

APPRAISAL OF REQUIREMENTS OF *HADANAH* (CHILD CUSTODY) AND ITS INCORPORATION OF OBJECTIVES OF SHARI'AH

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Abstract:

This work seeks to discuss elements of objectives of Shari'ah incorporated in the basic requirements of *Hadanah* (child custody) in Islam. These requirements are necessary for any individual to be qualified to have child custody. Doctrinal methodology with hermeneutic approach is used in this work as it is the most suitable for Shari'ah based work. This is because of the need to translate from Arabic as well as the necessity of legal interpretation of legal authorities from which specific legal provisions are deduced. The paper finds that Shari'ah provisions on *Hadanah* are in line with objectives of Shari'ah where the child's interest in relation of *maqasid* is protected. This is particularly evident in requirements of a custodian. The work recommends that judgements on *Hadanah* should take cognizance of objectives of Shari'ah rulings. This will ensure that ruling of Shari'ah are in line with the general objectives of Shari'ah.

Keys: *Hadanah* (child custody), Requirements, *Maqasid* (Objectives of Shari'ah), Child's Interest

1. Introduction

Ideally, a child lives with his father and mother under the condition of care and love of the mother as well as the requisite kindness and discipline of the father. These roles will be mutually undertaken by

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both parents and compromises can be easily reached whenever there is misunderstanding between them. However, where there is a separation either due to divorce, annulment or even death, the child will be left in the middle like a featherless bird unable to fly. Under this circumstance, child custody will be an attempt to rescue that which has been lost due to the separation which is the proper child upbringing within a loving family. Provisions of Shari'ah on child are not arbitrary rules without purposes. Instead, these provisions are aimed at protect the best interest of the child as they are in line with the major objectives of the Shari'ah. This paper aims to highlight specific provisions and requirements of *Hadanah* based on the implications of objectives of Shari'ah (*maqasid al-Shari'ah*). This will be seen from *Hadanah* being considered as primarily the child's right, the place of his custody. Giving priority to the child's mother in custody is also another representation of the child's interest as the objective of *Hadanah* as well as legal requirements in the *Hadin* (custody) which represent the core of this discussion.

2. Concept of *Hadanah*:

Hadanah is from the Arabic word *Hidn* which literally means bosom or breasts as a woman affectionately embraces a child to protection it. Al-Nawawi has defined *Hadanah* as undertaking the protection of an individual who does not have the ability of distinction or can he function for himself as well as his upbringing through that which is in his interest and protecting him from whatever that could harm him.¹

In Ibn 'Arafa's definition, *Hadanah* is protection of child's shelter, feeding, clothing, bed as well as cleanliness.² Al-Dasuqi described it as protection of child in his shelter, goings and comings, statements as well as the undertaking of his interests of feeding, clothing, cleanliness and position.³

¹ Abu Zakariyya Muhyiddin Yahya bin Sharaf Al-Nawawi, *Raudat al-Taibin wa 'Umdat al-Muftin*, (Al-Maktab al-Islami, Beirut, 1412H/1991), 9:98.

² Muhammad bin Qasim al-Ansari Al-Rasasa', *Sharh Hudud ibn 'Arafah*, (Al-Maktabah al-Ilmiyah, Beirut, 1350H):230.

³ Ahmad Al-Dardir and Muhammad bin Ahmad bin Arafa, *Al-Sharh al-Kabir ma'a Hashiyat al-Dasuqi*, (Dar al-Fikr, n.d.), 2:526.

These two Maliki definitions are similar even though al-Dasuqi's definition has additional elements which are child's protection in goings and comings as well as statements. This refers to being careful with the child's exit and entry as well as those the meets outside where he may pick certain phrases that are harmful. His definition provides more requirements of *Hadanah* beyond the physical care of the child.

In the Hanbali School, Al-Mawardi has described it as protection, care and administering affairs of a child as well as undertaking his interests.⁴ Al-Fattuhi defines it as protection of the minor, the idiot as well as the insane from what is harmful as their upbringing by undertaking their interests.⁵

Although these two definitions have both agreed on protection of the child's interests, Al-Fattuhi's definition has given additional information of target of *Hadanah* to not only a child, but also an idiot as well as the insane. This means the purpose of such protection of the subject matter's inability to protect himself is the rationale behind obliging its custody.

Examination of these definitions will reveal that the common element among them is protection as well as care through proper upbringing. *Hadanah* also covers provision of proper nourishment as well as cleanliness.

3. Related Terms to *Hadanah*:

Hadanah has similarities to other legal terms whose implication is often confused with *Hadanah*. These are: *wilayah* (guardianship or authority) and *kafalah*.

The term *wilayah* refers to power and authority as well as the ability to help and protect.⁶ Legally, it is the power to make decision on

⁴ Abu al-Hasan Ali bin Muhammad bin Muhammad bin Habib al-Mawardi, al-Hawi al-Kabir, (Dar al-Fikr, Beirut, n.d.), 11:1154.

⁵ Manşur bin Yunus bin Şalaḥuddin ibn Hasan al-Buhut, Daqa'iq Uli al-Nuha li Sharḥ al-Muntaha, ('Alam al-Kutub, Beirut, 1414H/1993), 3:248.

⁶ Zainuddin Abu Abdullah Muhammad bin Abibakr bin ABdulQadir al-Razi, *Mukhtar al-Şiḥah*, (Al-Maktabah al-'Aşriyyah, Beirut, 1420H/1999), 1:

another's behalf. The source of *wilayah* can either be the Shari'ah like the authority of father over his children or delegation such as agency and administrator of waqf. Similarly, there are several forms of *wilayah* including *wilayah* over properties and pecuniary interests, *wilayah* or guardianship in marriage, as well as child custody. Depending on the form of *wilayah*, it depends on who exercises the power. It can be exclusive to men as in the case of guardianship in marriage or it can be shared by men and women as in the case of *Hadanah*.⁷

The other term related to *wilayah* is *kafalah* which literally means combination or taking care of another person by standing for them. This can be observed from the Saying of Allah: "and put her in the care of (*wa kaffalaha*) Zakariyya"⁸ Here, *al-kafil* refers to a person who protects and takes care of a person who needs such care which is synonymous to the objective of *Hadanah*.⁹

Thus, *kafalah* has both the meanings of combining legal personality (*dhimmah*) as well as physical body of an individual to the body signifying protection as habituated by mothers.

Normally custody of a child is shared by both the mother and the father if they are still married. If they are separated however, it is the right of the mother. This is based on a Hadith of the Prophet peace be upon him in which a woman came to the Messenger of Allah, peace be upon him and said: "O Messenger of Allah! This is my son; for him my womb was a vessel, my breast was like water skin, and my lap was his bedding, yet his father divorced me and wants to take him away from me." The Messenger of Allah, peace be upon him said to her: You are entitled to keeping him unless you get married."¹⁰

⁷ Ibn Nujaim, *al-Ashbah wa al-Naza'ir*, 1:130; Al-Suyuti, *al-Ashbah wa al-Naza'ir*, 1:154.

⁸ Qur'an 3:37.

⁹ Ibn 'Abidin, *Hashiyah*, 5:281; Ibn Qudamah, *al-Mughni*, 4:408.

¹⁰ Transmitted by Ahmad bin Hanbal al-Shaibani, *Musnad Ahmad bin Hanbal*, (Mu'assasat al-Risalah, 1421H/2001), 11:310; Abu Dawud, *al-Sunan*, Hadith No. 2276; Abu Abdullah Al-Hakim Muhammad bin Abdullah bin Muhammad bin Hamdawaihi bin Nu'aim al-Naisaburi, *al-Mustadrak 'ala al-Shaḥīḥain*, (Dar al-Kutub al-'Ilmiyyah, 1411H/1990), 2:225, Hadith No. 2830.

4. Concept of Objectives of Shari'ah

There are several definitions of *maqasid al-Shari'ah*; but the most popular definition is that which was formulated by Sheikh Tahir 'Ashur who defined it as: general objectives of Shari'ah as observed concepts and wisdoms in all or most of the legislations of Shari'ah such that it is not exclusive to particular injunction.¹¹ However, al-Raisuni's definition is regarded as one of the most concise definition. He defines it as the goals for which the Shari'ah is legislated for the benefit of mankind.¹² This definition covers both the general and specific objectives of Shari'ah in its rulings. This means rulings of Shari'ah is intended to achieve specific goals such that they are not just abstract conduct without purposes. Invocation of Shari'ah ruling in a specific conduct must, therefore, attain the goal for which the ruling was legislated.

There are several classifications of *maqasid* with each having particular perspective. The most important classification looks at gravity of the objectives. The highest grade of objectives is the *Daruriyyat* (necessities) followed by *Hajiyyat* (complementary) and then *TaHsiniyyat* (embellishments).

Al-Daruriyyat (necessities) are those essential elements whose presence is a requirement for the interests of this world and the Hereafter to be safeguarded. In other words, absence of *daruriyyat* means loss of one's interest in this earth and it will also lead to the loss of whatever reward and benefit that one can get in the Hereafter.¹³ Jurists have attempted to enumerate these *daruriyyat* into five comprehensive or general essentials (*al-Kulliyyat al-Khams*). These are: protection of the religion, life, mind, progeny as well as wealth. Shihabuddin al-Qarafi has narrated that some have also added a sixth necessity namely dignity.¹⁴ All the rulings in *Hadanah* that are an emphasis to these objectives can therefore be safely recognised as

¹¹ Muhamad al-Tahir 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah* (Dar al-Basa'ir li al-Intaj al-Ilmi 1418H/1988), 171.

¹² Ahmad Al-Raisuni, *Nazariyyat al-Maqasid 'inda al-Imam al-Shaṭibi*, (IIIT, Virginia, 1415H/1995), 19.

¹³ Ibid, 35.

¹⁴ Shihabuddin Abu al-Abbas Ahmad bin Idriss Al-Qarafi, *Sharh Tanqih al-Fuṣul fi Ikhtisar al-Maḥsul fi al-Usul*, (Beirut: Daral-Fikr, 1424H/2004), 391.

fulfilment of the purposes of the Lawgiver in His legislations on child custody.

Protection of progeny as well as dignity can also be seen in the custody of a female child who can be sexually desired. Hence, jurists have stipulated that the son of paternal uncle's son will have no right of custody unless the girl resides in the company of a trusted woman.

The second grade of objectives according most scholars is *Hajiyyat* which is the plural of *Hajiyy*. According to Imam al-Shaṭibi, *al-Hajiyyu* is that which is needed as convenience and avoidance of hardship that may lead to difficulty in which even a necessity can be lost. If *hajiyyat* are not recognized, the *mukallaf* (the legally responsible adult) will be subjected to difficulty although such difficulty is not as severe as harming the general public interest.¹⁵ The wisdom behind *hajiyyat* is of two folds. First is the prevention of hardship and difficulty from inflicting an individual. The second fold is to complement the *daruriyyat* by fulfilling it and protecting it. Thus, contracts such as *ijara* (leasing), *istiṣna'* (commissioned manufacturing), *muzara'ah* (partnership farming) as well as divorce and *khulu'* are legalized in order to lift the harm upon either of the spouses.

In al-Mutaiṭi conception as narrated in al-Taj wa al-Iklil has referred to jurists' consensus that emphasized on the fact that children are weak and in need of the care under which they will grow to take care of themselves.¹⁶ This is a demonstration of the objective of *Hajiyyat* in child custody as the child's life will be difficult if it is negated.

The third grade of objectives which *taHsiniyyat* is described by Imam al-Shaṭibi as adopting good customs and avoidance of filths that good conscience avoids.¹⁷ It has the purpose of acquisition of nobility or avoidance of its negation and that whose acquisition has been recommended or encouraged according to Imam al-Haramain.¹⁸ Imam

¹⁵ Ibrahim bin Musa bin Muhammad Al-Lakhami Al-Shatibi, *Al-Muwafaqat fi al-Shari'ah*, (Riyadh: Maktabat al-Riyadh, 1420H), vol. 2:21.

¹⁶ Muhammad bin Yusuf bin Abi al-Qasim al-'Abdari Abu Abdullah, *al-Taj wa al-Iklil Li Mukhtasar Khalil*, (Dar al-Fikr, Beirut, 1398H), 5:594.

¹⁷ Al-Shaṭibi, *Al-Muwafaqat*, *ibid*, 2:20.

¹⁸ Hisham bin Sa'id Azhar, *Maqasid al-Shari'ah inda Imam al-Haramain wa atharuha fi al-Mu'amalat al-Maliyyah*, (Maktabat al-Rushd, 1429H), 244.

Shatibi has inferred from induction (*istiqra'*) that the Shari'ah has recognized embellishments as its objectives. He said the evidence of *istiqra'* (inductive reasoning) and the investigation of its general and specific provisions as well as reading authorities together with its varying contexts all point towards recognition of *taHsiniyyat*.¹⁹

5. Defining Rule of *Hadanah*:

The term defining rule (*Hukm taklifi*) is described by jurists as the locution or communication of the Lawgiver in form of demand or option.²⁰ In other words, it is the legal status of a conduct whether it is obligatory, recommended, lawful, disliked or prohibited.

Besides been a right of the party who is responsible for *Hadanah*, it is also obligatory upon such party to assume the responsibility. This is because the child can be harmed by failure to undertake the duty of custody. Thus, it will be deemed a personal obligation (*fard aini*) if there is no one that can assume the duty. Similarly, even where there are others who can take care of the child, but the child has refused them, it will also be obligatory. However, where there are others of similar status under whom the child can be taken care of, the obligation shift to collective obligation (*fard kifa'i*).²¹

According to Ibn Nujaim, *Hadanah* is the right of the child due to need for someone to keep hold of him, someone to benefit him physically as well as one to watch over his wealth so that it will not be wasted.

Al-Mawwaq has also emphasized on the obligatory nature of *Hadanah* as children are weak and in need of the care under which they will grow to take care of themselves. Thus, it is collective obligation upon all concerned, where someone has undertaken it, they others will not be liable. However, it is a personal obligation upon the father as well as the mother during his infancy or where his father is not available or he decline to accept breast feeding of another woman.²² Thus, it is

¹⁹ Al-Shatibi, *Al-Muwafaqat*, ibid, 2:39.

²⁰ Iyad bin Nami Al-Salami, *Usul al-Fiqh al-Ladhi la yasa' al-Faqih Jahluh*, (Dar al-Tadamuriyyah, Riyadh, 1426H/2005), 28.

²¹ Ahmad bin Ghanim bin Saim ibn Muhanna, al-Nafrawi al-Azhari al-Maliki, *Al-Fawakih al-Dawani 'ala Risalat Ibn Abi Zaid al-Qairawani*, (Dar al-Fikr, 1415H/1995), 2:66; Ibn Qudamah, al-Mughni, 8:237.

²² Al-'Abdari, al-Taj wa al-Iklil, ibid, 5:594.

personal obligation upon the parents; and in their absence or inability, the obligation shifts to other relatives.

Ibn Qudamah has also stated that custody of a child is obligatory; as the child can die without it. Thus, it is obligatory to protect the child from death just as it is obligatory to provide him with maintenance. Thus, the duty to provide such protection is upon his relatives as the guardianship is given to them.²³

From the above discussions it is clear that jurists agree that child custody (*Hadanah*) is a right of a child and it is obligatory upon those who are authorized to undertake it as the child can die without being under care. Thus, where a party with authority and power to take care of a child neglects such duty he can be sinful which is the implication of an obligatory duty in Islam. This obligation is also an emphasis on the Shari'ah objective of protection of life as failure to take care of a child can lead to his death which contradicts such objective.

6. Right of Child Custody:

Jurists have generally agreed that *Hadanah* is the right and responsibility of the mother unless there is an impediment that can disqualify her.²⁴ Similarly, women are generally given preference over men as they are naturally inclined to fully care to children and take care of them unlike men. Their ability to give both physical as well as emotional support to the child cannot be matched by men.²⁵ This becomes clearer if we look at the varying grades of those who are entitled to custody in the four schools of law as follows:

1. Hanafis are of the position that the child's mother is entitled to its custody. This will be followed by mother's mother, then father's mother, then sisters. A full sister has preference over other sisters. She will be followed by a maternal sister as she is closer to the mother than

²³ Muwaffiquddin Abdullah bin Ahmad bin Muhammad bin Qudamah, al-Mughni, (Maktabat al-Qahirah, 1388H/1968), 8:237.

²⁴ Muhammad bin Ali bin Muhammad bin Abdullah al-Shaukani, *Nail al-Auṭar*, (Dar al-Hadith, Ebypt, 1413H/1993), 6:389.

²⁵ 'Ala'uddin Abubakr bin Mas'ud bin Ahmad al-Kasani al-Ḥanafī Bada'i' al-Ṣana'i' fi Tartib al-Shara'i', (Dar al-Kutub al-'Ilmiyah, 1406H/1986), 4:41.

paternal sister and then finally maternal aunts and paternal aunts. Where none of the above women is available to have the child's custody, the responsibility shifts to the men side. In such case, the child's father will have preference followed by grandfather, and then a closer brother in terms of agnates.²⁶

2. In the Maliki School, the mother has greater entitlement of child's custody followed by mother's mother howsoever high. This will be followed by maternal aunt, then mother's aunt, and then father's aunt. After that, father's grandmother, then the child's sister and father's paternal aunt, then father's maternal aunt, then brother's daughter, sister's daughter and finally and appointed custodian.²⁷

3. In the Shafi'is School's later opinion, the mother will be first entitled for her child's custody. This will be followed by inheriting mother's mothers (i.e. from her mother to grandmothers howsoever high). In their absence, the custody goes to father's mother followed by her mothers. This is then followed by the mother of father's father, then mother grandfather's father, then sisters and finally aunts. On the male side, relatives who can inherit depending on their grade of inheritance.²⁸

From the above grading of right of *Hadanah*, jurists have agreed that a mother has preference to have the custody of her child. This is a representation of *Hajiyyat* objectives as the child will receive better care from his mother; and in her absence, the woman that is closer to her, or anyone that is entitled to his custody is to protect the child from any difficulty, ease the process of his upbringing, so that he lives under an atmosphere of love, kindness and protection which is something unobtainable from someone who does not have such quality.²⁹ It is also worth mentioning here that the right of custody can

²⁶ Zainuddin bin Ibrahim bin Muhammad Ibn Nujaim, *Al-Bahr al-Ra'iq fi Sharh Kanz al-Daqa'iq*, (Dar al-Kitab al-Islami, n.d.), 4:182.

²⁷ Al-Dasuqi, *Hashiyat*, ibid, 2:527.

²⁸ Zakariyya bin Muhammad al-Anṣari, *Asna al-Maṭalib fi Sharh Raud al-Ṭalib*, (Dar al-Kitab al-Islami, n.d.), 3:452.

²⁹ Muhammad bin Abibakr bin Ayyub bin Sa'ad Shamsuddin Ibn al-Qayyim, *Zad al-Ma'ad fi Hadyi Khair al-'Ibad*, (Mu'assasat al-Risalah, Beirut, 1415H/1994), 3:332.

only move to the next person with the entitlement when the person originally entitled is disqualified or declined to claim the right.³⁰

This by implication means any party who is given the power of custody but fails to meet its requirements will be sinful as the Shari'ah has the objectives stated above are meant to be protected.

7. Period of Custody

There is disagreement among scholars over the moment in which child custody ends. According to the Hanafis, custody of a mother ends when a girl child reaches the age of puberty. For the male child, when he has the ability to eat, drink and purify himself without identifying the particular age.³¹ This is based on a Hadith of the Prophet, peace be upon him:

In the Maliki School, mother's custody of a child only ends when the male child reaches the age of puberty. For the girl child, the custody ends when she is married and the marriage is consummated. A child is not given the option of choosing one of his parents at this stage as he has no ability to fully understand his interests.³² In *Mai Dala v. Mu'azu*,³³ the Sharia Court of Appeal held that custody of male children last (sic) till the age of maturity and that of female children last (sic) till they are married and such marriage consummated.

On their part, Shafi'is and Hanbalis agree that a male child's custody ends when he reaches the age of discretion (*tamyiz*) which is seven years for Hanbalis and eight for Shafi'is. After that, the child will be given an option to choose either his mother or father to live with. The basis of giving the child an option to choose either of his parents is from a Hadith of the Prophet, peace be upon him narrated by Abu Huraira, may Allah be pleased with him in which he said: "A woman came to the Prophet, peace be upon him and said to: my husband wants to go with my son even though the son is fetching me water from the

³⁰ Ahmad bin Saleh al-Barrak, *Aḥkam al-Ḥadanah fi al-Fiqh al-Islami in 1435H* (66), *al-'Adl*, 299.

³¹ Muhammad bin Ahmad bin Abi Sahal Shamsuddin Al-Sarakhsi, *al-Mabsut*, (Dar al-Ma'rifah, Beirut, 1414H/1993), 5:207; Al-Kasani, *Bada'i' al-Ṣana'i'*, *ibid*, 4:42.

³² Al-Ḍasuqi, *Ḥashiyat*, *ibid*, 3:292, 293.

³³ (2015) 3 SQLR (part 1) 125.

well of Abu 'Inabah and he is useful for me. The messenger of Allah, peace be upon him told her: you should cast a lot between you two. The husband then said: who will compete with me in having right over my son. Then the Prophet, peace be upon him said to the child: this is your father and this is your mother; take the hand of either of them. The child then took his mother's hand and she went with him."³⁴ The same rules apply for a female child if she reaches the age of puberty according to Shafi'is. But Hanbalis are of the opinion that the girl child's custody shifts to her father whenever she reaches puberty without giving her any option.³⁵ The reason why Malikis have not accepted this Hadith is because it is weak according to Ibn Rushd and opted to apply the norm³⁶ which prohibits separating a child from his mother as narrated from the Prophet, peace be upon him: "whoever that separates between a mother and her child, Allah will separate between him and his loved ones on the Day of Resurrection."³⁷ This should have been a much better ratiocination than that which was provided by the judge in the case of *Mai Dala v. Mu'azu* cited above.

7. Place of Custody

Normally, a child custody is undertaken in the place where the father is. This happens where the mother of the child has the right of the custody whether she is the father's wife or a divorcee during her waiting period whether it is revocable or irrevocable divorce. This is because a wife is expected to stay with her husband wherever he stays. Similarly, it is also obligatory for a divorcee to stay in her husband's house during her waiting period whether she has a child or not. This is the reason why Allah Ta'ala said:

³⁴ Abu Dawud Sulaiman bin al-Ash'ath bin Is'haq bin Bashir bin Shaddad al-Sijistani, Sunan Abi Dawud, (Al-Maktabah al-'Asriyah, Beirut, n.d.), 2:283, Hadith No. 2277.

³⁵ Ibn Qudamah, *al-Mughni*, ibid, 7:614.

³⁶ Abu al-Walid Muhammad bin Ahmad bin Muhammad bin Ahmad bn Rushd al-Qutubi, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, (Dar al-Hadith, Cairo, 1425H/2004), 3:79.

³⁷ Ahmad bin Hanbal, Musnad al-Imam Ahmad bin Hanbal, (Mu'assasat al-Risalah, 1421H/2001), 38:486; Muhamad bin Isa bin Suarat al-Timidhi, Sunan al-Tirmidhi, (Dar al-Gharb al-Islami, Beirut, 1998), 3:186.

“Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality.” Qur'an 65:1

Where the waiting period ends, the place of custody will be the town or village where the father of child or his guardian resides. This is to make it easy for the father or the guardian to carry out his responsibilities towards the child as expressed by Hanafis.³⁸ Ibn Juzai has also stated that one of the factors that will make a mother lose her right of custody is where she travels with the child away from the place of the child's guardian.³⁹ Malikis have also opined that the custodian will lose her right of custody if the child's father relocates to a different town unless she agrees to relocate with him. However, the road to such location as well as the town itself must be safe. They reasoned that the right of guardianship is stronger than the right of custody as the father is required to oversee the growth as well as discipline of his child.⁴⁰

On their parts, Shafi'is have distinguished between a travel of need whose duration is short and a permanent relocation to another town. Where either of the guardian or the custodian intends to travel, the child remains with the one that is staying. In other words, where the custodian is travelling, the child will remain with his father until her return. Where one of them wants to permanently relocate to another place, the father will have preference provided that the place he relocates to is safe for the child as opined by Malikis. Where it is not safe for the child, the child stays with the mother as the guardian will

³⁸ Al-Kasani, *Bada'i' al-Shana'i'*, ibid, 4:44; Abu al-Walid Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rushd al-Qurtubi, *Bidayat al-Mujtahid wa Nihayat al-Muqtaṣid*, (Dar al-Hadith, Cairo, 1425H/2004), 3:79; Ahmad bin Ghanim bin Salim ibn Mahanna Shihabuddin al-Nafrawi al-Maliki, *Al-Fawakih al-Dawani 'ala Risalat Ibn Abi Zaid al-Qairawani*, (Dar al-Fikr, Beirut, 1415H/1995), 2:65; Abu al-Ḥasan Ali bin Muhammad bin Muhammad bin Habib al-Baṣri al-Baghdadi al-Mawardi, *Al-Ḥawi al-Kabir fi Fiqh Madh'hab al-Imam al-Shafi'i*, (Dar al-Kutub al-'Ilmiyah, Beirut, 1419H/1999), 11:505; Abu Is'haq Ibrahim bin Ali bin Yusuf al-Shirazi, *Al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i*, (Dar al-Kutub al-'Ilmiyah, Beirut, n.d.), 3:164;

Ibn Qudamah, *Al-Mughni*, ibid, 8:238.

³⁹ Abu al-Qasim Muhammad bin Ahmad bin Muhammad bin Abdullah Ibn Juzai al-Kalabi, *al-Qawanin al-Fiqhiyyah*, (No publishing information), 149.

⁴⁰ Ahmad bin Muhammad al-Khalwati al-Ṣawi al-Maliki, *Al-Sharḥ al-Ṣaghir li Aqrab al-Masalik li madh'hab al-Imami Malik*, (Dar al-Ma'arif, n.d.), 2:761.

have no right to take the child to a conflict zone.⁴¹ Hanbalis have also added to the above by saying that where one of the parents wants relocate to a town with a distance of shortening prayers (qaṣr) and above, and the road as well as the town are safe for the child, the father will always have preference as the child's discipline as well as protection of his paternity are his responsibilities.⁴²

Likewise, the ability of a father to supervise and discipline his child is not compromised even though the right of custody is given to the mother and her relatives. This ensures that the role of a father as the guardian and provider of maintenance of the child as well as being the chief discipliner of the child will not be hindered. In other words, the right of hadanah is never intended to be as an avenue to separate a father from his son or deny him the ability to raise his child in a proper manner. It also means unnecessary difficulty will not be created for the father in undertaking his role of the child upbringing even though the custody remains with the mother or her female relatives like mother or aunty. This is in line with the Saying of Allah:

“O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded”⁴³ Ibn Kathir states that it means, command them to do the good, prevent them from doing the bad and do not neglect them for Hell to consume them on the Day of Resurrection.⁴⁴

Nevertheless, it is worth pointing out here that these rulings are primarily aimed at protecting the child's interest while not creating hardship or difficulty for the parents. Hence, the rulings should not be used as a means of punishing a parent whatever is the cause of their separation. This is based on the Saying of Allah Ta'ala: “No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the

⁴¹ Shamsuddin Muhammad bin Ahmad al-Khaṭīb al-Shirbini al-Shafi'i, *Mughni al-Muḥtāj ila Ma'rifat Ma'ani Alfaz al-Minhaj*, (Dar al-Kutub al-Ilmiyah, 1415H/1994), 5:201.

⁴² Maṣṣūr bin Yunus bin Idris al-Buhuti, *Kashshaf al-Qina' 'an Matn al-Iqna'*, (Dar al-Fikr, Beirut, 1402H), 5:581.

⁴³ Qur'an 66:6

⁴⁴ Abu al-Fida' Isma'il bin Umar bin Kathir al-Qurashi al-Baṣri, *Tafsir al-Qur'an an-Azim*, (Dar Taibah, 1420H/1999), 5:240.

[father's] heir is [a duty] like that [of the father].”⁴⁵ Thus, where the goal of the father is to hurt the child’s mother by relocating to another town, the child’s custody will remain with the mother based on the Maliki principle of *al-mu’amalatu bi naqid al-maqṣud*⁴⁶ (treating an individual contrary to his objective). In other words, the father will not use the change of town purposefully to hurt the mother.

8. Legal Requirements in the Hadin (Custodian)

As *Hadanah* is a form of authority (*wilayah*) limited to taken care of the child, the party entitled to it must fulfill certain requirements. These requirements can be spread into these categories:

- i. Requirements applicable to both men and women
- ii. Requirements unique to women only
- iii. Requirements unique to men only

This can be elaborated in the following discussion:

8.1 Requirements applicable to both men and women:

i. Islam: the requirement that a custodian must be a Muslim is a basic requirement where the child is also a Muslim. This is because a non-Muslim does not have authority over a Muslim and due to the fear that there can be a corruption of the child’s religion. This requirement is stipulated by Shafi’is,⁴⁷ Hanbalis⁴⁸ and some Malikis.⁴⁹ Hanafis have also stipulated the same condition for male custodian.⁵⁰ On the other hand, Malikis in their popular opinion (*mash’hur*) and Hanafis in their

⁴⁵ Qur’an 2:233.

⁴⁶ Al-Zarkashi, *al-Manthur*, 3:183; Al-Wansharisi, *Idah al-Masalik*, 315.

⁴⁷ Al-Mawardi, *Al-Hawi al-Kabir*, *ibid*, 8:332; Al-Nawawi, *Raudat al-Talibin*, *ibid*, 9:98.

⁴⁸ Ibn Qudamah, *al-Mughni*, *ibid*, 7:248

⁴⁹ Al-Nafrawi, *Al-Fawakih al-Dawani*, 2:67; Muhammad bin Ahmad bin Muhammad ‘Illish, *Minah al-Jalil Sharh Mukhtasar*, (Dar al-Fikr, Beirut, 1409H/1989), 4:425.

⁵⁰ Zainuddin bin Ibrahim bin Muhammad Ibn Nujaim, *Al-Baḥr al-Raiq Sharh Kanz al-Daqa’iq*, (Dar al-Kitab al-Islami, n.d.), 4:179; Muhammad Amin bin Umar bin ABdulAziz Ibn ‘Abidin al-Dimashqi al-Ḥanafi, *Radd al-Mukhtar ‘ala al-Durr al-Mukhtar*, , 3:555.

opinion on the condition of a female custodian, it is not conditional that the custodian is a Muslim unless the woman is an apostate. This is because such a woman will be detained according to Hanafis; and therefore, she will have no ability to take care of the child.⁵¹ Hanafis have however qualified allowing a non-Muslim woman to have custody of a child by saying that where the child begins understanding religion or where it is fear that the woman's religion will be influencing him, the child will be taken and given to Muslims.⁵² Malikis are however of the view that the child will not be taken from such a non-Muslim mother, rather she will be required to live with a Muslim family who will watch over her.⁵³ This requirement ensures the objective of protection of the child's religion of Islam which is the most important objective of Shari'ah is ensured so that the religion of his non-Muslim mother will not inadvertently influence the child.

ii. Sanity and reaching the age of puberty. This is because a child, an idiot or an insane will have no capacity to give properly needed care to a child. Similarly, an individual with such quality cannot even take care of themselves to take care of others.⁵⁴

iii. The custodian must be evidently credible or righteous (*'adil*). This is because custody of a child will not be given to an individual whose is obviously disobedient or sinful (*fasiq*). The example of obviously sinful person is he who openly consumes alcohol, known for committing adultery or popular for engaging in prohibited games. However, an individual against whom there is no evidence of sinfulness will have the right of custody. In another words, an individual whose characters is unknown will be presumed to be a righteous person. According to al-Dasuqi, the custodian (*Hadin*) will be presumed to be credible unless there is evidence to prove otherwise.⁵⁵ Ibn 'Abidin has also stated that where the custodian is of openly sinful behavior that the safety of the child can be compromised,

⁵¹ Ibn Nujaim, *Al-BAhr al-Ra'iq*, ibid, 4:179;

⁵² Ibn Nujaim, *Al-Bahr al-Ra'iq*, ibid, 4:179; Ibn 'Abidin, *Radd al-Muhtar*, ibid, 3:555.

⁵³ Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67; Ibid, *Minah al-Jalil*, ibid, 4:425.

⁵⁴ Ibn 'Abidin, *Hashiyat Radd al-Muhtar*, ibid, 3:555; Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67; Al-Mawardi, *Al-Hawi al-Kabir*, ibid, 8:332; Al-Buhuti, *Kashshaf al-Qina'*, ibid, 5:498.

⁵⁵ Al-Dasuqi, *Hashiyat*, ibid, 10:398; Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67.

she will lose the right of custody.⁵⁶ He also implies that if her character is not obviously sinful, her right of custody will not be disturbed. Al-Ramli of the Shafi'i School is also of the view that a custodian whose character is shielded is enough to be given custody of the child.⁵⁷ In other words, where there is no evidence that the custodian is a woman who has habituated sinful behaviours, there is no reason to order investigation of her character to determine whether she is a credible person.

iv. Reasonableness (*al-Rushd*): Al-Rushd refers to an individual's financial discipline such that one will not be extravagantly spending.⁵⁸ This is a condition stipulated by Malikis and Shafi'is. Thus, a prodigal who is financially indisciplined cannot be given custody of a child so that the child's interest will not be harmed.⁵⁹ This condition ensures the objective of protection of wealth or property is ensured. This is yet another demonstration of how *Hadanah* is directly connected to objectives of Shari'ah.

v. Ability to take care of the child. This is because there is a purpose of the *Hadanah* itself and it will be pointless to give the right of custody to an individual who has no ability to perform the required task. Thus, a woman who has no ability to take care of the child due to sickness, old age, disability like blindness that the task of custody will not be given custody of the child. This also includes a custodian who constantly goes out to work and live the child alone will not be given the right of custody. However, she will not be denied custody where she has an assistant from another person that will help her take care of the child.⁶⁰ This particular requirement involves all the three grades of objective. This is because it involves protection of the child's religion, life, mind, progeny as well as property or financial interests. The custodian must have the ability as well as the capacity to provide such protection. This is the reason why the father is required to have access to the child and to continue to provide for the child's need. Similarly,

⁵⁶ Ibn 'Abidin, *Hashiyat Radd al-Muhtar*, ibid, 3:555.

⁵⁷ Shamsuddin Muhammad bin Abu al-'Abbas Ahmad bn Hamzah al-Ramli, *Nihayat al-Muhtaj ila Sharh al-Minhaj*, (Dar al-Fikr, Beirut, 1404H/1984), 7:229.

⁵⁸ Wahbah bin Mustafa Al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh*, (Dar al-Fikr, Damascus, 1986), 4:2970.

⁵⁹ Sharh Mukhtasar Khalil, 4:211; Al-Nawawi, *Raudat al-Talibin*, 9:98.

⁶⁰ Ibn 'Abidin, *Radd al-Muhtar*, ibid, 3:555; Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67; Al-Mawardi, *Al-Hawi al-Kabir*, ibid, 8:332; Al-Buhuti, *Kashshaf al-Qina'*, ibid 5:498.

this requirement covers the child's need of feeding, shelter, health, discipline through education as well as emotional care from his mother. This is meeting objectives of *Hajiyyat* which the child's needs if he is to grow well. Similarly, it covers *tahsiniyyat* which involves the child's cleanliness, his needs of fashion relative to his age as well as fellow children to play with as obtainable in his house or school.

vi. Malikis have also expressly stipulated that the place where the child lives must be safe from corruption or loss of the child's financial interests. Thus, where the custodian is living in a place where the child's safety will be endangered or their characters compromised, the right of custody will not be granted.⁶¹ This condition embodies two objectives of necessities as well as needs. This is because where the place in which the custodian lives is a crime ridden and will endanger the life of the child, taking it into consideration is in line with the protection of a necessity of protection of life. According to Ibn Qudamah, *Hadanah* is obligatory as abandoning the child without the needed care can lead to his death. It is the obligation of his relatives as it is an auxiliary of their power of guardianship *wilayah*.⁶² Similarly, where the place is awash with drug addicts and it may be impossible to protect the child from their influence, taking it into cognizance in giving the custodian the right of the custody is in line with protection of this *daruri* objective.

Embellishments is also covered in a place where there is no corruption which by implication is also a place where good friends with good etiquettes can be made which can enhance the personality of the child towards nobility.

vii. The custodian should be free from any contagious or serious sickness that can be detrimental to the child. Jurists cite examples like skin diseases leprosy and *baras* (scrophula – a form of skin disease). In modern times, any contagious diseases that can endanger the child's life like tuberculosis or affect his life can disqualify such party the right of custody.⁶³

⁶¹ Al-Haṭṭab, *Mawahib al-Jalil*, ibid, 4:217.

⁶² Ibn Qudamah, *al-Mughni*, ibid, 8:237.

⁶³ Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67; Al-Mawardi, *Al-Hawi al-Kabir*, ibid, 8:332; Al-Buhuti, *Kashshaf al-Qina'*, ibid, 5:498.

8.2 Requirements unique to women only

Jurists have also drawn out some conditions that are only applicable to women child custodians. These can be summarised in the following discussions:

i. Custodian must not be married to a man who is not a relative of the child so that her preoccupation with taking care of the husband will not compromise the child's interests. This is based on the Hadith of the Prophet, peace be upon him in which he said: "you are entitled to (his) custody so long as you did not get married."⁶⁴ Thus the right of custody is lost the moment such the contract of marriage is formed according to Hanafis, Shafi'is and Hanbalis and after consummation according to Malikis.⁶⁵ This another embodiment of objective of *Hajiyy* as the conflicting needs of the husband unrelated to the child will compromise the interest of the child. Thus, under such circumstance the mother will lose her right of custody and the child will move to another person where his interest and needs is most protected.

ii. Malikis and Hanafis have opined the custodian must be a relative of the child and must fall under the category of women whose marriage is prohibited for the child. Thus, daughters of the uncles and aunts will have no right of custody.⁶⁶

iii. Shafi'is have also stated that the custodian must not refuse the child breastfeeding if the child needs it.⁶⁷ This protects both *daruri* and *Hajiyy* needs of the child as failure to breastfeed a child who cannot eat any other food will be detrimental to his life. Similarly, where the child can be provided with other nutritional supplements, he still needs to be breastfed as it is medically the best nutrition he can have hence, a protection of his need that may not rise to the level of necessity. A

⁶⁴ Ahmad bin Hanbal bin Hilal bin Asad al-Shaibani, *Musnad al-Imam Ahmad*, (Mu'assasat al-Risalah, Beirut, 1421H/2001), 2:182; Abu Dawud, Sunan Abi Dawud, Hadith No. 2276;

⁶⁵ Al-Kasani, *Bada'i' al-Shana'i*, ibid, 4:42-44; Al-Shirazi, *Al-Muhadhdhab*, ibid, 3:164; Ibn Qudamah, *Al-Mughni*, ibid, 8:238; Al-Nafrawi, *al-Fawakih al-Dawani*, ibid, 2:65.

⁶⁶ Al-Kasani, *Bada'i' al-Shana'i*, ibid, 4:42-44; Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:65.

⁶⁷ Al-Ramli, *Mughni al-Muhtaj*, ibid, 5:191-196.

male relative must be such a person whom it will be prohibited for him to marry where the child is female.

8.3 Requirements unique to men only

Jurists have also stipulated requirements that male custodians of child must fulfill before they are granted the right of custody. These are:

i. Where the child is female and can be desired or she is sexually attractive, the custodian must be a relative under the degree of those that are prohibited to marry her. Thus, son of a paternal uncle can have no right of custody as he can marry her; and as a result, he cannot be trusted with her. Under this circumstance, the paternal uncle's son will choose a trusted woman and keep the child under her watch according to Shafi'is and Hanbalis.⁶⁸ Hanafis are of the view that the discretion to choose the appropriate woman will be within a judge's authority.⁶⁹ However, where she is a minor that cannot be sexually desired, the son of paternal uncle can have her custody⁷⁰ while Shafi'is are of the view that where the son of the child's paternal uncle has another daughter that he is shy of, the child can stay with such daughter.⁷¹

ii. Malikis have stipulated that for a man to be given child custody, he must have access to a woman that can take care of the child. This can either be his wife, mother, or any other woman that can gratuitously take care of the child,⁷²

9. Conclusion:

The goal of Shari'ah in its rulings regulating *Hadanah* is to protect child's interest. This demonstrates Islam's concern of child's right by making his care obligatory upon the concerned parties. It also

⁶⁸ Ibn Nujaim, *Al-Bahr al-Raiq*, ibid, 4:179; Ibn 'Abidin, *Hashiyat Radd al-Muhtar*, ibid, 3:55; Ibn Qudamah, *al-Mughni*, ibid, 7:248; Al-Buhuti, *Kashshaf al-Qina'*, ibid, 5:498.

⁶⁹ Ibn Nujaim, *Al-Bahr al-Raiq*, ibid, 4:179; Ibn 'Abidin, *Hashiyat Radd al-Muhtar*, ibid, 3:555.

⁷⁰ Al-Nafrawi, *Al-Fawakih al-Dawani*, ibid, 2:67.

⁷¹ Al-Mawardi, *Al-Hawi al-Kabir*, ibid, 8:332; Al-Nawawi, *Raudat al-Talibin*, ibid, 9:98.

⁷² 'Illish, *Minah al-Jalil*, ibid, 4:427.

obliged cooperation between parties that may not normally agree with each other to ensure that the child's interests are met. Hence, the side of the mother and her female relatives have preference over the others in the child's custody. This is because they are prone to be kinder to the child. However, even though the mother, and in her absence, her mother or sister have been given preference the child's custody, such right will be lost if the mother travels away from the father. This is because the father's right of supervising the disciplined upbringing of his child will be dented. Similarly, the residence or place of custody must be suitable for child upbringing to ensure that the child is raised in a manner that the general objectives of Shari'ah as well as its specific goals in *Hadanah* are not contravened. The requirement that the custodian is sane is to ensure that she has the ability to give the child the needed protection. Similarly, credibility of the custodian will ensure that the child is brought up under an atmosphere which the Shari'ah has approved. This covers all the etiquettes and moral upbringing that a person without credibility cannot offer. Another requirement in line with goals of Shari'ah is reasonableness to protect the child's financial or pecuniary interests. Another central requirement for a custodian is the ability of child care as without it, it will be pointless for the law to allow such an individual to have the child's custody. Each of these conditions are practical and necessary to the child's interests showing the general goal of Shari'ah that its legislation is to protect human interests of this world and the Hereafter.

The female custodian must not be a married woman, the child's relative and should act in the child's interest including his breastfeeding. A male custody should also have access to a woman with capacity to take care of the child as this is a role naturally suitable for them.

All these specific requirements in custodian as well as the nature and place of child custody demonstrates that *Hadanah* is intended to be a system that provides adequate protection to the child. For this reason, these understanding the objectives and goals of rulings will make it easy for judges to reduce Shari'ah rules suitable to the facts before them.