

“THE BEST INTERESTS OF THE CHILD IN CUSTODY ASSIGNMENT AND TERMINATION : A COMPARATIVE STUDY OF ISLAMIC JURISPRUDENCE AND THE ALGERIAN FAMILY CODE”

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Abstract:

The dissolution of marriage may occur through the death of a spouse, divorce, or khul'. To shield the child from the adverse consequences of such separation, Islamic law has established detailed provisions safeguarding the child's rights, as set forth in the sources of Islamic jurisprudence. Among these rights is the child's entitlement to care and custody, entrusted to the person most capable of ensuring his physical welfare and religious upbringing. This assignment is always determined in light of the paramount consideration of the child's best interests, even where this may take precedence over the custodian's interests, including those of the mother, until the child reaches sufficient maturity and independence.

Personal status laws in Arab countries, largely derived from Islamic law, have adopted the same approach. The Algerian Family Code, enacted by Law No. 84/11 of 9 Ramadan 1404 AH (corresponding to 9 June 1984), and subsequently amended and supplemented by Ordinance No. 05/02 of 18 Muharram 1426 AH (27 February 2005), regulates the rules of custody in Articles 62–72. These provisions emphasize, above all else, the primacy of the child's best interests, regardless of the custodian's identity, including in cases where the custodian is the mother. Accordingly, this research addresses the issue of custody, with particular emphasis on its assignment and termination, both in Islamic jurisprudence and under the Algerian Family Code. The study is therefore entitled:

“The Best Interests of the Child in the Assignment and Termination of Custody in Islamic Jurisprudence and the Algerian Family Code “.

Key words: Custody, Child, Best Interests, Islamic Jurisprudence, Family Law.

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1. Introduction

All praise is due to Allah, and may peace and blessings be upon our master Muhammad, his family, and his companions...

The Muslim family has received great attention from Islamic law, as Islam has been keen to establish the family on the foundations of affection and mercy, in accordance with the words of Allah the Almighty: *“And among His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought.”*¹ Islam has also defined the rights and duties of both spouses. The family is deserving of this care and attention, as it is the cornerstone of the Islamic society. Preserving the family is therefore one of the main pillars of preserving the Islamic community. Among the aspects of Islam’s care for the family is its concern for the child. It has made it a father’s duty to choose a good origin and a righteous mother who will raise and nurture him. The Messenger of Allah (peace and blessings be upon him) said: *“Choose well for your offspring.”*

² Likewise, it is the child’s right to be given a good name that instills in him self-confidence. This care begins even before his birth, while he is in his father’s loins and his mother’s womb. Islamic law has also ensured the child’s rights after the separation of the parents—whether by death or divorce—by safeguarding his rights, which are detailed in Islamic jurisprudence. Among these rights is the right to care and custody, entrusted to those who will best fulfill his interests, until he grows up and becomes independent.

Therefore, we have chosen in this research to address the issue of safeguarding the best interest of the child in the assignment and termination of custody.

Accordingly, the central question we seek to answer in this study is: **To whom should the custody of the boy or girl be assigned upon the separation of the parents? And when does this custody end, both in Islamic jurisprudence and in law, in accordance with the best interest of the child?**

To answer this question, we have adopted the comparative method and divided the research into two sections and a conclusion, as follows:

- **Section One:** Safeguarding the best interest of the child in the assignment of custody
- **Section Two:** Safeguarding the best interest of the child in the termination of custody
- **Conclusion**

Section One

Safeguarding the Best Interest of the Child in the Assignment of Custody

After birth, a human being is in need of someone to care for him, look after his needs, and provide for his upbringing and daily life, since he is incapable and unaware of his own interests. The responsibility of managing his affairs must therefore be entrusted to others. As the parents are the closest to him and the most compassionate and caring toward him, Islamic law has vested them with the responsibility of safeguarding his interests. However, in the event of their separation, the Lawgiver has taken into account what is in the child’s best

interest. Thus, in the early stage of life the responsibility of upbringing and care is assigned to the mother, for she is more compassionate, tender, patient, and capable of enduring the hardships of custody and nurturing during this stage of the child's life. She is also more available to provide for his needs. Meanwhile, the guardianship over the child's person and property is entrusted to the father, as he is better suited for this responsibility due to his sound judgment, proper management, and full compassion. He is also obliged to provide financial support for the child, a duty in which no one else shares, as he is more capable of fulfilling it than women.

For this reason, In this section we will discuss the evidences for the legitimacy of assigning custody. We will then address the order of custody assignment according to Islamic law, followed by the order of custody assignment under civil law

First: The Evidence for the Legitimacy of Assigning Custody

The assignment of custody has firm foundations in the **Qur'an**, the **Sunnah**, and the **consensus (ijmāʿ)**.

1. From the Qur'an:

Allah Almighty says: *“And lower to them the wing of humility out of mercy and say, ‘My Lord, have mercy upon them as they brought me up when I was small.’”*³

And specifically regarding mothers, Allah says: *“Mothers may nurse their children for two whole years—for those who desire to complete the term of nursing. And the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No soul is burdened beyond its capacity. A mother should not be harmed through her child, nor should a father be harmed through his child. And upon the heir is a duty like that. But if they both desire weaning through mutual consent and consultation, there is no blame upon them. And if you wish to have your children nursed by a substitute, there is no blame upon you, provided you pay what you promised on a fair basis. And fear Allah, and know that Allah is All-Seeing of what you do.”*⁴

From this verse it is understood that the mother is most entitled to nurse and care for her child until he no longer depends on her.

Allah also says, narrating the words of the sister of Mūsā (peace be upon him) to Pharaoh's wife: *“When your sister went and said, ‘Shall I direct you to someone who will nurse him?’ So We restored you to your mother that she might be comforted and not grieve.”*⁵

And Allah says as well: *“And We had forbidden him from nursing by any foster mothers before, so she said, ‘Shall I direct you to a household that will bring him up for you and be sincere to him?’ Thus We restored him to his mother that her eyes might be comforted and that she might not grieve, and so that she would know that the promise of Allah is true. But most of them do not know.”*⁶

Here, the phrase *“a household that will bring him up”* refers to the mother of Mūsā, whom Allah returned her son to, so that she could nurse him and take him into her care.⁷

2. From the Sunnah:

Among the evidences from the Sunnah are the following:

- Narrated by Abdullah ibn Umar (may Allah be pleased with him), who said: "I heard the Messenger of Allah (peace and blessings be upon him) say: *'Each of you is a shepherd, and each of you is responsible for his flock. A leader is a shepherd and is responsible for his subjects. A man is a shepherd over his household and is responsible for his flock. A woman is a shepherd over her husband's house and children and is responsible for them. A servant is a shepherd over his master's property and is responsible for it. So each of you is a shepherd and each of you is responsible for his flock.'*"⁸
- It was also narrated that a woman came to the Prophet (peace and blessings be upon him) and said: *"O Messenger of Allah, this son of mine—my womb was his vessel, my breast was his source of drink, and my lap was his shelter. Now his father has divorced me and wants to take him away from me."* The Messenger of Allah (peace and blessings be upon him) said to her: *"You are more entitled to him, as long as you do not remarry."*⁹.

This hadith clearly indicates that the mother is more entitled to the custody of her child when the father seeks to take him away after separation. The woman herself mentioned the unique qualities that justified her entitlement to custody, and the Prophet (peace and blessings be upon him) affirmed her right. The reasoning underlying this ruling is consistent with sound human nature and is recognized in the principles of Islamic jurisprudence. The ruling derived from this hadith is undisputed, and both Abū Bakr and 'Umar (may Allah be pleased with them) judged accordingly. The commentator of this hadith stated: *It proves that the mother is more entitled to her child than the father, unless a preventing factor arises, such as her marrying a man who is not a mahram to the child—as the Prophet (peace and blessings be upon him) restricted the ruling with his words: "as long as you do not remarry."*¹⁰

Among the well-established traditions regarding the mother's entitlement to custody is the hadith narrated by Abū Hurayrah (may Allah be pleased with him): *"A man came to the Messenger of Allah (peace and blessings be upon him) and said: 'O Messenger of Allah, who is most deserving of my good companionship?' He replied: 'Your mother.' He said: 'Then who?' He replied: 'Your mother.' He said: 'Then who?' He replied: 'Your mother.' He said: 'Then who?' He replied: 'Your father.'"*¹¹.

Books of jurisprudence also narrate that 'Umar ibn al-Khaṭṭāb (may Allah be pleased with him) had divorced his Anṣārī wife after she had borne him a son, 'Aṣim. One day, 'Umar saw the boy in the street and took him. The boy's maternal grandmother followed after them, and they disputed the matter before Abū Bakr al-Ṣiddīq (may Allah be pleased with him). Abū Bakr awarded custody to the grandmother and said to 'Umar: *"Her scent, her touch, her lap, and even her saliva are better for him than honey with you."*¹².

Abū Bakr did this in the presence of the Companions gathered in his council, which serves as their tacit approval of his judgment, thereby affirming that what he ruled was correct.

3. The Evidence of Custody from the Consensus of the Ummah

There is no disagreement among the Muslim community regarding the necessity of caring for young children. For man was created weak and in need of one who will protect and nurture him until he can benefit himself and live independently. This obligation is therefore a communal duty (farḍ kifāyah), such that it is impermissible to leave a child without care, lest he perish or be lost.¹³

Second: The Order of Assigning Custody in Islamic Law

The Lawgiver has considered who is most beneficial in fulfilling the interests of the boy or girl in the assignment of custody. For this reason, custody is first given to the maternal relatives who are unmarriageable kin (maḥārim) through the mother's line, then to the paternal relatives from the agnates (‘aṣabah), and then to other relatives who are maḥārim.

The rationale for prioritizing women over men in custody is that this serves the best interest of the child, since women are more capable of meeting the needs of the child and caring for him in the early stage of life.

The wisdom behind this is that women are generally more compassionate, tender, and skilled in raising children, and more patient in managing their affairs.¹⁴

This principle is unanimously agreed upon by the jurists in general, as they also concur that the mother has priority in custody of her child after separating from her husband, based on the following evidences:

- **From the Qur'an:** the previously mentioned verses establishing the legitimacy of custody.
- **From the Sunnah:** the following hadiths.

‘Abdullāh ibn ‘Amr narrated that a woman came to the Prophet (peace and blessings be upon him) and said: *“O Messenger of Allah, this son of mine—my womb was his vessel, my breast was his source of drink, and my lap was his shelter. Now his father has divorced me and wants to take him away from me.”* The Messenger of Allah (peace and blessings be upon him) said to her: *“You are more entitled to him, as long as you do not remarry.”*

Ibn al-Mundhir stated: *“There is consensus among the scholars whose opinions are preserved, that when a couple separates and they have a child, the mother is more entitled to the child as long as she does not remarry.”*¹⁵

If the mother remarries someone who is not a maḥram (non-relative to the child), her right to custody lapses, for a stepfather is usually resentful or hostile toward his wife's child. However, if she marries a maḥram relative, there is no such concern, since the bond of kinship brings compassion and affection, and thus there is no fear for the child in such a case.

If the conditions required of the custodian whether the mother or another woman are not fulfilled, the right of custody passes to the next eligible custodian in order. Once the

impediment is removed, custody reverts to her. The term “stranger” (ajnaḇī) includes kin who are not maḥārim, such as a paternal cousin.

Al-Ḥaṣḥaḥ states in *al-Durr al-Mukhtār*: “In *al-Baḥr* I expressed hesitation about a case where a maternal aunt, or the like, raises the child in the home of a stranger (i.e., not a maḥram to the child) while she is unmarried. The apparent ruling is that custody lapses by analogy to what was previously mentioned. But in *al-Nahr* it is stated that the ruling does not lapse, due to the clear difference between the mother’s husband and a mere stranger.”

In *Radd al-Muḥtār*, it is further explained: “Al-Ramlī supported this distinction by pointing out that a stepfather (ajnaḇī) often feeds the child meagerly and looks at him with resentment, whereas this does not occur with a stranger in the custodian’s household. However, in my view, this distinction is questionable, for if the stepfather (called al-rābb because he raises the child) acts in this way, then it is even more likely from a complete stranger.”

The author then concludes: “The sounder position is to distinguish: if the female custodian maintains her own household and raises the child independently, she retains her right, for the stranger has no control over her or her child. This differs from the case where she lives under the care of that stranger or is married to him.”

It is clear that the forfeiture of custody in such cases is intended to prevent harm to the child. Thus, the muftī must exercise insight and prioritize the child’s welfare. For instance, a child might have a relative who despises him and even wishes for his death, while the stepfather may be compassionate and deeply attached to him. In such cases, the relative might only seek custody to harm the child or exploit his financial support. Likewise, a stepmother might harm the child far more than a stepfather would, or other children in the household might pose a risk of corruption to a young girl living among them. If the muftī or judge is aware of such circumstances, it is impermissible to remove the child from his mother, since the fundamental purpose of custody is the benefit of the child.¹⁶

No one would doubt the fairness of this reasoning, for it accords with truth and justice. Yet, al-Rāfi‘ reported from al-Sindī that the hadith clearly indicates that the mother loses custody upon remarrying, regardless of the compassion of her husband.

I would argue that the hadith explicitly establishes the mother’s entitlement to custody over the father *so long as she does not remarry*. Thus, this entitlement is nullified by marriage, and the text is silent about what comes after. What is certain is that the entitlement ceases with the absence of its condition, which is the mother’s being unmarried.

However, the loss of *priority* does not mean the complete loss of *right*. The absence of entitlement to priority does not entail that she has no right at all. If a new circumstance arises that restores her entitlement to custody, then it must be taken into account, since the ultimate goal is always the child’s best interest.

This is particularly applicable in the case of a woman married to a man other than the child’s father, where the stepfather is affectionate and caring, while a maḥram relative of the child is malicious and hostile, perhaps wishing for the child’s death in order to inherit his wealth. Would the hadith extend the custody right to such a harmful relative, over the compassionate care of the mother and her husband? Would any jurist truly argue so?

In reality, we keep the child with the mother in such circumstances not because she is *inherently* more entitled.¹⁷

But because it ensures the child’s safety and protects him from a harmful relative—even if that relative is a maḥram.

1. Custody Priority According to the Ḥanafī School¹⁸

Because the upbringing of a child is a matter of great importance, the Ḥanafīs require certain conditions in the female custodian—whether the mother or another woman—so that proper upbringing may be achieved. If any of these conditions are not met, proper care of the child may be compromised.

Conditions for a valid female custodian:

- a. Sane – An insane woman cannot safeguard the child and may even pose a danger to them.
- b. Of legal age (bālighah) – This is only applicable to custodians other than the mother, as a minor girl is herself in need of care.
- c. Trustworthy – The custodian must not be absent frequently (e.g., constantly going out), to the extent that the child’s safety or wellbeing may be jeopardized.
- d. Capable – If the woman is physically unable to care for the child due to illness or disability, she loses the right to custody.
- e. Not an apostate – As apostasy leads to imprisonment, she cannot provide care.
- f. Not keeping the child in a hostile environment – e.g., living in the house of people who hate the child, which may expose the child to harm.
- g. Not married to a non-maḥram of the child – She may, however, retain custody if she marries someone who is a maḥram to the child, such as his paternal uncle.

2. If the mother is absent, unqualified for custody, or her right to custody has lapsed, the right of custody is transferred to the maternal grandmother, followed by the paternal grandmother. The maternal grandmother is given precedence over the paternal grandmother, despite both being equal in degree of kinship, because the former is related through the mother, whereas the latter is related through the father. Since the right of custody is derived from the maternal side, those connected through the mother are prioritized over those connected through the father.

3. After that, custody passes to the siblings of the child, with priority given to the full sister, followed by the maternal half-sister, then the paternal half-sister. If unavailable, custody moves to the daughter of the full sister, then the daughter of the maternal half-sister, followed by the maternal aunts, in order: the full maternal aunt, the maternal half-aunt, then the paternal half-aunt. After them, the daughter of the paternal half-sister, followed by nieces (daughters of brothers), in order: the daughter of the full brother, then the daughter of the maternal half-brother, then the paternal half-brother.

4. The daughters of sisters are given priority over the daughters of brothers in custody because the sister herself is prioritized over the brother in custody, and therefore, her offspring also take precedence. Next in line are the paternal aunts, ordered as follows: the full paternal aunt, then the maternal half-aunt, then the paternal half-aunt. After them, custody is assigned to the maternal great-aunt, then the paternal great-aunt, then the maternal grandaunt,

and finally the paternal grandaunt—with full kin always prioritized, followed by maternal half, then paternal half.

5. Custody by Male Relatives

6. If no eligible female custodian exists, or if she is unqualified, or if the eligible woman’s custodial period ends (for either a boy or a girl), custody is transferred to the male agnates (‘asaba) in the order of inheritance: the father, then the paternal grandfather (no matter how far in lineage), followed by the full brother, the paternal half-brother, the son of the full brother, the son of the paternal half-brother, the full paternal uncle, and then the paternal half-uncle.¹⁹

7. If there are multiple relatives in the same degree, such as three full brothers, the most suitable among them is chosen. If they are equal in suitability, then the most pious is given priority. If still equal, the eldest in age is given preference.

8. Custody by Non-Agnate Relatives (Arḥām Maḥārim)

9. If no eligible agnate is available, or if the agnate is unqualified—such as being corrupt or mentally incompetent—custody is not granted to him. Instead, the child is entrusted to a non-agnate relative who is also a maḥram (unmarriageable kin). The order is as follows: the maternal grandfather, then the maternal brother, then his son, then the maternal uncle, then the maternal-uncle through both parents, followed by the paternal half-maternal-uncle, and then the maternal half-maternal-uncle.

10. The daughters of paternal uncles, paternal aunts, maternal uncles, and maternal aunts have no right to custody of male children due to the absence of maḥramiyya. However, they do have a right to custody of female children. Conversely, the sons of paternal uncles, paternal aunts, maternal uncles, and maternal aunts have no right to custody of female children, though they may obtain custody of male children.

11. If the only relative available for a female child is her cousin, then the matter is left to the discretion of the judge. If the judge deems him suitable, custody may be entrusted to him; otherwise, the child is placed with a trustworthy woman, as the judge is appointed to safeguard the public interest.²⁰

12. Custody According to the Mālikī School

13. The general rule in the Mālikī school is that the mother and her female relatives take precedence over the father and his relatives. If no maternal relatives exist, custody passes to the paternal side. If no relatives exist at all, custody is assigned to the guardian (walī), followed by the agnates.²¹

14. The detailed order is as follows: If the mother is absent (e.g., deceased), custody passes to her mother (the maternal grandmother). If she is unavailable, then to her grandmother (the maternal great-grandmother), no matter how far in lineage, and she takes precedence over others. If she is absent, then custody goes to the maternal aunt (the mother’s sister). If she is absent, then to the maternal grandaunt (the mother’s maternal aunt).

15. If none are available, then custody passes to the paternal grandmother (the father’s mother), followed by her mother, then the father’s paternal grandmother. Here, the maternal side is prioritized over the paternal side.

16. If no grandmother exists, custody passes to the father of the child, then to the child’s sister, then to the paternal aunt, then to the paternal grandaunt, then to the paternal grandaunt’s descendants, then to the child’s niece (daughter of his full or half siblings).

17. If none of the above are available, custody passes to the appointed guardian (waṣī). It is agreed that custody belongs to the guardian when the child is male or a non-marriageable female, provided that the guardian is female. If the custodian is male, he may be entrusted only if married to the child’s mother or grandmother. Otherwise, he is not entitled to custody.

18. After this, custody follows the line: the full brother, then the maternal half-brother, then the paternal half-brother, followed by the paternal grandfather and his descendants, then the paternal uncle and his descendants. If the child is male and none are available, then custody returns to the maternal grandfather due to his compassion and affection.

19. When two relatives of equal degree exist (such as two sisters, two maternal aunts, or two paternal aunts), the one who is more righteous and protective is given preference. If equal, then the elder in age is chosen.²²

Custody According to the Shāfi‘ī School

The Shāfi‘īs determine custody according to circumstance, which falls into three scenarios:

- a. If only women exist, or only men exist, or both men and women are present.
- b. If only men exist: custody goes to each male Maḥram heir, following the order of inheritance.
- c. If both men and women exist: custody goes first to the mother, then to her maternal relatives, then to the father, then to his maternal relatives, then to the grandfather, then his maternal relatives, and so forth.

The author of *I‘ānat al-Ṭālibīn* states: Custody is established for any man or woman who possesses the necessary qualifications. However, women are more suitable for it, as they are generally more compassionate toward the child, more patient in fulfilling the demands of custody, and more knowledgeable in matters of upbringing. If eligibility is disputed, it must be confirmed before the judge. The expenses of custody are to be borne from the property of the child; if insufficient, then by the father; if he is unable, then by the mother; and if none of these are possible, the child is to be considered among the dependents of the Muslims, with the expenses drawn from the public treasury (*Bayt al-Māl*) if it is organized, otherwise from the wealthy among the Muslims. As for those most entitled to custody after the mother:

If the claimants are exclusively female, priority is given in the following order: the maternal grandmothers, then the paternal grandmothers, then the sister, then the maternal aunt, then the daughter of the sister, then the daughter of the brother, and finally the paternal aunt. One poet summarized this order: “The mother, then her mother, provided she inherits;

Then the paternal grandmothers, surely they inherit. Then the sister, the maternal aunt, the sister’s daughter, Then the brother’s daughter, O friend, along with the paternal aunt.

If the claimants are exclusively male, custody is established for any eligible male relative who is an heir, even if he is not a maḥram. Their order follows that of guardianship in marriage (*wilāyat al-nikāḥ*), not inheritance. Thus, the paternal grandfather is given precedence over the brother, even though he does not precede him in inheritance. However, a female child who has reached an age of desirability (*mushtahāt*) may not be entrusted to a non-maḥram; instead, she is entrusted to a trustworthy person.

If both male and female relatives are present, priority is given to the mother, then her mothers, then the father, then his mothers, then the paternal grandfather, then his mothers, and thereafter to the closest relatives from the collateral kin (*ḥawāshī*), whether male or female. Brothers and sisters are therefore prioritized over others, such as maternal or paternal aunts.

If relatives are equal in degree of kinship, the female is given precedence over the male, due to the previously mentioned reasons: women are generally more capable and patient in caregiving. Hence, the sister is prioritized over the brother, and the daughter of the brother is prioritized over the son of the brother.

If two relatives of the same gender and degree exist such as two brothers or two daughters the matter is resolved by drawing lots (qur‘a), and the one whose lot is drawn is given precedence.

Custody According to the Ḥanbalī School

In the Ḥanbalī school, custody is first established for the mother, followed by her mothers in order of closest to farthest in degree, by consensus within the school. Accordingly, the order of those entitled to custody after the mother is as follows:

Her mothers (maternal grandmothers), the closest first, then the father, then his mothers (paternal grandmothers), then the grandfather (no matter how far in lineage), then his mothers (paternal great-grandmothers), the closest first, then the full sister, then the maternal half-sister, then the paternal half-sister, then the maternal aunts, then the paternal aunts (with the full paternal aunt given precedence over others), then the great-aunts from the father’s side, then the paternal grandaunts, followed by the daughters of brothers and sisters, then the daughters of paternal uncles and aunts, and thereafter the daughters of the paternal uncles and aunts of the father, and so forth.

After these, custody passes to the ‘aṣaba (agnates) in order of closeness, excluding the father and grandfather (no matter how high), as noted above. Thus, the ‘aṣaba do not receive custody until all the previously mentioned relatives are excluded.

When the ‘aṣaba do become entitled to custody, priority is given to the closest agnate who is also a maḥram. If the custodian is a female relative who is not a maḥram to the child, custody is not granted to her. Likewise, if the claimant is a paternal cousin (ibn ‘amm), he has no right to custody of a female child, as he is not her maḥram. The sound opinion within the school is that he has no right to her custody under any circumstance. Another opinion states that he loses this right only once she reaches the age of seven, after which he must either entrust her to a trustworthy woman of his choosing, by virtue of his agnatic authority, or to one of her maḥārim.²³

a. Female Custodians

The right of custody is derived from the mother; therefore, those related through her are given precedence over those related through the father when they are equal in degree of kinship.

If the mother dies, marries a stranger, or is otherwise deemed unfit for custody, custody passes to her mother, regardless of how distant her degree of kinship may be. If the maternal grandmother is absent or unfit, custody is transferred to the paternal grandmother. After that, custody goes to the child’s sisters, as they are closer to the child than the maternal or paternal aunts: first the full sister, then the maternal half-sister, then the paternal half-sister, followed by the daughter of the full sister. Thereafter come the maternal aunts, followed by the

daughter of the maternal half-sister, then the paternal half-aunt, the daughter of the paternal half-sister, the nieces (daughters of brothers), the paternal aunts, the maternal grandaunts, the paternal grandaunts, and finally the aunts of the parents, in this order.

b. Custody of Agnates (‘Aṣāba)

If there are no eligible female custodians among the maḥārim, or if such a custodian exists but is unfit, custody is transferred to the male agnates who are maḥārim, in the order of inheritance. Priority is given first to the father, then to the grandfather, then to the full brother, then the paternal half-brother, then the sons of the full brother, then the sons of the paternal half-brother, followed by the paternal uncle, then the paternal half-uncle, and so on.

If multiple relatives exist in the same degree for example, three full brothers the most suitable of them is given priority. If they are equal in suitability, the most virtuous is preferred; if equal again, the eldest is given precedence. Ultimately, what is most beneficial and suitable for the child, male or female, is the determining factor. If all else is equal, the matter is referred to the judge.

It is also a condition among the agnates that they share the same religion as the child, since the rule is based on inheritance, which itself depends on unity of religion. Thus, if a non-Muslim child (dhimmī) has two brothers, one Muslim and the other of the same faith as the child, custody is given to the one sharing the child’s religion, not to the Muslim brother.

c. Custody of Non-Agnate Relatives (Dhū al-Raḥim al-Maḥram)

If no eligible agnatic custodian exists, or if those available are unfit—such as being openly sinful or mentally incompetent—custody is given to a dhū al-raḥim al-maḥram (a non-agnate relative who is also a maḥram). In this case, the maternal grandfather is given priority, followed by the maternal brother, then his son, then the maternal uncle, then the full maternal uncle, then the paternal maternal uncle, and then the maternal uncle through the mother.

The daughters of paternal uncles and aunts, and of maternal uncles and aunts, have no right of custody over male children, since they are not maḥārim. They may, however, have custody over female children. Conversely, the sons of paternal uncles and aunts, and of maternal uncles and aunts, have no right of custody over female children but may assume custody of male children.

If the only potential custodian for a female child is her paternal cousin (ibn ‘amm), the decision lies with the judge: if he deems him suitable, custody is granted; otherwise, the child is entrusted to a trustworthy and reliable woman, since the judge is appointed as guardian of the public interest.

Second: Custody and Its Order under the Family Code

The Algerian Family Code regulates custody (ḥaḍāna) under Articles 62 to 72. Two interconnected principles dominate these provisions:

a. Strict judicial supervision, supported by the Public Prosecutor’s Office, to ensure proper application of the relevant provisions.

Accordingly, Article 3 bis of the Family Code provides that the Public Prosecutor is considered a principal party in all disputes and cases relating to the family, stating:

“The Public Prosecutor shall be a principal party in all cases aimed at applying the provisions of this law.”

b. The best interests of the child (al-mahḍūn) must be observed in every application of the law or exercise of judicial discretion in matters of custody.

With respect to the assignment of custody, Article 64 provides:

“The mother is entitled to custody of her child, followed by the father, then the maternal grandmother, then the paternal grandmother, then the maternal aunt, then the paternal aunt, and then the closest relatives in degree, all while considering the best interests of the child. The judge, when assigning custody, must also grant visitation rights.”

From the moment of birth, the child requires care, upbringing, protection, and the provision of all necessities of life, as at this stage they are incapable of safeguarding their own interests or distinguishing harm from benefit.

Custody is, in principle, a right of both spouses while they remain united in marriage. Upon separation whether by divorce, dissolution, annulment, or death custody becomes a legal duty, not merely a right. In particular, in cases of divorce, custody is granted to the mother, provided she meets the conditions set forth in Article 62(2), which states:

“The custodian must be fit to assume custody.”

The mother’s entitlement to custody over the father has both textual (naqlī) and rational justifications. Textually, it is based on the Qur’ānic verses previously cited, reinforced by the ḥadīth: “You have more right to him as long as you do not remarry”, as well as the consensus (ijmā’) of the Companions and Sunni jurists. Rationally, no one disputes that the mother is more compassionate, gentle, patient, and devoted to her child’s care especially in the early years and usually more available to provide constant care than the father.

Even when custody is transferred to the father, whether by court decision or the mother’s relinquishment, the father often entrusts the child to another woman, such as his mother, sister, or wife. None of these can match the compassion of the child’s own mother, and in Islamic law the father’s right to custody is contingent on his ability to provide a suitable female caregiver.

Nevertheless, the legislator sought to strike a balance between mother and father upon separation: custody is given to the mother, while guardianship (wilāya) both over the person and the property of the child belongs to the father.

The most significant amendment to Article 64 of the Family Code was the father’s advancement in the custody order. Under the original 1984 law (Law 84/11), the order was as follows:

“The mother is entitled to custody of her child, followed by her own mother, then the maternal aunt, then the father, then the paternal grandmother, then the closest relatives in degree, all while considering the best interests of the child. The judge, when assigning custody, must also grant visitation rights.”

Following the 2005 amendment (Law 05/02), the father was elevated to second place, immediately after the mother, so that custody reverts to him directly once the mother loses it or relinquishes it.

This prioritization of the father after the mother has some basis in Hanbalī jurisprudence, as mentioned by the author of *al-Inṣāf*.²⁴

A similar approach was adopted by the Moroccan Family Code, which, following its 2004 amendment, states in Article 171:

“Custody is granted to the mother, then to the father ...”

As for the temporal application of this provision, the new law cannot undermine situations settled under the old law. Thus, custody previously assigned to the grandmother or maternal aunt under Law 84/11 cannot be revoked by the new law. However, where custody was held by the mother and subsequently lost under the new law, it passes directly to the father. Similarly, if custody was held by the grandmother or maternal aunt under the old law and they lose it under the new law, it transfers directly to the father, not to the next person in the prior ranking.

Despite this, the rules under the old Family Code (84/11) no longer align with the new orientation of the amended Code (Law 05/02), which emphasizes above all else the best interests of the child, in line with international conventions on the rights of the child ratified by Algeria. This principle was also recognized by the Egyptian Constitutional Court in 1999, which ruled that the order of custodians is a matter of judicial discretion guided primarily by the welfare of the child.

In its decision (Case No. 164 of Judicial Year 19, Constitutional, session of 3 July 1999), the Court dismissed a challenge to the constitutionality of Article 20(5) regarding the ranking and priority of custodians, reasoning as follows:

“From birth, the child is subject to three types of guardianship: first, guardianship of upbringing (*wilāyat al-tarbiyya*); second, guardianship over the person; and third, guardianship over property. The latter two generally belong to the male agnates, while guardianship of upbringing—custody (*ḥaḍāna*)—is intended to ensure care, protection, and supervision during the earliest stage of life when the child cannot do without women entitled to their care under Islamic law. The essential criterion is the welfare of the child, which is best secured by the custodian drawing the child under her protection, as she is more compassionate, more patient, and better equipped to care for the child. Removing the child from her—during this delicate period of dependency—would cause harm. Authentic reports affirm that women are more entitled to custody at this stage, as in the *ḥadīth* of the woman who came to the Prophet ﷺ disputing custody of her child with her divorced husband, and the Prophet ﷺ said to her: ‘You have more right to him as long as you do not remarry.’

Accordingly, custody is first for female maḥārim, with maternal kin given precedence over paternal kin, which is precisely what the challenged provision intended.”

There is no definitive (qaṭ‘ī) text establishing a conclusive ruling regarding the order of female custodians (ḥāḍināt) after the mother. Consequently, the door of ijtihād in this domain remains open, based on both transmitted (naqlī) and rational (‘aqlī) evidence. No single ijtihād invalidates another, nor does it carry immunity against alternative reasoning. Rather, ijtihād in matters regulating the family must be evaluated in light of prevailing circumstances and customs, provided that these do not contradict the divine Sharī‘a and its objectives.

It is reported that when ‘Umar ibn al-Khaṭṭāb (may Allah be pleased with him) and the maternal grandmother of his son ‘Āsim disputed custody before Caliph Abū Bakr al-Ṣiddīq (may Allah be pleased with him), Abū Bakr awarded custody to the grandmother, saying to ‘Umar: “Her fragrance, her touch, her lap, and her saliva are better for him than honey with you.” None of the Companions objected to this ruling.

The jurists of the four schools unanimously agreed that the maternal grandmother, who is directly related through the mother, follows the mother in the custody order. The Ḥanbalīs held that custody belongs first to the mother, then her mother, then her grandmother, and so on, followed by the father and then his mothers. The Shāfi‘īs stated that when male and female relatives are in competition, the mother precedes the father, followed by the maternal grandmother (no matter how far in degree) provided she is an heir, then the father, and then his mother (the paternal grandmother) if she is also an heir. The Ḥanafīs, together with the Mālikīs, maintained that the maternal grandmother (no matter how far in lineage) is the most entitled to custody after the mother.

This was also the direction of the contested provision, which adopted what best serves the welfare of the child—around which custody revolves—inspired by the overarching objectives of the Sharī‘a and rooted in its general principles.

The Supreme Court likewise ruled in Case No. 10 of Judicial Year 5 (Supreme) on 3 July 1976, dismissing the petition challenging the constitutionality of Article 280 of the Sharī‘a Regulations and Article 20 of Decree-Law No. 25 of 1929.²⁵

Section Two:

Considering the Best Interests of the Child at the Expiry of Custody

Custody (ḥaḍāna) is exercised during a period in which the child is in need of care for his body, upbringing, and all aspects of his life, particularly in the earliest stage following birth. The expiry of custody refers specifically to the end of female custody and its transfer to the male agnates (‘aṣaba).

Accordingly, this section addresses first the termination of custody according to the jurists, and secondly, its termination under statutory law.

I. Termination of Custody According to the Jurists

The jurists differed regarding the age at which female custody ends, after which the child is transferred to the custody of male relatives.

1. The Ḥanafī School

If the child is male: The Ḥanafīs hold that custody continues until the boy becomes independent of the service of women—that is, until he can eat, drink, and dress by himself. Imām al-Khaṣṣāf estimated this to be at seven or eight years, and this is the opinion on which the fatwā within the school is based. Thereafter, the boy is delivered to his father or his male agnates. Ibn al-Humām stated: “Al-Khaṣṣāf (may Allah have mercy on him) estimated self-sufficiency at seven years, and upon this rests the fatwā, as mentioned in al-Kāfī and others, not the opinion that it is at nine.”²⁶

If the child is female: The Ḥanafīs hold that a girl remains with her mother or maternal grandmother until she reaches puberty (i.e., until menstruation). If she is with someone other than the mother or grandmother, she remains until she is of marriageable desire, estimated at around nine years. Thereafter, she is transferred to her father or her male agnates. The distinction between boys and girls lies in the fact that the boy, upon self-sufficiency, requires moral discipline and training in the manners of men, which the father is better equipped to provide. The girl, however, requires the guidance of her mother in learning the manners and conduct of women. Afterward, she needs her father’s protection. Neither the boy nor the girl is given the option (*takhyīr*) after reaching the end of custody, since their immature judgment might lead them to choose comfort and play, contrary to their best interest.²⁷

2. The Mālikī School

For boys: Custody continues until puberty, which is the well-known position of the school. Another narration from Imām Mālik²⁸, sets the limit at the shedding and regrowth of teeth (*ithghār*). The boy is not given a choice upon puberty; he is transferred to his agnates.

For girls: Custody continues until she marries and her husband consummates the marriage. However, this is conditional upon the mother providing safety and protection. If the mother resides in an unsafe environment or fails to safeguard her daughter, the girl’s guardians are more entitled to custody.²⁹

3. The Shāfi‘ī School

The Shāfi‘īs do not distinguish between boys and girls. They maintain that custody lasts until the age of discernment (*tamayyīz*), set at seven years. After this, the child is given the choice between parents, and custody is awarded to the parent chosen. However, the child must not be mentally impaired, insane, or disabled. Moreover, the choice is not limited to the mother and father; if they are unavailable, the child may choose between grandparents or other relatives according to proximity in degree.³⁰

4. The Ḥanbalī School

The Ḥanbalīs hold that the mother has priority in custody of a boy until he reaches seven years, after which he is given the choice between parents. This is the most authentic and well-known opinion from Imām Aḥmad. However, if the child is impaired or insane, the rule does

not apply. A second narration states that the paternal grandfather is more entitled without choice being given.

For girls: The well-known position of the Ḥanbalīs is that the mother retains custody until seven years, after which the girl is transferred to the father without any option, since this is considered more beneficial. The father is deemed more suitable to supervise, protect, and safeguard her, and because a girl may be subject to marriage proposals which must be addressed by her father, she is not given the right of choice.

Custody of the Mentally Disabled and the Insane

The majority of jurists hold that if the child, male or female, is mentally disabled (ma‘tūh) or insane (majnūn), custody continues with the mother or the female relative who has the right to custody, without any option of choice being granted to the child, even according to those jurists who otherwise adopt the principle of takhyīr. This is the position of the majority of the Ḥanafīs, Shāfi‘īs, Ḥanbalīs, and some Mālikīs.

Some jurists, however, maintained that custody ends at puberty for males, even if afflicted with chronic illness or insanity, in which case the child is handed over to the father.³¹

Care of the Child after the Expiry of Custody

If the boy reaches adulthood, sound of mind and fully competent, no custody applies to him. He is not obliged to live with either parent, nor can he be compelled to do so, provided he is trustworthy with regard to himself. However, it is preferable that he not separate from his parents.

If he is not trustworthy with regard to himself, the father may take him into his care, as the father is the legal guardian over his property, and preservation of life takes precedence. Alternatively, the boy may be given a choice between his parents. If he reaches adulthood while insane, custody continues, but under the care of the relative who is obliged to provide financial maintenance (nafaqa), usually from among the male agnates. There is no objection, however, to the mother continuing custody if this serves the child’s best interests, since the determining factor is the welfare of the child. This is the predominant view within the Ḥanaḥ school.

As for girls: If she is a virgin, the father is entitled to take her into his care, and she may not live independently until she marries, unless she is of advanced age and there is no fear of temptation (fitna), in which case she may reside independently.

If she is previously married (thayyib) and trustworthy, with no fear of temptation, she is not compelled to live with her guardian and may live independently, though it is preferable that she remain under the care of her parents or her male agnates.

If she is not trustworthy, or if there is fear of temptation, her guardian must take her into his care. Where the guardian is not from among the agnates, or if no agnatic guardian exists, she is to be placed under the custody of a trustworthy, capable woman. The same rule applies equally to virgins and previously married women in this regard.³²

II. Expiry of Custody under Family Law

Articles 64 and onward of the Algerian Family Code define the parties to whom custody is entrusted. Where custody is assigned to the father, it continues until the child reaches the age of legal majority, which is nineteen (19) years, applying equally to boys and girls.

Where custody is assigned to female relatives, whether the mother or otherwise, Article 65 specifies the duration of such custody:

“Custody of a male child terminates upon his reaching ten (10) years, and custody of a female child upon her reaching the age of marriage. The judge may extend custody in the case of a male child up to sixteen (16) years, provided the custodian is the mother and has not remarried, and provided that the best interests of the child are duly considered in the ruling on termination.”

It is evident from this that the law sets custody limits at ten years for boys—on the condition that they are of sound mind and not incapacitated—and at sixteen years for girls, under the same conditions. After this period, the child is transferred to the father or his agnatic relatives.

If the child is mentally disabled or incapacitated, female custody continues, unless the welfare of the child requires otherwise.

The distinction drawn by the legislator between boys and girls reflects the recognition that boys, upon reaching a certain age, need to be disciplined and trained in the manners of men, which the father is better suited to provide, whereas girls remain longer under the care of the mother in order to learn the manners and conduct of women, before eventually moving to the father’s care.

The law rejects the notion of granting boys or girls the right of choice between parents or other custodians, deeming it contrary to the child’s best interest. This is because reliance upon the judgment of a child disregards the reasoned assessments of the parents and custodians, and instead subjects the matter to the immature preference of a young child, incapable of weighing his or her present and future welfare.

As Ibn al-Qayyim observed: “The child has weak judgment and inclines toward idleness and play. If he were to choose the one who would indulge him in that, his choice would not be considered. He is to be placed with the custodian who is more beneficial and better for him.”³³

Conclusion

In conclusion, it is worth noting that Islamic Sharia is the only legal system that regulates custody (ḥaḍāna) within the framework of the child’s parents and close family, emphasizing at every stage the safeguarding of the best interests of the child. Accordingly, through this study on the assignment and termination of custody, we have reached the following findings:

1. It has become evident that the assignment of custody is a matter of juristic reasoning (ijtihād) in which the welfare of the child is the primary consideration. It is not a fixed or divinely mandated order in the sense of an explicit text prescribing a sequence that may not be

contravened. This is demonstrated by the differences among the schools of Islamic jurisprudence regarding the ranking of those entitled to custody of a boy or girl, a fact further confirmed by the judgment of the Egyptian Constitutional Court on 3 July 1999.

2. The Algerian Family Code, in general, has adopted the Mālikī school in matters of custody, with the exception of certain cases, such as granting the father priority over other custodians by placing him second in order, directly after the mother. This approach reflects the central principle that custody revolves around the best interests of the child, which take precedence over all other considerations.

3. Furthermore, the Family Code does not mention the additional categories of custodians recognized in Islamic jurisprudence, such as the male agnates (‘aṣaba) and female relatives within the prohibited degrees of kinship (dhū al-arḥām al-maḥārim).

4. The Code is also silent on the issue of determining custody when there is equality among those entitled to it.

5. The Family Code rejects the practice of offering a choice to boys or girls between their parents or other custodians. This is because reliance upon the child’s preference is not deemed to serve his or her best interest. As Ibn al-Qayyim observed, a child’s judgment is weak; he inclines toward idleness and play. If he were allowed to choose, he would opt for the one who indulges him in that, and such a choice is therefore disregarded, for the child must remain with the custodian who is most beneficial and best for him.

6. It is also noteworthy that the amendments made to the Family Code—moving from Law 84/11 to Law 05/02—were aligned with international conventions on the rights of the child, particularly those ratified by Algeria, especially concerning matters of custody.

As Allah says: “And Allah speaks the truth and guides to the right path.”

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