

# The Custody of Children in Shari'ah

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A Paper Presented to a Seminar on: "International Child Abduction "

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## 1. Definition of Shari'ah:

Shari'ah is an Arabic word which means 'the Clear Path.'

As a term it refers to the guidance (teachings and commandments) of God contained in the Qur'an (the holy book for Muslims) and the teachings of the Prophet of Islam, Muhammad, peace be upon him. In this way: Islamic beliefs, practices, moral teachings, injunctions and prohibitions are all part of the Shari'ah. However, the term Shari'ah has been used by Muslims and others to mean Islamic law, and this has become the common meaning of the term.

## 2. The nature of the rules of the Shari'ah:

Two types:

**2.1. Detailed:** These include teachings and rules regarding:

- (i) Beliefs (belief in God; His qualities, life after death etc.)
- (ii) Practices (acts of worship: how to pray, fast ect..)
- (iii) Moral teachings.
- (iv) Rules and laws relating to dealings between people (marriage, inheritance, financial, penal etc..)

**2.2. General principles and rules:**

- (i) Shurah (mutual consultation) in governance.
- (ii) Equality
- (iii) Justice

## 3. Sources of Shari'ah - Islamic Legislation:

**3.1. Primary Sources:**

3.1.1. The Qur'an (Word of God revealed to the Prophet Muhammad, peace be upon him, through the angel Gabriel.)

3.1.2. The Sunnah (recorded practices and sayings of Prophet Muhammad peace be upon him.)

### 3.2. Secondary Sources:

3.2.1. The Consensus of opinions of the Muslim scholars.

3.2.2. Analogical deductions.

3.2.3. Ijtihad: The exercise of one's reasoning to arrive at a logical conclusion to solve new problems not expressly regulated before.

## 4. Non-Muslims under the Shari'ah:

The religious freedom of non-Muslims living under a Muslim state and their right to follow the teachings and laws of their religions in Family law is guaranteed in the Shari'ah. This is represented in the following:

i) None of them shall be forced to abandon his/her religion or to follow a certain faith. The Islamic rule is "There is no compulsion in religion." (Qur'an)

ii) They have the right to practise their religion; none of their churches/places of worship shall be touched. A Christian or Jewish wife has the right to go to her church or synagogue, and her Muslim husband does not have the right to prevent her. The rule is: "Leave them alone and what they believe." (*Hadith.*)

iii) The Shari'ah permitted for them the food which is permitted in their religion. They can farm pigs (eat pork) and drink alcohol (prohibited for Muslims.)

iv) They have the right to follow the rules of their religion in Family Law i.e. marriage, divorce, maintenance, inheritance etc.. (In this way Shari'ah more tolerant than most modern legislations...)

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## HIDANA (GUARDIANSHIP/CUSTODY) OF CHILDREN

**Hidana** is an Arabic word which is derived from the word '*hadana*' which literally means to embrace or hug.

In the Shari'ah it means raising or bringing up a child.

**Hidana** is a form of guardianship which women are more suitable to assume because they have more experience in looking after children than men, and they are generally more caring and compassionate.

### **The Order of those who have the right of *Hidana***

Muslim jurists gave preference as to who has the right to care for a child taking into consideration the interest of the child. Women are preferred over men, and within the same gender preference has been given to those who are closer to the child and who are expected to be more compassionate and merciful.

#### **Women:**

- i) The mother unless she is unfit.
- ii) Grandmothers: from the mother's side first and then from father's.
- iii) Sisters: Full sister, half sister from the mother's side and then half sister from the father's.
- iv) Aunties: from the mother's side and then from the father's.
- v) Nieces: from the mother's side and then from the father's

#### **Men:**

If none of the above mentioned women is available or available but unfit, then *hadana* is becomes the right of one of the men in the following order:

- (i) The father, and then the grandfathers.
- (ii) The brothers and then their children (nephews)
- (iii) The uncles and then their children (cousins.)

#### **Purpose of *Hidana*:**

Caring for the child, teaching and educating him/her.

#### **The Interest of the Child:**

The interest of the child who is cared for takes preference over the rights of the parent.

#### **Expenses of *Hidana*:**

The expenses are paid by the father on a regular basis.

#### **Pre-conditions for the caring person:**

- i) Mature. ii) Sane. iii) Capability to look after the child. iv) Trustworthiness.

There is a further condition in case of a woman which is that she should not be married to a man who is a stranger to the child (not a close relative.)

**Hadith 1:** A woman came to the Prophet and said: 'O Messenger of Allah! I carried my son in my womb, suckled him my breasts and held him on my lap; yet his father has divorced me and wants to take him away from me. The Prophet replied: "You have more right to him as long as you do not re-marry."

- Re-marry strange man to the child.
- The child does not go to the father but to the grandmother.

**Hadith 2:** A man called rafi' bin Sinan accepted Islam but his wife refused to accept it. The Prophet then made the mother sit down to a side and the father to another side, and made the son sit down between them. The son inclined to his mother. The Prophet then said: "O Allah! Give him guidance" Then he inclined to his father and he took him.

According to this *Hadith* some scholars said that being a polytheist does not nullify the right of a mother to her child. Other scholars however, are of the opinion that being a Muslim is a pre-condition for custody of a Muslim child.

There is a further condition in the case of a man which is that he should have a wife or a mother who would be looking after the child.

#### **Period of Hidana:**

Different opinions:

**Kuwait:** The girl remains in the care of the Hadana until she marries. The boy remains until he reaches the age of puberty. After this he is given the choice to stay with his father or mother. (Same in Sudan.)

**Morocco:** The length of period is: 12 for the boy and 15 for the girl. After this period the child is given the choice to stay with the father, mother or another relative.

**Egypt:** 9 years for the boy and more than this for the girl.

#### **Visit by the other parent:**

If the child is in the custody of one parent, the other has the right to visit him at least once a week, unless that is not in the interest of the child according to the view of the judge.

#### **Travel with the child:**

If one of the parents wants to travel and return, the child stays with the one who remains in the country. If one who wants to travel is leaving for good, then the child goes with whoever is more capable of realising the child's interest.

#### **Dispute over Hidana:**

People are advised to resolve their disagreements in an amicable way and to stay away from courts. This happens in most of the cases. However, the courts remain as the last resort.

Written by Imam Yahya Mohammad Al-Hussein

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