Hanafi jurisprudence, as Afghan civil law relies heavily on Hanafi principles in many matters related to custody.

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